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THE
FEDERAL REPORTER.

VOLUME 147.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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FEDERAL REPORTER, VOLUME 147.

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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

OMAHA WATER CO. v. CITY OF OMAHA et al.

(Circuit Court of Appeals, Eighth Circuit. June 15, 1906.)

No. 2,361.

1. CONSTITUTIONAL LAW—MUNICIPAL CONTRACTS—IMPAIRMENT OF OBLIGATION.

The Legislature empowered the city of Omaha to contract with individuals or corporations for the construction and maintenance of waterworks "on such terms and under such regulations as may be agreed on." The city by ordinance offered the contract for the construction of the works and their operation for 25 years to the lowest bidder on condition that he would first accept the terms of the ordinance, which provided that the contractor should furnish water to private consumers during the term at such prices as the contractor and the consumers should agree upon, not exceeding certain specified rates. The contractor accepted the ordinance and his assigns constructed the waterworks and operated them for 20 years. The water board of the city ordered the rates reduced below those specified in the ordinance. *Held*, the accepted ordinance was a contract, the order of the water board impaired its obligation, and the water company was entitled to an injunction to restrain its execution.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 385.]

2. MUNICIPAL CORPORATIONS—POWERS, GOVERNMENTAL AND BUSINESS.

Municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office, the other business or proprietary, in the exercise of which they are governed by the same rules as individuals or private corporations.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 665-667.]

3. SAME—PROCURING WATERWORKS—EXERCISE OF BUSINESS POWER.

A city exercises its business or proprietary power in purchasing waterworks or contracting for their construction or operation.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 665-667.]

4. SAME—RATES TO PRIVATE CONSUMERS—POWER OF CITY TO REGULATE BOTH GOVERNMENTAL AND BUSINESS.

The power of a city to regulate or fix the rates which a water, gas, or railway company may collect of private consumers partakes of the nature of a governmental power and also of the nature of a business power.

5. SAME—RATES TO PRIVATE CONSUMERS—POWER TO REGULATE MAY BE SUSPENDED BY CONTRACT.

The Legislature of a state unless prohibited by its Constitution may empower a city to suspend by contract, and a city may suspend in that way for a reasonable term of years, its power to fix or regulate the rates which a third party may collect of private consumers.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1315.]

6. CONSTITUTIONAL LAW—INHIBITION OF GRANT OF SPECIAL PRIVILEGES AND IMMUNITIES—MUNICIPAL CONTRACTS.

Neither the power of a municipality to contract with a third party for the construction and operation of waterworks, street railways, or other public utilities, nor the right of such a third party under such a contract, constitutes a special privilege or immunity within the meaning of those terms in section 16, article 1 of the Constitution of Nebraska, which prohibits the Legislature from "making any irrevocable grant of special privileges or immunities."

7. SAME—RESERVATION OF POWER TO AMEND OR REPEAL CORPORATION LAWS—IMPAIRMENT OF CONTRACT OF THIRD PARTIES.

The power to alter or repeal general laws under which corporations have been organized reserved by section 1, art. 11b [13] of the Constitution of Nebraska 1875, is limited by section 16, art. 1 of the same Constitution which forbids the passage of any law impairing the obligation of contracts, and it does not reserve to the Legislature the power to destroy or impair the contracts of third parties with such corporations.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 368.]

8. SAME—WATER RATES—POWER TO REGULATE—SUSPENSION FOR 25 YEARS NOT UNREASONABLE.

The making of a municipal contract to suspend for 25 years the power of the city to regulate the rates which a water company shall collect from private consumers in consideration of the construction and operation of waterworks, is not an unreasonable exercise of the power to contract therefor.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 757.]

9. SAME—CONTRACTS FOR SUSPENSION OF POWER ENFORCED IF CLEAR—CONSTRUED FAVORABLY TO PUBLIC IF AMBIGUOUS.

Agreements and grants regarding the suspension of the power to regulate rates and regarding other public franchises will not be raised by mere implication, will be construed favorably to public rights if ambiguous and will be protected and enforced if clear.

10. SAME—POWER TO AGREE UPON TERMS AND REGULATIONS IS AUTHORITY TO AGREE UPON RATES TO PRIVATE CONSUMERS.

Power granted to a city to contract for the construction and operation of waterworks "on such terms and under such regulations as may be agreed on" constitutes authority to the municipality to agree with the contractor upon the rates which he may collect of private consumers during a reasonable term of years.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 757.]

11. CONSTITUTIONAL LAW—CONTRACT FOR WATER RATES—IMPAIRMENT BY A REDUCTION BELOW THE SPECIFIED RATES.

An accepted ordinance which provides for such rate "as may be agreed upon between the consumer and water company not exceeding" specified rates constitutes a contract by the city that it will not reduce the rates below those specified during the term of the contract, and any such attempted reduction thereof by the city or its water board, under a law of the state, impairs the obligation of this contract.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 385.]

12. CORPORATIONS—WATER COMPANIES—MORTGAGE AND FORECLOSURE PASSES CONTRACT TO PURCHASER.

A mortgage of the property and rights of a water company and the foreclosure thereof passes to the purchaser thereunder its contract right to collect rates specified in a contract between it and a city.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1871.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

The Omaha Water Company, a corporation of the state of Maine, exhibited its bill against the city of Omaha, the water board of that city, and the individual members of that board, all citizens of the state of Nebraska, to restrain them from enforcing an order of the water board made on May 1, 1905, which reduced some of the meter rates fixed by an ordinance of the city passed on July 11, 1880, under which the complainant was furnishing water under a contract with the city, upon the grounds that the order of the water board impaired the obligation of the complainant's contract and established unreasonable rates. This is an appeal from a decree which dismissed this bill on the ground that it failed to state facts sufficient to entitle the complainant to any relief in equity. These facts were disclosed by the bill: The Legislature of Nebraska, by an act approved March 28, 1873, empowered the city of Omaha "to erect, construct and maintain waterworks, either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such waterworks, and to all acts necessary for the construction, completion, management and control of the same." Gen. St. Neb. 1873, c. 8, § 15, subd. 27. By an act approved February 27, 1879, the Legislature added to the foregoing subdivision this provision: "And the mayor and council of each city created and governed by said act (the act of March 28, 1873) shall have power to contract with, and procure individuals or incorporations to construct and maintain waterworks on such terms and under such regulations as may be agreed on." Laws Neb. 1879, p. 99, § 15, subd. 27.

The city of Omaha, by an ordinance and an amendment thereto, in the year 1880, provided that any person or corporation who should construct and maintain waterworks of the character described therein for the purpose of supplying the city and its inhabitants with water should have the right of way along the streets and public places of the city for the purpose of placing and maintaining mains, pipes, and hydrants upon the terms and conditions in said ordinance specified. Some of the terms and conditions thus specified were that any person or corporation who should construct such waterworks should furnish water to citizens residing along the line of its mains at all times when any such waterworks should be maintained at rates which should not exceed a certain tariff of water rates set forth in the ordinance which specified the rate for dwelling houses not exceeding five rooms as \$6 per annum, and various other specific services at specific prices which are termed "flat rates", that "rents for all pur-

poses not herein named will be fixed by meter measurement as may be agreed upon between the consumer and water company not exceeding meter rates" which were specified to be used as follows:

Gals. per day.	Rate per 1,000 gals.
100 to 500.....	35c.
500 to 1,000.....	30c.
1,000 to 2,000.....	25c.
2,000 to 4,000.....	20c.
Over 4,000	15c.

that advertisements for furnishing the city with water for fire protection and public use for the term of 25 years from the completion of such works should be published, that the bids should be accompanied with bonds in the sum of \$25,000 conditioned "for the faithful performance of the terms and conditions of this ordinance;" that "said bids shall also be accompanied by a conditional acceptance of this ordinance in the event the contract for the public supply and fire protection shall be awarded;" and that the city of Omaha should have the right at any time after the expiration of 20 years to purchase the waterworks at an appraised valuation.

Sidney E. Locke accepted the terms of this ordinance, bid for the construction of the waterworks thereunder, his bid was accepted and the city made a contract with him for the construction of the waterworks and the rental of 250 hydrants for the term of 25 years. Locke assigned his contract and his rights and franchises thereunder, with the consent of the city, to the City Waterworks Company, a corporation of Nebraska, which constructed the waterworks, and they were accepted by the city on September 4, 1883. By subsequent conveyances the property, rights, and franchises of this corporation vested in the complainant. In March, 1903, the city elected to purchase the waterworks pursuant to the provision of the ordinance of 1880, appraisers were selected, an examination of the waterworks has been made and the matter has been submitted to the appraisers for the completion of their report.

By an act approved March 9, 1905, the Legislature of Nebraska authorized the election of a water board for the city and provided that "if such city or any portion thereof shall be supplied with water for domestic, mechanical, public, or fire purposes by any individual, copartnership or corporation, then and in such case, said board shall have the sole power and authority to regulate and fix the water rates and fire hydrants' rentals." On May 1, 1905, the water board of the city of Omaha passed an order to the effect that the maxima meter rates fixed by the ordinance of 1880 should be materially reduced so that the cost of furnishing water to consumers governed by these reduced rates will not be covered by the complainant's receipts for the water thus furnished and so that the enforcement of this order would reduce the revenues of the complainant below a fair and reasonable return upon the cost of the waterworks and would reduce the complainant's net income below an amount sufficient to provide for maintenance and depreciation, to pay the interest on its mortgage bonds and a dividend of 5 per cent. on its stock.

Howard Mansfield and R. S. Hall (J. M. Woolworth, on the brief) for appellant.

C. C. Wright and John L. Webster (John P. Breen, on the brief) for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court. The water company seeks an injunction against the reduction of the maxima rates fixed by the ordinance of 1880, because the proposed reduction impairs the obligation of its con-

tract with the city in violation of section 16, art. 1, of the Constitution, and because the reduced rates are unreasonable and hence violative of the fifth and fourteenth articles of amendment to the Constitution. The Legislature of Nebraska empowered the city of Omaha to make a contract with individuals or corporations "to construct and maintain waterworks on such terms and under such regulations as may be agreed on." The city prescribed the terms and regulations upon which it offered to make such a contract with the lowest bidder for the construction of waterworks and for their operation for 25 years, and one of these terms was that the bidder should furnish water to private consumers at such rates, not exceeding the rates specified in the ordinance, as the bidder and the consumers should agree upon. Locke accepted the city's offer, made the lowest bid and secured the contract. His assigns built the waterworks, agreed with consumers upon their meter rates as prescribed in the ordinance and operated the works thereunder without objection for more than 20 years. The city has claimed and exercised the option to purchase the works secured to it by the ordinance. Why do not these facts establish an irrevocable agreement between the city and the contractor and his assigns, that, during the term of the contract they shall be free to agree with their consumers upon, and to collect from them any rates which do not exceed those which were specified by the city in its ordinance and offer? Counsel for the city present many plausible answers to this question with an ability and ingenuity that excite admiration. Before entering upon their discussion let us bring clearly to mind some of the established principles by which these answers must be tested.

A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their offices because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary, powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens. *Illinois Trust & Sav. Bank v. Arkansas City*, 22 C. C. A. 171, 182, and cases there cited, 76 Fed. 271, 292, 34 L. R. A. 518.

The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a govern-

mental power and also of that of a business power. Are the inhabitants of a city paying rates not fixed by contract to quasi public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. It is to procure water and to get rates for the city and for its inhabitants. Hence it is that the Legislature of a state, unless prohibited by its Constitution, may empower a city to suspend by contract, and a city may suspend in that way during a reasonable term of years, its power to change or regulate the rates which an individual or corporation may collect of private consumers. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382, 388, 389, 22 Sup. Ct. 410, 46 L. Ed. 592; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 593, 21 Sup. Ct. 493, 45 L. Ed. 679; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. Ed. 341; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 536, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Cleveland v. Cleveland Electric R. Co.*, 26 Sup. Ct. 513, 516, 517, 50 L. Ed. 854.

Let us consider in the light of these rules of law the reasons why the city insists that it is under no obligation to refrain from reducing the rates specified in the ordinance of 1880. The counsel for the municipality argue that the city was without power to make any irrevocable and unalterable contract regarding rates because section 16 of article 1 of the Constitution of Nebraska prohibited it from passing any "law impairing the obligation of contracts or making any irrevocable grant of special privileges or immunities," because section 1 of article 11b [13] of that Constitution provides that "no corporation shall be created by special law, nor its charter extended, changed, or amended.

* * * All general laws passed pursuant to this section may be altered from time to time or repealed," and because it was an unreasonable exercise by the city of the power to contract for it to fix definite rates for the supply of water for all time. They cite in support of their argument here *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Tomlinson v. Jessup*, 15 Wall. 454, 459, 21 L. Ed. 204; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 107, 11 Sup. Ct. 226, 34 L. Ed. 898; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 24 Sup. Ct. 82, 48 L. Ed. 217; *County of Stanislaus v. San Joaquin C. & I. Co.*, 192 U. S. 201, 24 Sup. Ct. 211, 48 L. Ed. 406; and *People's Gas Light & Coke Co. v. Chicago*, 194 U. S. 1, 13, 17, 24 Sup. Ct. 520, 48 L. Ed. 851.

But a contract made by a municipal corporation with a third person

for the construction of a public building, a street railway, waterworks, or gas works, or for the supply of transportation, water, or any other public utility to the city and its inhabitants creates no special privilege or immunity within the meaning of the first provision of the Constitution cited and neither the contract nor the power to make it is inhibited thereby. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 14, 17, 19 Sup. Ct. 77, 43 L. Ed. 341; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382, 388, 389, 22 Sup. Ct. 410, 46 L. Ed. 592. One who makes such a contract to grade a street, to construct a building or to supply gas or water to a municipality may be said to acquire a monopoly of that work and a special privilege to perform it. But this special privilege or immunity is not granted to him by any law of the state. It is secured to him by his own agreement to render the public service. The law which empowered the city of Omaha to make the contract under consideration was a general law of the state which granted the same authority to all cities of its class. It gave no special privilege or immunity to this municipality, nor did the city offer or grant to Locke or to his assigns any special privilege or immunity to construct or to operate the waterworks. It offered the contract which he secured to the lowest bidder in all the world and gave it to Locke because he agreed to render the service required for the lowest price. Such a general grant of power to contract and such an agreement constitute no special privilege or immunity within the meaning of those terms in the Constitution of Nebraska and the Legislature of the state had ample power to authorize the city to make the agreement under consideration. Nor does the section of the Constitution which provides that general laws affecting the charters of corporations may be altered or repealed condition the validity or the effect of this contract. That section is in *pari materia* with section 16, article 1, of the same Constitution, which prohibits the Legislature from passing any law impairing the obligation of contracts, and upon familiar principles the two provisions must be read and construed together. So read they provide that the Legislature may make an alteration or repeal of any general law involving the charters of corporations which does not impair the obligation of any contract and that it may make no repeal or alteration of those laws which has that effect. *Vicksburg v. Vicksburg Waterworks Co.* (May 21, 1906) 26 Sup. Ct. 660, 50 L. Ed. 1102. There was therefore no provision of the Constitution of Nebraska which inhibited or limited the authority of the Legislature to empower the city to make the contract in question.

Whether or not it would be an unreasonable exercise of this power of the city to contract for waterworks for it to agree upon water rates for all time is an academic question which it is unnecessary to consider. It does not arise in this case. The city has exercised its option to purchase these works under the ordinance of 1880, at the end of 20 years from their completion. It has thereby limited the term of the ordinance contract to the time preceding the completion of this purchase, which will undoubtedly make its term less than 25 years. The city has attempted to reduce the rates fixed by the ordinance before the expiration of this limited term. The question is whether or not 25

years is an unreasonable term for a city to grant the use of its streets for water mains, to pay hydrant rentals and to agree upon water rates for its inhabitants in consideration of the construction of waterworks and the supply of water to itself and its inhabitants during that term. That question has already been answered by the decisions of the Supreme Court and of this court. It is not an unreasonable exercise of its power. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 14, 17, 19 Sup. Ct. 77, 43 L. Ed. 341; *Illinois Trust & Sav. Bank v. Arkansas City*, 22 C. C. A. 171, 183, 76 Fed. 271, 283, 34 L. Ed. 518, and cases there cited; *Atlantic City Waterworks v. Atlantic City*, 48 N. J. Law, 378, 6 Atl. 24.

The cases cited for the city here are not in conflict with these conclusions and they fail to rule the case in hand. They treat of charters granted by states by general or special laws to corporations as in *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357, where the statute from which all the powers of a consolidated corporation were derived was enacted under a Constitution which provided that such statutes were subject to be "altered, revoked, or repealed by the General Assembly" and the court held that a subsequent law which prescribed the rates of transportation did not impair the contract between the state and the corporation which was evidenced by the latter's grant of its franchise, because the stipulation of the reservation of the right to modify the grant was a part of that contract, or they construe the effect of specific limitations of the extent and effect of particular contracts, as in *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 24 Sup. Ct. 82, 48 L. Ed. 217, where the city made an ordinance contract with the water company to the effect that the latter might prescribe water rates "not inconsistent with the law." During the term of the contract the municipality passed from a city of the second class to a city of the first class and thereby became vested by the law with the power to fix prices of water to consumers, and the courts held that a subsequent act of the city prescribing reduced rates was not violative of the contract, because by its terms the water company was limited to prescribing rates "not inconsistent with the law" and the law authorized the city to fix the reduced rate.

In the case at bar the power of the Legislature to authorize the city to agree upon the water rates and upon the other terms of its contract was unlimited, and authority was granted to the city without restriction. The city exercised it, received the benefit of its exercise, and the contract and the constitutional rights of the water company vested thereunder. None of the authorities cited holds that in such a case the contract of the city to maintain the agreed rates is not irrevocable and unalterable.

Another contention in behalf of the city is that the Legislature did not in fact authorize the city to agree upon unalterable water rates to consumers and that the city made no such agreement. In the consideration of these two questions the following authorities have been cited and examined: *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 20 Sup. Ct. 40, 44 L. Ed. 92; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 14, 17, 19 Sup. Ct. 77, 43 L. Ed. 341; *Freeport*

Water Co. v. Freeport City, 180 U. S. 587, 592, 599, 21 Sup. Ct. 493, 45 L. Ed. 679; Danville Water Co. v. Danville City, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 436, 23 Sup. Ct. 531, 47 L. Ed. 887; Owensboro v. Owensboro Waterworks Co., 191 U. S. 383, 24 Sup. Ct. 82, 48 L. Ed. 217; People's Gas Light & Coke Co. v. Chicago, 194 U. S. 1, 13, 17, 24 Sup. Ct. 520, 48 L. Ed. 851; Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201, 207-8, 24 Sup. Ct. 241, 48 L. Ed. 406; Helena Water Works Co. v. Helena, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224; Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 535, 536, 24 Sup. Ct. 756, 48 L. Ed. 1102; Cleveland v. Cleveland Electric R. Co., 26 Sup. Ct. 513, 517, 50 L. Ed. 854; Vicksburg v. Vicksburg Waterworks Co. (May 21, 1906) 26 Sup. Ct. 660, 50 L. Ed. 1102.

In *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 436, 23 Sup. Ct. 531, 47 L. Ed. 887, which is perhaps the strongest case in support of the contentions of the city, a water company was incorporated with power to contract with the city and its inhabitants to supply water and to "charge such prices for the same as may be agreed upon between said company and said parties." The incorporation was under a general act which provided that "this act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company." The water company made a contract with the city which consisted of three distinct parts, first, the promises of the water company, second, those of the city, and third, their mutual undertakings. In the first part the company undertook to "supply private consumers with water at a rate not to exceed 5 cents for 100 gallons." The court held that these were in form the words of the water company, that they were subject to the express reservation by its act of incorporation of the power of the city to regulate the price of water furnished by the company and that they did not constitute an agreement with the city that it would not reduce the rate below that specified in the contract. The court added:

"We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company and neither statute nor ordinance reserved a power to the city to alter rates."

Why does not this description of the *Detroit* case portray the case in hand?

In *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 589, 599, 600, 21 Sup. Ct. 493, 45 L. Ed. 679, the Supreme Court followed a deci-

sion of the Illinois court to the effect that a power granted to a city to establish such rates "as may be fixed by ordinance" was a continuing power to fix the rates from time to time and not once for all, and that under this authority the city was empowered to reduce the rate fixed by an accepted ordinance which constituted the contract under which the water company had constructed the waterworks.

In *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S. 201, 207-8, 24 Sup. Ct. 241, 48 L. Ed. 406, the Legislature granted to counties the power to regulate water rates subject to a limitation in a general law under which a canal and irrigation company was incorporated that these counties might not reduce the rates below such prices as would produce $1\frac{1}{2}$ per cent. per month on the capital actually invested. Under this state of the law the canal company was incorporated and constructed irrigation works. Thereafter the Legislature granted to the counties more power, the power to reduce the rates below the limit previously specified and the courts held that the limited grant of power to the counties constituted no agreement with the canal company that the state would not give to the counties more power and that the latter might lawfully reduce the rates under the later power granted.

In *Tampa Waterworks Co. v. Tampa*, 26 Sup. Ct. 23, 50 L. Ed. 170, the waterworks company procured a contract from the city which, by its terms, gave to the company the right to charge certain rates for water for 30 years. At the time this contract was made the Constitution of the state vested in the Legislature full power to pass laws to prevent excessive charges by persons and corporations engaged as common carriers in transporting persons and property or performing other services of a public nature. The Legislature subsequently passed an act whereby it empowered the cities of the state to prescribe by ordinance reasonable and just maxima charges for water and the city of Tampa prescribed reasonable but reduced rates. The Supreme Court held that, as there was no claim that the rates thus established were unreasonable, the decision of the Supreme Court of Florida that the law and ordinance did not impair the obligation of any contract was not so clearly erroneous as to require its reversal.

In *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 113, 114, 20 Sup. Ct. 40, 44 L. Ed. 92, the Legislature empowered the water company to construct waterworks and to supply the city of Mobile and its inhabitants with water. The company did so and thereafter made a contract with the city of Mobile that it would furnish to that city the use of 260 hydrants for the term of six years, and that it would not charge the citizens higher rates than those specified in the contract. But it did not undertake by the agreement to supply the inhabitants and the city with water. The city strictly complied with the terms of the agreement but proceeded to construct waterworks of its own. The court held that it had the power to build waterworks and that its action in no way impaired the obligation of its contract with the water company. On the other hand, in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, a contract by the city to pay hydrant rentals for a term of 25 years and to refrain during that time from constructing or becoming interested in any other

waterworks was sustained by the Supreme Court and the city was enjoined from carrying into execution an ordinance for the construction of new works because that ordinance impaired the obligation of its contract with the water company.

In *Vicksburg v. Vicksburg Waterworks Co.* (May 21, 1906) 26 Sup. Ct. 660, 50 L. Ed. 1102, the city of Vicksburg made an ordinance contract to give to the waterworks company the exclusive right to construct and maintain waterworks in that city for the term of 30 years, and it was enjoined from proceeding to issue bonds for the purpose of constructing or purchasing other works upon the ground that a subsequent law of the state which empowered it to do so impaired the obligation of its contract with the company. The rule that nothing may be taken by implication against the city and that a contract regarding a public franchise should be construed most favorably to the municipality was earnestly invoked, the decision in the case of *Lehigh Water Company's Appeal*, 102 Pa. 515, wherein the word "exclusive" was held to except the city was cited and urged upon the attention of the court and it was argued that the contract to give an exclusive right meant exclusive of other corporations and not of the city. But the argument did not prevail. The Supreme Court held that the exclusive right which the city agreed to give was a sole and undivided privilege, and that its contract as effectually estopped it from exercising or sharing this privilege as from granting it to another.

In *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 374, 22 Sup. Ct. 410, 46 L. Ed. 592, the Legislature of the state of Michigan empowered the city of Detroit to contract for the construction and operation of a street railway and provided that the rates of toll or fare should be established by agreement between the railway company and the city. The municipality passed ordinances which were accepted by the railway company whereby it granted the right to use the streets for street railways for 30 years and provided that the rate of fare should not exceed 5 cents for each passenger. The Constitution of Michigan contained a provision that all laws under which municipal corporations were formed might be amended, altered or repealed. The charter of the city gave it general power to control and regulate the use of its streets. The ordinance contract itself reserved to the city the right to make such further rules or regulations as should from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to the railways. After the railways were constructed the city passed ordinances which by their terms reduced the fares below 5 cents for each passenger. The Supreme Court held (1) that the Legislature gave to the city the power to agree upon unalterable rates of fare for 30 years (page 385 of 184 U. S., page 417 of 22 Sup. Ct. [46 L. Ed. 592]); (2) that the city had so agreed; (3) that this agreement could not be lawfully renounced or modified by the city without the consent of the railway company either under the constitutional provision for the alteration or repeal of municipal charters or under the power to regulate the operation of the railways reserved in the ordinance (page 389 of 184 U. S., page 418 of 22 Sup. Ct. [46 L. Ed. 592]); and (4) that the stipulation

in an ordinance contract that the rate of fare for one passenger shall not to be more than 5 cents is an agreement by the city that it will not reduce the rate below 5 cents for each passenger during the term of the contract, and the court enjoined the city from enforcing the ordinances reducing the fare on the ground that they impaired the obligation of the contract.

In *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 535, 536, 24 Sup. Ct. 756, 48 L. Ed. 1102, the Legislature authorized the city to fix the terms and conditions upon which street "railways may be constructed, operated, extended, and consolidated." Under this power the city of Cleveland made an ordinance contract whereby it authorized a consolidation and provided that "for a single fare * * * no greater charge than 5 cents shall be collected" during the term of the contract. The Supreme Court held that this was an unalterable agreement that the city would not reduce the rate of fare during the term below that specified therein, that this contract was authorized by the delegation to the city of the power to fix the terms and conditions of the consolidation and that a reduction of the rate was an impairment of the obligation of the agreement. In *Cleveland v. Cleveland Electric R. Co.*, 26 Sup. Ct. 513, 516, 517, 50 L. Ed. 854, this decision was reviewed and affirmed.

Many decisions of the state courts have been examined and considered, but it would be a futile task to review or comment upon them here because in the determination of the question whether a law of the state impairs the obligation of a contract the federal courts must determine for themselves and by the exercise of their independent judgment the existence and the extent of the contract and the effect of the challenged law. *Douglas v. Kentucky*, 168 U. S. 488, 501, 502, 18 Sup. Ct. 199, 42 L. Ed. 553.

From the decisions of the Supreme Court to which we have adverted these rules are deducible: The power to regulate rates of water, gas, transportation, and other public utilities partakes of the nature of a governmental and of a proprietary power whose exercise may be suspended for a reasonable time by express grant or by contract. An agreement for such a suspension will not be raised by mere implication. Where the meaning of a grant or contract regarding such a suspension or regarding any public franchise or privilege is ambiguous or doubtful, it will be construed favorably to the rights of the public. Where the grant or the contract is clear and plain it will be protected and enforced.

Did the Legislature of Nebraska empower the city of Omaha to agree upon unalterable water rates during the term of the contract in hand? Did the city agree that it would not reduce these rates below those specified in the ordinance? We turn back to the act of 1879 and to the ordinance contract of 1880 in the light of the rules and decisions to which we have adverted for the answers to these questions. Authority had already been granted to the city to build its waterworks and to regulate the use of water derived therefrom when the act of 1879 was passed, but no waterworks had been constructed. The state then granted to the city the additional power to contract with third par-

ties for their construction and operation "on such terms and under such regulations as may be agreed on." Are the rates under which water is to be furnished to private consumers "terms and regulations" upon which parties may agree that waterworks may be constructed and operated? The Supreme Court was of the opinion that they were, for it held in the Cleveland case that a city was empowered to agree with a railway company upon rates of fare for passengers under legislative authority to fix the "terms and conditions" for the consolidation of corporations. The city of Omaha evidently thought so, for by the ordinance of 1880 it made specified water rates one of the terms and regulations of the contract which it offered to the lowest bidder and which it required him to accept. The main purpose of city waterworks is the revenue derived from private consumers of water. The rates which they pay absolutely determine the financial success or failure of a city water company's enterprise. The term or regulation in a contract for the construction and operation of waterworks which more than any other conditions the nature and the prospect of the undertaking is that which fixes the rates which the owner may collect of private consumers. These are matters of common knowledge. The members of the Legislature could not have been ignorant of them when they granted to this city the power to agree upon terms and regulations upon which the works should be built and operated, and it is incredible that they intended to except from this general grant the authority to agree upon the cardinal term which alone conditions the success of the entire undertaking. They made no such exception and that fact raises a conclusive presumption that they intended to make none, and it is not the province of the courts to do so. *Madden v. Lancaster County*, 12 C. C. A. 566, 572, 65 Fed. 188, 194; *Wrightman v. Boone County*, 31 C. C. A. 570, 572, 88 Fed. 435, 437; *Union Central Life Ins. Co. v. Champlin*, 54 C. C. A. 208, 210, 116 Fed. 858, 860. The conclusion is unavoidable that by its grant of power to agree upon the terms and regulations under which the waterworks should be constructed and operated the Legislature intended to grant, and it did grant to the city of Omaha, by apt words and in unmistakable terms, the power to make an unalterable contract regarding the water rates which the contractor might collect from private consumers for a reasonable term of years.

Did the city make such a contract? The stipulation concerning these rates is not embodied in the agreement for hydrant rentals which followed the ordinance of 1880. But the city required the contractor as a qualification to receive the contract, to accept the terms and conditions of the ordinance, and an accepted ordinance is a contract. The ordinance was an offer by the city of the terms and regulations under which it would enter into a contract for the construction and operation of the waterworks. The city prepared and passed the ordinance. All its terms and words were the language of the city. It was enacted under a statute which empowered the city to agree upon the water rates. It prescribed specific rates for the use of water by private consumers and provided that the water company should furnish water to them at such rates as should be agreed upon between the

water company and the consumers not exceeding those specified in the ordinance. The concession is readily made that the acceptance of this ordinance constituted a contract by the water company to furnish the water to private consumers at prices not exceeding those named in the ordinance. The contention is that it left the city free to reduce them. If so, the contract permitted the city to retain the power to withdraw from the water company all the substantial benefits of its undertaking, for a reduction of the rates to private consumers would diminish the most substantial part of its revenue and might ruin the company. It cannot be that either the city or Locke intended to make an agreement of this nature, for such a transaction would be contrary to the ordinary course of action of rational men under similar circumstances. The chief object of the city in the procurement of this contract was a supply of water. The great desideratum of the contractor was remunerative rates from private consumers. The presumption is that the contract secured both for both parties consented to it. Nor is it doubtful that this was its effect when its terms are fairly read. Concerning the meter rates which are the subject of this suit it stipulates:

"Rents for all purposes not herein named will be fixed by meter measurement as may be agreed upon between the consumer and water company not exceeding meter rates."

Here is a plain contract by the water company that it will agree with consumers upon rates not exceeding those specified in the ordinance, and as clear an agreement by the city that the water company and the consumers shall be free to agree upon any such rates which do not exceed those there named. The covenant of the city was that the water company should be free during the term of the agreement to contract with its consumers for any rate not exceeding those specified. Any reduction of those rates, any inhibition of agreements between the company and its consumers upon any rates not exceeding those there specified, necessarily deprives the company of that freedom to contract with its consumers and to collect from them which the city covenanted by this clause of the contract that it should enjoy. Any reduction of these rates necessarily impairs the obligation of this contract because it deprives the water company of the full benefit of the term of the contract which was most important and beneficial to it. The order of the water board which purported to reduce the rates was made pursuant to a law of the state and it was therefore violative of section 10, article 1, of the Constitution, and the bill states a good cause of action for an injunction to prevent its execution.

The suggestion of counsel for the city that the complainant has no right to this relief because there is a mortgage foreclosure sale in its chain of title has not been overlooked. It may be that this contention could have been maintained if the water rates under consideration in this case had been fixed by the charter of the mortgagor or by legislative grant to it upon the ground that provisions in such grants are not matters of contract, but of law, and hence do not pass to a mortgagee or to a purchaser at a foreclosure sale. *Grand Rapids, etc., Ry. Co. v. Osborn*, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; *Union*

Pac. R. Co. v. Mason City & Fort Dodge R. Co., 199 U. S. 160, 170, 26 Sup. Ct. 19, 50 L. Ed. 134; *Hooker v. Burr*, 194 U. S. 415, 24 Sup. Ct. 706, 48 L. Ed. 1046; *People's Gas Light & Coke Co. v. Chicago*, 194 U. S. 1, 16, 17, 24 Sup. Ct. 520, 48 L. Ed. 851. But the right to the rates which the mortgagor in this case held was a contract right vested in it, not by any charter or legislative grant, but by the agreement between the city and Locke and his assigns. The radical difference between charter rights and contract rights of this nature is marked in the opinion in the *Detroit Case* in 184 U. S., at pages 387-389, 22 Sup. Ct., at pages 417-419 (46 L. Ed. 592). The mortgage and the foreclosure sale under it in the case now under consideration by their terms include all the franchises, rights and property of the mortgagor. While the right of a corporation to exist may not be mortgaged or sold, all its contract rights with other corporations and with individuals may be, and this mortgage and the foreclosure sale under it passed the right of the mortgagor to maintain these water rates and to enforce its agreement with the city to the purchaser thereunder whence they have been conveyed to the complainant. *Vicksburg v. Vicksburg Waterworks Co.* (May 21, 1906) 26 Sup. Ct. 660, 50 L. Ed. 1102; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 831; *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; *Julian v. Central Trust Co.*, 193 U. S. 93, 106, 24 Sup. Ct. 399, 48 L. Ed. 629.

The Legislature authorized the city to agree with the contractor upon water rates which he might collect of private consumers during the term of the contract. The city made this agreement with Locke. His rights have passed to the complainant. The order of the water board which attempts to reduce the agreed rates impairs the obligation of this contract. On this ground there is abundant equity in the bill, and it is unnecessary to consider or decide whether or not the bill also shows that the reduced rates are unreasonable or confiscatory.

The decree below is reversed and the case is remanded to the Circuit Court for further proceedings not inconsistent with the views expressed in this opinion.

BOBBS-MERRILL CO. v. STRAUS et al.

(Circuit Court of Appeals, Second Circuit. June 16, 1906.)

No. 189.

1. LITERARY PROPERTY—COMMON-LAW COPYRIGHT—RIGHTS OF OWNER.

The owner of a common-law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto, enjoy the benefit of a restricted publication without forfeiture of the right of general publication.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Literary Property, §§ 3, 4.]

2. COPYRIGHT—RIGHTS ACQUIRED BY STATUTORY COPYRIGHT—EFFECT ON COMMON-LAW RIGHTS.

The right to a common-law copyright has been superseded by statute, and hence where the owner of the common-law copyright elects to sub-

stitute the protection of the statute for that of the common law, he, on publication, abandons or surrenders his common-law rights, including his right of limited publication, in exchange for his exclusive statutory right to multiply copies.

3. SAME.

Under Rev. St. § 4952 [U. S. Comp. St. 1901, p. 3406] giving to the owner of a copyrighted book the right to copy and vend the same, protection against multiplication of copies and the incidents thereof constitute the only protection afforded by the copyright statutes to the publisher.

4. SAME—INFRINGEMENT—SALE OF LAWFULLY PRINTED COPY.

The sale of a lawfully printed copy of a copyrighted publication, in the absence of any contract, condition, or provision of forfeiture, is not an infringement of the copyright law.

5. INJUNCTION—INDUCING BREACH OF CONTRACT—SALE UNDER RESTRICTIVE LICENSE—NOTICE—PROTECTION.

Where a copyrighted publication is sold under restriction that no dealer is licensed to sell at a less price than \$1 per copy, etc., and a third person makes malicious and unlawful attempts to induce original purchasers to break their contracts, to the injury of the original seller, the latter is entitled to relief in equity.

6. SAME—EVIDENCE.

Complainant sold copies of a copyrighted book, in which was published a notice that the price of the book at retail was \$1 net; that no dealer was licensed to sell at a less price, and that a sale at a less price would be treated as an infringement of the copyright. There was no reservation of title to, or any interest in, or subsequent control over, copies sold in violation of the notice, nor any suggestion of an agreement on the part of the purchaser, or restriction on, or provision for, forfeiture of the title, nor any attempt to provide that a purchase should constitute an acceptance of the terms of the notice. Dealers to whom complainant sold the books were under no agreement to enforce observance of the terms of the notice or to restrict their sales, and complainant's proof failed to show that defendants had themselves violated any contract or had persuaded others to violate any contract with complainant, but that they had purchased their copies, intending to acquire the absolute title, nor did it appear that such copies were purchased from purchasers of complainant. *Held*, that complainant was not entitled to an injunction restraining the resale of such copies at a less price than \$1 per volume.

7. ELECTION OF REMEDIES—NOTICE—EFFECT.

Where a notice printed in a copyrighted publication recited that a sale at a less price than \$1 per volume would be treated as an infringement of the copyright, the publisher thereby elected to pursue that remedy for violation of the notice, and was precluded from maintaining an injunction to restrain the sale.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decree of the United States Circuit Court for the Southern District of New York, dismissing bill alleging infringement of copyright.

For opinion below see 139 Fed. 155.

Frank H. Platt and W. H. H. Miller, for appellant.

John G. Carlisle and Edmund E. Wise, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The material facts herein are undisputed, and are as follows: Complainant is an Indiana corporation en-

gaged in the business of publishing and selling books; it was the owner and proprietor of a novel entitled "The Castaway," by Hallie Erminie Rives, which it caused to be duly copyrighted and published. On each copy of the published book was printed, on the page following the title page, the following notice:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

"The Bobbs-Merrill Company."

The defendants purchased copies of said book for sale at retail, 90 per cent. of which were purchased at wholesale at a rebate from the retail price of about 40 per cent., the wholesalers and the defendants knowing that the book was copyrighted and knowing of the printed notice. It is admitted that none of the wholesalers were required to enforce a compliance with the terms of such notice by retail dealers or to restrict their sales to such retail dealers only as would agree to observe the terms of said notice. The defendants sold copies of said book at the uniform retail price of 89 cents a copy. Complainant has brought this suit, claiming infringement of its copyright, to restrain defendants from selling the book at any price other than that fixed in the notice, and asking for an accounting.

The defenses material to this discussion are that the acts complained of do not constitute a violation of the rights secured to complainant by the statutes relating to copyright, and that complainant's remedy, if any, is at law, and not in equity.

The general question argued is as to the right of a proprietor of a copyright book, by affixing to each copy sold, a notice that no dealer is licensed to sell it at less than a specified price, and that "a sale at a less price will be treated as an infringement of the copyright," to maintain an action in equity against a defendant who buys the book, with knowledge of the restrictive terms, for the purpose of selling it at a reduced price and who actually sells it below the price specified in the notice.

The argument, on the one hand, is that the copyright statute gives to the proprietor the exclusive right of "vending" the book and, consequently, empowers him to exercise that right, under such restrictions as he chooses to affix to its exercise, by a general notice of rights asserted under the copyright law, and that a purchaser who buys the book with notice of the restriction acquires only a qualified right, and becomes an infringer when he disregards the restriction. In other words, the argument is that the purchaser becomes merely a licensee, and, when he disregards the terms of his license, becomes a user without authority, and may be enjoined against infringement of copyright.

The argument, on the other hand, is that the copyright statute only gives to the proprietor the exclusive right of vending which inheres at common law to every owner of property, whether tangible or incorporeal, and when he exercises it confers on the purchaser the ordinary incidents of ownership of personal property, among which is the right of alienation or to do what he pleases with his own; and that the owner of the copyright cannot by such a notice separate the right of

alienation from the property so that it will remain in him, while the general right of property passes to a purchaser from his vendee, and especially when the original vendee is under no obligation to enforce said terms upon subsequent purchasers, and in the absence of proof of assent by such purchasers to said terms.

The contention by complainant of a right of restricted publication, such as is here sought, disregards the fundamental distinction between the common-law right of literary property, commonly called common-law copyright, and copyright under the statute. "A copyright is an incorporeal right to print and publish. *Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942. It is a property in notion, without corporeal, tangible substance. *Millar v. Taylor*, 4 Burr. 2303. This property is a different and independent right, detached from the corporeal property out of which it arises. *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528. Each of these is capable of existing and being owned and transferred independent of the other. *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155." *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 323, 324, 69 C. C. A. 553, 555, 68 L. R. A. 591. "The property of an author in his intellectual production is absolute until he voluntarily parts with all or some of his rights. There is no principle of law by which he can be compelled to publish it or to permit others to enjoy it. He has a right to exclude all persons from its enjoyment; and, when he chooses to do so, any use of the property without his consent is a violation of his rights. He may admit one or more persons to its use, to the exclusion of all others; and, in doing so, he may restrict the uses which shall be made of it. He may give a copy of his manuscript to another person, without parting with his literary property in it. He may circulate copies among his friends, for their own personal enjoyment, without giving them or others the right to publish such copies." *Drone on Copyright*, 102, 103.

The argument of complainant rests upon an assumed identity of common-law rights and statutory copyright. But in this view we think it is in error. "The two rights do not co-exist in the same composition; when the statutory right begins, the common-law right ends. Both may be defeated by publication." *Drone on Copyright*, 100.

The owner of the common-law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto, enjoy the benefit of a restricted publication without forfeiture of the right of general publication. Thus, he may communicate the contents of his work under restrictions without forfeiture of the right. This communication of contents under restriction, known as a restricted or limited publication, is illustrated by lectures to classes of students, dramatic performances before a select audience, exhibitions of paintings in private galleries, private circulation of copies of manuscript, etc. *Werckmeister v. American Lithographic Co.*, *supra*. "The copies which were given to the members of the committee on ceremonies and to a so-called 'Literary Committee' were delivered to them solely to enable them to decide whether the poem was one suitable and worthy of their acceptance as the ode to be delivered at the opening exercises. Such a delivery of copies of a literary production is not a pub-

lication, and could not prejudice the owner's common-law rights. *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082; *Bartlette v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076." *Press Publishing Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353.

On the other hand, the surrender of the perpetual right is a condition precedent to the enjoyment of statutory copyright. The common-law right is lost by the general publication or unrestricted sale of a single copy. The statute protects the owner in the unrestricted publication and sale of all copies during the term of the copyright.

The right to copyright, which exists at common law, has been superseded by statute. *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904. Where the owner of the common-law copyright elects to substitute the protection of the statute for that of the common law, he, upon publication, abandons or surrenders his common-law rights, including said right of limited publication, in exchange for the statutory right, the exclusive right to multiply copies. He "cannot have at the same time the benefit of the copyright statute and also retain [his] common-law right. No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right." *Jewelers' Mercantile Agency v. Jewelers' Publishing Co.*, 155 N. Y. 241, 247, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666.

The statute does not permit the owner of the copyright, by attempted restrictions upon the use of copies, to retain in himself forever the common-law right of first publication. *Jewelers' Mercantile Agency v. Jewelers' Publishing Co.*, *supra*. The peculiar right conferred by statutory copyright is to multiply copies after publication, to the exclusion of others. *Palmer v. DeWitt*, 47 N. Y. 532, 536, 7 Am. Rep. 480. "Copyright may be defined as the sole and exclusive liberty of multiplying copies of an original work of composition." *Coppinger*, *Law of Copyrights* (3d Ed.) 1. This right was not reserved by the common law. *Wheaton and Donaldson v. Peters and Grigg*, 8 Pet. 591 (append. 725) 8 L. Ed. 1055. The common-law right of first publication and its incident of restricted publication were sufficient for the protection of authors prior to the invention of printing. Thereafter, when the substantial profit to be derived from literary property consisted in the multiplication of copies by printing, the statutory protection was substituted for the common-law protection, upon the condition precedent of the surrender of the common-law right. That this is the sole right conferred by statute, as distinguished from such common-law rights as inhere in the ownership of other property, is evident from the language of the statutes, and from the decisions.

Section 4952 [U. S. Comp. St. 1901, p. 3406], provides that the author of a book, his executors, administrators, or assigns, shall have "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."

Section 4964, Rev. St. [U. S. Comp. St. 1901, p. 3413], provides as follows:

"Every person, who, after the recording of the title of any book and the depositing of two copies of such book, as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish, dramatize, translate, or import, or knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

There are many decisions and dicta which assert and support the view that the peculiar statutory protection granted to the author or proprietor is the right of multiplication of copies. "The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar v. Taylor*, 4 Burr. 2396, 'A property in notion, and has no corporeal, tangible substance.'" *Stephens v. Cady*, 14 How. 528, 530, 14 L. Ed. 528. *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155. "A copyright secures the proprietor against the copying, by others, of the original work." *Johnson v. Donaldson* (C. C.) 3 Fed. 22.

A dictum of the Supreme Court in *Perris v. Hexamer*, 99 U. S. 674, 25 L. Ed. 308, is as follows:

"A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced."

In *Publishing Co. v. Smythe* (C. C.) 27 Fed. 914, it is held that where the ownership of a particular copy is parted with the transferee cannot by restrictive notices be deprived of the ordinary incidents of alienation attached to the particular copy. "The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains, has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property." *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 591, 61 N. E. 219, 55 L. R. A. 631.

In *Harrison v. Maynard, Merrill & Co.*, 61 Fed. 689, 10 C. C. A. 17, this court held as follows:

"The owner of a copyright, who has transferred the title to copyrighted books under an agreement restricting their use, cannot restrain, by virtue of the copyright statutes, sales of said books, in violation of the agreement; he is confined to his remedies for the breach of contract."

This case is cited with approval in the opinion of the Circuit Court of Appeals for the Seventh Circuit in *Doan v. American Book Co.*, 105 Fed. 772, 45 C. C. A. 42. To the same effect is the decision in the suit by this complainant against *Snellenburg* (C. C.) 131 Fed. 530.

The complainant herein is attempting by a mere notice to import into the statutory copyright a right of limited publication or of restriction upon use, which was abandoned by virtue of the surrender of the common-law copyright.

Counsel for complainant argues as follows:

"To justify their sale by the proprietor's publication of the books, defendants must show an unqualified and absolute publication. But there was no unqualified publication, offer or distribution of 'The Castaway.' It was offered and published subject to the restrictions and limitations expressed in the notice."

We cannot assent to the latter assertion. We think, in view of the foregoing considerations, that there was an unqualified and absolute publication and a surrender of the right of restricted publication when the owner of the book complied with the statutory requirements, and thus acquired the right to notify the public of its exclusive right to the multiplication of copies.

Counsel for complainant contends that section 4964 of the statutes, providing for a penalty for infringement of copyright, has no bearing on this question because there may be infringements of the copyright law by a sale of a book lawfully printed or lawfully imported. While there are some obiter dicta which would seem to support this contention, we can find no decision to that effect. On the contrary, the decisions already quoted indicate that the protection against multiplication of copies and the incidents thereof constitute the only protection afforded by the statute. Section 4952 of the statutes, giving the owner of the copyright the right to copy and vend the copyrighted article, contains no suggestion of any right either of restricted sale or restricted publication. But the argument of complainant is stated as follows:

"These references to the controversy as to the common-law rights of authors after publication are sufficient to show that the copyright statutes have not created new and extraordinary rights of property which did not previously exist, but are rather declaratory of the common law, in a sense derogatory of the common law, since the statutes give the right only a limited duration."

That this view is inaccurate is sufficiently shown by many decisions. Thus, in *Wheaton and Donaldson v. Peters and Grigg*, 8 Pet. 591, 8 L. Ed. 1055, the court says:

"Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it."

In *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155, the court says:

"There being no common law of copyright in this country, whatever rights are possessed by the proprietor of the copyright must be derived from some grant thereof in some act of Congress, either nominatim or by satisfactory implication."

In *re Brosnahan, Jr.* (C. C.) 18 Fed. 62, Judge, afterwards Mr. Justice, Miller said:

"The sole object and purpose of the laws which constitute the patent and copyright systems is to give to the author and inventor a monopoly of what he has written or discovered, so that no one else shall make or use or sell

his writings or his invention without his permission; and what is granted to him is the exclusive right; not the abstract right, but the right in him to the exclusion of everybody else."

The fallacy of complainant's argument lies in disregarding the peculiar common-law right of literary property, namely, the right of first publication, and the right to restricted publication, and the condition precedent to the enjoyment of the statutory right, namely, the surrender of such common-law right by a general publication. If the statutory owner desires after publication to control the lawfully published copies, such control can only be secured by means of positive contract or conditions, so accepted by the party to be charged or so brought to his knowledge that it would be inequitable to permit him to violate them. But while this right might be protected at law or enforced by a court of equity, it is not a statutory right but a common-law right attached generally to the ownership of all species of property. *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848.

Furthermore, no right of license in case of a sale is conferred by the statute. As Judge, afterwards Mr. Justice, Jackson says in *United States v. American Bell Telephone Co.* (C. C.) 29 Fed. 17, 43:

"The right of the patent owner to permit or license the use of the invention is not the creature of the federal franchise or statute, but of the common law."

Counsel for complainant, quoting from the opinion of the court below that "the copyright statutes could not be invoked to control the retail trade of books, the title to which the copyright owner has transferred," says as follows:

"If by the words 'the title to which the copyright owner has transferred' is meant that he has transferred the same without limitation, the proposition is not questioned; but if it be meant that the owner of the copyright cannot prescribe limitations upon which the books may be sold in the trade, then we deny the proposition, and we say it is directly at variance with the cases above cited touching the subject, for they all proceed upon the basis that as against a party who has sold or is selling in violation of the terms prescribed by the owner of the copyright an injunction may issue."

We have already shown that the proposition thus asserted by complainant is unsupported by authority. The record shows that in this case the owner has transferred the property without limitation, so far as the transfer of title is concerned.

It is argued that the effect of thus cutting the price is disastrous to the publisher in its sale of the work, and that, therefore, the question is one which appeals to the favorable consideration of the court as a court of equity. But it is not satisfactorily shown that this arrangement is beneficial to, or required for, the protection of the author. The Constitution grants to Congress power to legislate for the benefit of the author. It is by no means clear that a free and unrestricted alienation of the book at a reduced price would not be more beneficial to the author than the higher prices provided for by the publishers' combination for the benefit of a certain class of dealers.

But it is further argued that the copyright statutes should receive a

liberal and not a strict construction because they are merely declaratory of the common law, and that the provision in this case is for the protection of the author. We have already seen, however, that the statute is in derogation of the common-law right and, therefore, is to be strictly construed.

In *Thompson v. Hubbard*, 131 U. S. 123, 9 Sup. Ct. 710, 33 L. Ed. 76, the Supreme Court said as follows:

"The right of action, as well as copyright itself, is wholly statutory, and means of securing such right of action are thus prescribed by Congress."

"The right of an author to a monopoly of his publications is measured and determined by the copyright act." *Holmes v. Hurst*, supra. *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425; *Wheaton and Donaldson v. Peters and Grigg*, supra; *Perris v. Hexamer*, supra.

In these circumstances, we are of the opinion that a sale of a lawfully printed copy, in the absence of any contract, condition, or provision for forfeiture, is not an infringement of the copyright law. As was said by this court in *Kipling v. G. P. Putnam's Sons*, 120 Fed. 631, 634, 57 C. C. A. 295, 65 L. R. A. 873, citing *Harrison v. Maynard, Merrill & Co.*, supra:

"We are unable to find any provision in the agreements with plaintiff's publishers which prohibited the sale of the copyrighted sheets to the defendants, but if such a provision were present, the plaintiff's remedy would be an action against the publishers for breach of contract."

A court of equity, therefore, would not be justified in enforcing the provisions of the copyright law, merely to prevent a sale of a copyrighted article, because the vendor has informed the purchasing public that it will treat such sale as an infringement. We are brought, then, to a consideration of the question whether the complainant is entitled to protection, on the ground of a violation of the restrictive license stated in the notice, independently of the copyright law. The general questions raised by this inquiry belong to a class which have recently become prominent in the courts relating to attempted restrictions on the disposition of certain classes of personal property by lease or sale. These cases may be divided generally into those relating to sales of proprietary medicines made under secret processes, those protected by patents or copyright, and those involving breaches of contracts or conditions in the sale of ordinary chattels. It has been claimed as to all these classes that conditions or restrictions may be imposed by the original owner, who parts with the possession or the ownership, or both, which shall so attach to or follow the article that they may be enforced against any subsequent purchaser.

In view of the conclusions reached, it is unnecessary to express any opinion as to the scope of such attempted restrictions in the case of patented articles. It may be said generally, however, that there is such a distinction between rights of copyright and patent rights that the decision of cases under one class would not necessarily be controlling in the other class. The protection afforded by the patent law is broader in the case of patents than in that of copyright. By a grant of copyright the owner of the work acquires the exclusive right of multi-

plication of copies; by the grant of a patent the patentee acquires the exclusive right to make and use the thing patented. The patent law protects the production and use of the creative conception reduced to practical shape in various forms; the copyright law protects the publication of copies in the form or substance of the particular creative conception in which it has been expressed by its author. The right secured by the copyright act is "the right to that arrangement of words which the author has selected to express his ideas." *Holmes v. Hurst*, *supra*.

The statutory right to make a patented article and to prevent others from making it is entirely distinct from the further statutory right to use, and therefore to control the use of, the thing made.

Furthermore, the statute permits the patentee to subdivide his rights, and the common law protects him against any infringement of any part thereof. The copyright statute provides only for the assignment of the right as a whole, and, in terms, protects against infringement by unlawful publication. But in view of the conflicting opinions of various judges as to the scope of the restrictions imposed by patentees upon the use of patented articles, we express no opinion upon this question.

Nor are we required to pass upon the specific questions involved in the patent, secret process or copyright decisions. An examination of the cases under the above heads shows that they have generally been disposed of upon the ground that there was a contract between the original vendor and vendee, or that conditions were imposed or rights asserted, which, in each case, were brought home to the knowledge of a subsequent vendee, and where the right was sustained by virtue of the inherent character of the article, as in the secret processes, or by virtue of the specific statutory protection, as in the case of patents and copyrights. We are concerned rather with the general question presented in cases where there has been either a malicious or unlawful attempt by a third party to induce the original purchaser to break his contract, to the injury of the original vendor, or in those cases which relate to the attempt of an owner of an ordinary chattel to impose by contract restrictions upon its use or sale binding upon third parties, and which, it is claimed, may operate as a sort of ambulatory covenant annexed to the chattel.

There are two legal principles, which may be invoked in support of complainant's claim. The first of these may be generally stated as follows: A person who unlawfully or maliciously persuades another person to break his contract with a third person, to the injury of such third person, is liable for the damages which are the natural result of such act, and when by reason thereof he has acquired title to property wrongfully he may be adjudged a trustee *ex maleficio* in respect to such property, and enjoined from disposing thereof. This principle has been discussed and maintained in a great variety of cases, among which are the following: *Heath v. American Book Co.* (C. C.) 97 Fed. 533, where the defendant knowingly induced the state school board to buy its books, and to break a contract for purchase of books from the plaintiff; *Walker v. Cronin*, 107 Mass. 556; *Lumley v. Gye*, 2 El. & Bl. 216; *Guenther v. Astor*, 4 J. B. Moore, 12, cases where the defendants

knowingly persuaded persons to break contracts for services; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839, where defendant persuaded a purchaser of medicine from plaintiff to break his contract not to sell below a certain price; *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 128 Fed. 800, breach of contract as to trading stamps.

The whole doctrine is fully discussed, and the principle suggested above is approved, in *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55. There the Supreme Court applied it in a case where, upon demurrer, it was admitted that the defendant actively interfered to prevent a party from performing a contract entered into with complainant, and secured the control of the property which was the subject of the contract. Mr. Justice Brown, delivering the opinion of the court, said as follows:

"It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer; (citing cases). * * *

"It may be conceded that an action at law would lie for the damages sustained by the Portage Company, through the wrongful acts of the Omaha Company. Indeed, that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy was either full or adequate. Waiving the question as to the solvency of the Omaha Company, and assuming that any judgment against it for damages could be fully satisfied by legal process, there remains the proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure, by its wrongful acts. * * *

"While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property."

Several of the later cases decided in the state and federal courts are collected and discussed by Judge Thomas in his exhaustive opinion in *Wells & Richardson Co. v. Abraham* (C. C.) 146 Fed. 190.

The other principle which might be invoked to sustain complainant's contention, and which may be considered as growing out of the doctrine already discussed, is one as to which there is some conflict in the decisions.

This principle is stated by Lord Justice Bruce in *De Mattos v. Gibson*, 4 De Gex & Jones, 276, as follows:

"Reason and justice seem to prescribe that at least as a general rule, where a man by gift or purchase acquires property from another with knowledge of a previous contract, lawfully and for a valuable consideration made by him with a third person, to use and employ the property for a particular purpose and in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to his contract and inconsistent with it, use the property in a manner not allowable to the giver or seller. The rule applicable alike in general, as I conceive, to movable and immovable property, recognized and adopted, as I apprehend, by the English law, may like other general rules, be liable to exceptions arising from special circumstances, but I see at present no reason for any exception in the instance before us."

In *Murphy v. Christian Press Association Publishing Co.*, 38 App. Div. 426, 56 N. Y. Supp. 597, a corporation owning a copyright in a prayer book and certain plates sold a set of the plates and authorized

the vendees to publish therefrom, and agreed that it would not sell a set to any other publisher without the vendees' consent, and that the price of the bound copies of the book should be a certain sum. Subsequently, the corporation was dissolved, and its receiver sold the remaining plates and the copyright to a company having full notice of said agreement. Said company proceeded to publish books at a price much less than that fixed in the agreement between the vendor and the first vendees. The Special Term enjoined the company from selling its publications at less than the price stipulated in the agreement. The court said as follows:

"We think this action can be maintained against the appellant, and that it is bound by the agreement of the Catholic Publication Society Company from which it acquired the copyright and electrotype plates. The agreement on the part of the defendant's predecessor in title, though technically a personal one, related to the use of its property, the copyrights and the plates, and obligated all who might acquire that property with notice of the agreement. This is the settled doctrine of the Court of Appeals where the agreement relates to real estate. *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81, 26 Am. St. Rep. 516. We can see no reason why the same rule should not apply in the case of personal property, nor are we wanting in authority to sustain the proposition. *New York Bank Note Co. v. Hamilton Bank Note Co.*, 83 Hun. 593, 31 N. Y. Supp. 1060; *Id.*, 28 App. Div. 411, 50 N. Y. Supp. 1093; *Littlefield v. Perry*, 88 U. S. 205, 22 L. Ed. 577."

So in *New York Bank Note Co. v. Hamilton Bank Note Co.*, 28 App. Div. 411, 50 N. Y. Supp. 1093, reversed on another point in 180 N. Y. 280, 73 N. E. 48, a majority of the court approved the decision of the court below in the following language:

"If a person purchases from another a printing press, having knowledge of the existence of a contract between the vendor and a third person, whereby the vendor has agreed not to sell such presses except under certain restrictions, such third person is entitled to enforce his contract as against the vendee. * * * Contracts prohibiting the use of personal property in a particular way are valid."

See, also, *New York Phonograph Co. v. Jones* (C. C.) 123 Fed. 197.

On the other hand, in *Taddy & Co. v. Sterious & Co.*, 20 T. L. R. 102, Eng. Ch. D., tobacco was sold in boxes, accompanied by invoices, labels, etc., stating the terms of sale. The price was printed on the box, with the following notice:

"All of the above packet tobacco and cigarettes are sold by Taddy & Co. upon the express condition that retail dealers do not sell the packet tobacco or cigarettes below the prices set forth. Acceptance of the goods will be deemed a contract between the purchaser and Taddy & Co. that he will observe these stipulations."

There, the court said:

"Conditions of this kind did not run with the goods and could not be imposed upon them. Subsequent purchasers, therefore, did not take the goods subject to any conditions which the court could enforce."

The court also held, on other grounds, that the contract claimed to be created thereby was not one on which plaintiff could sue a third party.

In *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631 the complainant was the manufacturer of a proprietary med-

icine made from a secret formula, which he sold only subject to the conditions of a contract in which each purchaser agreed that he would not sell, directly or indirectly, for prices less than those specified in the agreement; and further agreed that the acceptance of said goods with the notice of such conditions should be held to be an assent on the part of the purchaser to the foregoing terms and an agreement with the complainant to sell subject to the price restrictions fixed by it. The defendant, with knowledge of these conditions, bought said medicine, not from the plaintiff, nor from his vendee who had agreed to sell subject to the above conditions, but from purchasers from such vendees. In these circumstances, the court held as follows:

"The contract contemplated sales by retailers which shall pass an absolute title to the property. The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it or sell it to another. The plaintiff has contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff, he has a remedy against them to recover his damages. *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174. This right is founded on the personal contract alone, and it can be enforced only against the contracting party. To say that this contract is attached to the property and follows it through successive sales which severally pass title is a very different proposition. We know of no authority or of any sound principle which will justify us in so holding."

In the light of these decisions the disposition of the questions raised in the present case depends upon the effect to be given to the terms of the printed notice. Its language may be fairly interpreted as though it read as follows:

"The Bobbs-Merrill Co. hereby gives notice that it has licensed dealers to sell this book at the net retail price of \$1, and not at any less price, and that the penalties which will be imposed for sale by a dealer at a less price will be those provided in case of infringement of copyright."

It will be observed that this statement is a notice, not a contract. There is no reservation of title to, or of any interest in, or subsequent control over, the copy sold; no suggestion of any agreement on the part of the purchaser, or restriction upon, or provision for forfeiture of, title; no attempt to provide that a purchase shall constitute an acceptance of the terms stated in the notice. In fact, as already shown, it is conceded that the dealers to whom complainant sold the books were under no agreement or obligation to enforce the observance of the terms of said notice, or to restrict their sales to such retail dealers as would agree to observe said notice.

In these circumstances, we think complainant has failed to bring itself within the principles applied in the foregoing cases. It has failed to show that the defendants have themselves violated any contract, or have persuaded any other persons to violate any contract with complainant. It does not appear that any purchaser assented to the terms of the notice or agreed that the absolute title acquired by a sale should be converted into a qualified or restricted title. Furthermore, it does not appear that defendants purchased their copies from purchasers from complainant. But even if it could be claimed that such a notice might ordinarily operate to annex a condition to the sale in the case of the original purchaser from complainant, and that a subsequent purchaser

with notice might, therefore, acquire title subject to such conditions, and might, therefore, be restrained from their violation by a court of equity, yet, we are of the opinion that this claim would not help this complainant.

The only notice of right asserted in case of breach of the attempted condition is that contained in the notice itself, namely, that complainant will proceed by suit for infringement under the copyright law. Therefore, even if an assent to the terms of the notice might be implied from the sales by defendants, yet, as complainant by said notice has elected to limit itself to its supposed right "to treat a sale at a less price as an infringement of the copyright law," the defendants cannot be assumed to have assented to the assertion of any other and inconsistent right. In this notice of election of remedies, the case is differentiated from the other classes of cases already considered, with one or two exceptions, which, for reasons therein shown, do not seem to be applicable to this case.

We conclude, therefore, upon the facts shown herein, that the complainant is not entitled to relief either under the copyright statutes, or by virtue of the general powers of a court of equity.

The decree is affirmed.

SCRIBNER et al. v. STRAUS et al.

CHARLES SCRIBNER'S SONS v. SAME.

(Circuit Court of Appeals, Second Circuit. June 16, 1906.)

Nos. 185, 186.

1. COPYRIGHTS—INFRINGEMENT—SALE OF COPYRIGHTED PUBLICATIONS.

Where an association of publishers of copyrighted books printed notices therein that the books were sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association, but there was no statement in the notice or blanks used in the sale of the books of any claim of right under the copyright law, the question of the liability of a purchaser of such books for failure to maintain prices by reason of such notice was not one of infringement of copyright, but as to whether the publishers were entitled to relief in equity by virtue of their common-law rights independent of their statutory copyright.

2. COURTS—FEDERAL COURTS—JURISDICTION.

Where, in a suit in the federal courts to restrain the sale of complainants' copyrighted publications at less than regular prices, there was neither diversity of citizenship nor claim for damages in the sum of \$2,000, questions not arising out of the copyright law could not be considered.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 833.]

3. COPYRIGHTS—COPYRIGHTED PUBLICATIONS—SALE—RESTRICTIONS—ASSENT.

Where members of an association of publishers of copyrighted books sold the same through jobbers to persons who would not agree to sign a contract to maintain prices, assent to such contract could not be implied from mere purchasers of books which might have been lawfully sold or bought on an express refusal to sign such agreement.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 47.]

4. SAME—CONTRIBUTORY INFRINGEMENT.

Where there was no proof of any reservation of right in a copyright of certain copyrighted publications by their owner, or of an agreement by dealers from whom defendant purchased to abide by the rules adopted by an association of such publishers to maintain prices, or of any wrongful attempt on defendant's part to induce its vendors to break any contract with such publishers, defendant's sale of such publications for less than the regular price did not constitute a contributory infringement of the copyright.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 139 Fed. 193.

These causes come here upon appeals from decrees dismissing bills alleging infringement of copyright.

Stephen H. Olin, for appellants.

Edmond E. Wise and John C. Carlisle, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The facts herein are as follows:

The complainants, under the firm name of Charles Scribner's Sons, are publishers and sellers of books. The defendants are partners under the firm name of R. H. Macy & Co., and are carrying on the business of a department store, wherein they sell, at retail only, books, copyrighted and uncopyrighted.

About the year 1901, certain publishers of copyrighted books formed an association, known as the "American Publishers' Association," and, in pursuance of a "plan to correct some of the evils connected with the cutting of prices on copyrighted books," its members agreed, *inter alia*, as follows:

"(3) That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations, as may be established by local associations as hereinafter provided."

Defendants refused to enter said association or to abide by any of its rules, and sold books at prices less than those fixed by the association; thereupon it issued a circular, requesting all publishers and booksellers to refuse any dealing of any kind with defendants, and complainants, who were members of said association, refused to sell any books to defendants. Thereafter, defendants bought books from other dealers, including those published by complainants, and sold them at such prices as they saw fit. Their purchases were made from people who knew that they intended to sell them at less than the prices fixed by the association. Complainants thereupon brought this suit against defendants to restrain them from selling complainants' copyrighted books at prices less than those fixed by complainants, and from buying any of such books except under the rules and regulations of said association.

Complainants caused to be printed at the head of their catalogues, and on their invoices and bills for goods, the following notice:

"Copyrighted net books, published after May 1, 1901, and copyrighted books published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association."

Complainants admitted that no other method was taken to bring the rules of the association to the notice of purchasers in the wholesale department, and that they could not say whether or not these rules were, in one way or another, brought to the attention of every purchaser from the wholesale department; but that notice was given, in case of a new purchaser, by correspondence and by sending the following blank:

"American Publishers' Association.

"_____, 190—.

"In consideration of discount allowed on books bought from _____ we hereby agree that for one year from date of publication we will not sell net books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1, 1902, at a greater discount than 28 per cent. at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers' Association to any dealer known to us to cut prices of net books or of new fiction except as above provided."

Complainants admitted that, if dealers were asked to sign this notice and refused to sign it, the trade was still allowed to sell to them, and would sell to them. On the other hand, if a new member of the trade, or one about whom the trade was in doubt, made application for books, the matter was referred to the association before sales were made, and the pledge to the association was executed before deliveries were made.

Complainants say that the question presented is the following:

"Where the proprietor of a copyright sells copies of his copyrighted book by a conditional sale, subject to a restriction upon further sale, and to a purchaser who agrees to comply therewith, are these copies of the book released from the monopoly as against persons having notice of the restrictions?"

Upon this assumption of fact complainants argue that the same rule should be applied as in restricted sales in patent cases, namely:

"To the extent that the sale is subject to any restriction upon the use or future sale, the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly." *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 735, 64 C. C. A. 594."

—and that defendants, by inducing booksellers to break their contracts, are guilty of contributory infringement of copyright. Complainants further seek to take advantage of the rules established in cases of restricted sales of proprietary articles manufactured under secret processes.

The questions raised herein are discussed in the opinion of this court in the case of the Bobbs-Merrill Company against these defendants, decided at this term of court. For the reasons therein stated, we are of the opinion that the claims arising out of the

peculiar rights attached to articles made by secret processes, or the statutory rights in articles protected by patents or copyright, do not directly bear upon the questions raised herein, although the discussions in some of said cases cover the principles applicable to this case.

There is no statement in the printed notice or blanks of any claim of right under the copyright law. The question of liability by reason of such notice is not one of infringement of copyright. The question is one as to the right of these complainants to relief in a court of equity, by virtue of their common-law rights, independent of statutory copyright, in view of the fact that they have issued, as above, printed notices that

"Copyrighted books * * * are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association," etc.

But this question is not open to discussion in these cases, as there is neither the diversity of citizenship, in the first case, nor the claim of damages in the sum of \$2,000, in either case, requisite to confer jurisdiction of questions not arising out of the copyright law.

The complainants further contend that defendants have been guilty of contributory infringement of copyright because they, knowing of complainants' refusal to sell, except upon condition that the rules of the Publishers' Association should be obeyed as to resale and maintenance of prices, "designing and contriving to benefit themselves at the expense of and to the injury of your orators, have, as your orators are informed and believe, in the borough of Manhattan and elsewhere in the United States, induced and persuaded sundry of the jobbers and dealers who have obtained from your orators as aforesaid books published under the above enumerated copyrights, to deliver the same books to the defendants for sale at retail at less than the net retail prices fixed by your orators for such books respectively, in violation of the agreement, conditions and restrictions upon which as aforesaid the said jobbers and dealers have obtained such books and hold the same as aforesaid; and the defendants have thus induced such jobbers, booksellers and dealers to break and violate the agreement and condition as to maintaining prices and selling to no one known to cut net prices, so as aforesaid made and assumed by them." The answer "admits, on information and belief, that the complainants have made all sales of books subject to the rules of the American Publishers' Association as set forth," but denies all the allegations as to attempts on defendants' part to induce dealers to violate the agreements, conditions, and instructions on which they obtained said books. The evidence fails to show that defendants have wrongfully induced any person to break his agreement with complainants.

The facts bearing on this contention are substantially as follows: The defendants "have been compelled to purchase books through secret ways," and the books which they have "succeeded in buying were bought from people who knew the price for which deponent (defendants' agent) bought them, * * * and who were willing

to take the risk of incurring the displeasure of the combined publishers and combined booksellers for the profits that she offered them." In some instances members of the association were required to sign papers or agreements with the American Publishers' Association, but in a great many cases they were not required to sign unless they were newcomers in the business, and, "generally speaking, such signature was only exacted from those traders who were new in the business"; and, if purchasers were asked to sign and refused, the trade was still allowed to sell to them, and would sell to them, and apparently this pledge was to a considerable extent a mere matter of form. It nowhere satisfactorily appears that defendants purchased from complainants' vendees, or from any one who made any contract to obey said rules. It does not appear that defendants' may not have bought from subvendees or from those dealers who refused to sign the pledge as to resale, and to whom the trade was allowed to sell and did sell books.

The evidence fails to show which dealers, if any, from whom defendants purchased books, ever assented to said attempted conditions, or accepted them or agreed to abide by the terms as to retail prices. Such assent or agreement cannot be implied from mere purchases, for such books may have been lawfully sold and bought upon an express refusal to sign said pledge. In the absence of proof of any reservation of right in the copyright by its owner, or of an agreement by the dealers from whom defendant purchased to abide by said rules, or of a wrongful attempt on the part of defendants to induce its vendors to break any contract, there can be no foundation for a claim of contributory infringement of copyright.

In these circumstances, it is unnecessary to apply to the facts proven herein the principles stated in *Bobbs-Merrill Company* against these defendants, *supra*, that a violation of the restrictions attempted to be imposed upon sales of copyrighted books is not an infringement of copyright.

The decree is affirmed.

BALL v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,221.

1. CRIMINAL LAW—FEDERAL STATUTES—APPLICATION—WITNESSES—NOTICE TO DEFENDANT.

Rev. St. U. S. § 1033 [U. S. Comp. St. 1901, p. 722], requiring the district attorney to furnish accused with a list of all witnesses to be produced against him on the trial, applies only to treason and capital cases tried in the courts of the United States, and not to felonies for which prosecutions were had in a territorial court of Alaska, under the Alaska Codes of Criminal and Civil Procedure.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1420-1436.]

*Rehearing denied October 29, 1906.

2. SAME.

Since the Alaska Codes of Criminal and Civil Procedure contain no requirement that a list of witnesses be furnished the accused, the government is entitled to call witnesses against accused whose names have not been furnished to him before trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1420-1436.]

3. HOMICIDE—EVIDENCE—DECLARATIONS OF THIRD PERSONS.

In a prosecution for homicide, evidence of conversations between witness and D., and witness and accused concerning what opinion D. had expressed as to the probability of trouble between deceased and accused, and as to what opinion on that subject witness had expressed to accused, was inadmissible.

4. SAME—ENTRY ON PROPERTY—GOOD FAITH—EVIDENCE.

Where defendant shot deceased, who had entered on property of a corporation for the purpose of doing certain assessment work, evidence of the minutes of the election of the officers of the corporation, and a letter written by the secretary of the company to one of the men living on its property, was admissible as showing deceased's good faith in going on the property.

5. CRIMINAL LAW—EVIDENCE—OPINION.

Evidence of a witness in a prosecution for homicide that deceased and certain others, apparently by arrangement, all rushed onto the property occupied by defendant together, was incompetent as the witness' deduction from the appearance of things.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1035-1039.]

6. WITNESSES—CROSS-EXAMINATION—PRIOR CONVICTION.

In a prosecution for homicide, accused having tendered himself as a witness, the district attorney was entitled to ask him on cross-examination whether he had not formerly and under a different name, been convicted of using the United States mails to further a scheme to defraud.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1146-1148.]

7. SAME—RECORD OF CONVICTION.

Where accused offered himself as a witness in his own behalf, the introduction by the government of the record of a federal court, sitting in another state, convicting accused of a different offense, for the purpose of affecting his credibility as a witness, was not objectionable as in effect giving extraterritorial force to such judgment.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1161, 1162.]

8. SAME—MISDEMEANORS.

Carter's Code Alaska, pt. 4, § 669, provides that it may be shown by the examination of a witness or the record of a judgment that he has been convicted of a crime, and section 675 declares that a witness must answer as to the fact of his previous conviction of a felony. *Held*, that such sections did not preclude proof that a witness had been convicted of a misdemeanor by the record of such conviction for the purpose of affecting his credibility.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1126-1128, 1132.]

9. CRIMINAL LAW—APPEAL—OBJECTIONS NOT MADE AT TRIAL.

An objection to the admission of a judgment roll in evidence, not made at the trial, cannot be urged on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2639.]

10. SAME—JUDGMENT ROLL—INDICTMENT.

An indictment is a proper part of a judgment roll introduced to prove a former conviction.

11. SAME—HARMLESS ERROR.

Where, in a prosecution for homicide, the district attorney erroneously read the heading of a newspaper clipping in the presence of the jury to the effect that deceased's slayer was an ex-convict, but such clipping went no farther than did the record proof of such fact properly introduced in evidence, the error was harmless.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3127.]

12. WITNESSES—CROSS-EXAMINATION OF ACCUSED.

Where, in a prosecution for homicide, defendant claimed that deceased, who was his enemy, had been "trailing" him wherever he went and had threatened to injure him, and the prosecution claimed that the reason why deceased dogged defendant's footsteps was for the purpose of taking a picture of him to be used for identification in looking up defendant's criminal record, and not for the purpose of doing him bodily harm. It was not error for the court to permit defendant to be asked on cross-examination whether deceased had not told defendant that he would bring forward his record in other states, and that he wanted to take a snap-shot picture of him for identification.

13. CRIMINAL LAW—INSTRUCTIONS—NECESSITY OF REQUEST.

Failure of the trial court to charge that evidence of a prior conviction of accused was admissible only as tending to affect his credibility as a witness was not error, in the absence of a request therefor, or any objection to the court's omission so to charge.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1996-2004.]

14. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

Where an instruction on self-defense authorized an acquittal if it appeared to accused that he was actually in danger, and authorized the jury to consider apparent actual danger, the fact that it also charged that, in order to justify the homicide, it must have appeared to defendant's apprehension that he was actually in danger of his life or of receiving great bodily harm, and to avoid such danger or harm it appeared necessary to take deceased's life, was not erroneous as requiring that the danger must be actual and positive; the court having immediately thereafter properly charged on the subject of the appearance of danger.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 629.]

15. SAME—DEMONSTRATION OF WEAPON.

Where the court charged that an assault was an unlawful physical force, partially or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being, the refusal of a portion of an instruction that any demonstration with a deadly weapon which puts another in fear is an assault, as well as any act done which constitutes menace and the beginning of violence toward another, was not error.

16. SAME.

In a prosecution for homicide, it was not error for the court to refuse to charge that if the jury believed that deceased was a man of violent or vicious character, and this was known to defendant, that fact, together with threats against defendant's life, would authorize defendant to act in self-defense on a less aggressive act, indicating apparent danger to life, than if his assailant were a man of ordinarily well-disposed character for peace.

17. SAME—APPEAL—INSTRUCTIONS—OBJECTIONS AT TRIAL.

Where no objection was made to an instruction when given, and no request for further instructions was proffered, accused was not entitled

to object that the court erred in giving an instruction defining manslaughter, because he was guilty of murder in the first degree, if guilty at all.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 693.]

18. SAME—INSTRUCTIONS—THREATS.

Where, in a prosecution for homicide, the charge correctly announced the rule that threats, unaccompanied at the time of the killing with any attempt to carry them into execution, were insufficient to justify the homicide, it was not error for the court to charge that no mere threats made by deceased before or at the time of the killing, unaccompanied at that time by any attempt to carry them into execution, were sufficient to justify the killing or reduce it to a lower degree of homicide than murder.

19. CRIMINAL LAW—EXCEPTIONS—INSTRUCTIONS.

Where an exception to an instruction was directed to an entire paragraph and did not point out the defective portions, so as to afford the trial court an opportunity to remedy them, the exception was insufficient to justify a review of such objectionable portions.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2871.]

In error to the District Court of the United States for the First Division of the District of Alaska.

The plaintiff in error was charged with the crime of murder in the first degree. He was found guilty of manslaughter, and was sentenced to imprisonment for a term of 12 years. The facts disclosed upon the trial are, so far as it is necessary to consider them on the writ of error, in substance the following: The plaintiff in error had been the president of the Great American Marble Company, a corporation created under the laws of the state of Washington, having its principal place of business at Seattle. The company had secured certain marble lands on Fox Island, in southeastern Alaska. On October 18, 1904, at a meeting of the stockholders at Seattle, F. C. Harper was elected president in the place of the plaintiff in error. The latter contended that the election of Harper was void and that he was still the president of the company. The assessment work on the property for the year 1904 had not been completed. The plaintiff in error, claiming to be the president of the company, went to the property to do such assessment work. He was there on January 1, 1905, together with two others, Maxwell and Noble, living in a cabin belonging to the corporation, when William Deppe and a party accompanying him arrived on the grounds of the company. Deppe and his party claimed that they came to do the assessment work. Deppe and the plaintiff in error were enemies. They had had business differences in Seattle, and on one occasion had had a personal encounter in the office of the plaintiff in error, in which Deppe picked up a paper fastener from Ball's desk and struck the plaintiff in error with it. The latter testified that on that occasion Deppe kicked him and thereby produced hernia. There is evidence that while in Seattle each threatened the other with bodily harm. When Deppe and his party arrived at the property, the plaintiff in error informed him that there was not room in his cabin for them, whereupon Deppe said that he would make room and forcibly opened the door and entered the cabin. Finally, after some discussion, it was agreed that Deppe and his party should occupy and use another cabin situated on the property, and they took possession of that cabin. On the following day Deppe came two or three times to the cabin of the plaintiff in error. One of these times he came to try to get a stovepipe for his cabin, and when the stovepipe was refused he used insulting language to the plaintiff in error. Another time he came to the plaintiff in error to get him to remove a tent which was in the other cabin and was in the way. On the evening of January 2d, Dackins, who belonged to the Deppe party, had gone over to the cabin of the plaintiff in error and had

been there some time in friendly conversation with the members of the plaintiff in error's party, when Deppe came to the door and knocked. At first there was no response to his knock, but as he knocked the second time Noble arose and went to the door to open it. Whether he actually opened it, or whether Deppe opened it, is not definitely proven by the testimony. Deppe stepped in, removed his hat, and was turning to close the door, when Ball, who had been sitting on his bunk with his hand on his rifle, arose and ordered him to leave the cabin, and immediately or almost immediately fired. Deppe fell in the corner against the door and immediately expired. He was armed with a revolver carried in a holster, but there is no evidence that he attempted to draw it, except that of the plaintiff in error, and possibly the testimony of Noble may justify the inference that he meant to say that the deceased might have made a motion of his hand toward his pistol.

James E. Fenton, J. C. Campbell, W. H. Metson, C. H. Oatman, and F. C. Drew, for the plaintiff in error.

John J. Boyce and Edward E. Cushman, for the United States.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error that the court overruled the motion of the plaintiff in error to require the district attorney to furnish him a list of all the witnesses to be produced against him on the trial in accordance with the provisions of section 1033 of the Revised Statutes. [U. S. Comp. St. 1901, p. 722]. That statute applies only to the trial of treason and capital cases in the courts of the United States. The present case was tried in a territorial court under the Penal Code and Code of Criminal Procedure of Alaska. Those Codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise. In *Thiede v. Utah Territory*, 159 U. S. 510-515, 16 Sup. Ct. 62, 40 L. Ed. 237, it was held that section 1033 does not control practice and procedure in territorial courts. The court said:

"In the absence of some statutory provision, there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial."

It is contended that the court erred in sustaining the objection of the district attorney to questions propounded to the witness Noble as to certain conversations which he had with Dackins and with the plaintiff in error on the day of the homicide. The witness testified that he had a conversation with Dackins in the afternoon of that day. He was asked:

"Q. In that conversation did he say to you that the next time these men met one of them would be killed? A. No, sir. Q. Did he make any declaration in substance anything like that? (To which objection was made by the district attorney, and the objection was sustained by the court.)"

The witness was then asked:

"Q. Did you say to Mr. Ball, after your conversation with Dackins, that one of these two men would get hurt the first time they came together? (To which an objection was also sustained.)"

It is claimed that the purpose of these questions was to show threats made by the deceased against the accused. We do not see how the testimony which was sought to be elicited can be said to indicate that threats were made. The questions called for no testimony as to what the deceased had said. They referred to conversations only between the witness and Dackins, and the witness and the accused, and called for testimony as to what opinion Dackins had expressed concerning the probability of trouble between the deceased and the accused, and as to what opinion on that subject the witness had expressed to the accused. Such testimony was not admissible under any rule of evidence. It was not admissible as part of the *res gestæ*, nor as the declaration of a co-conspirator. There is nothing in the record to indicate that Dackins was unfriendly to the plaintiff in error or wished him harm. There is nothing to show that he ever made any threat against him. At the time when Deppe was killed, Dackins was sitting in the cabin of the plaintiff in error in conversation with Noble, and was unarmed. There is nothing to show that he knew or supposed that the deceased was coming to the cabin that night. We find no error in the exclusion of the proffered testimony.

Error is assigned to the introduction in evidence of minutes of the election of officers of the marble company and a letter of the secretary of that company to Noble, which was taken by Deppe when he went to Fox Island and there delivered to Noble. The objection made to the admission of this evidence is that the election of officers referred to in the minutes was absolutely void, and that said officers had no authority to direct Deppe to do the assessment work. The testimony was introduced for the purpose of showing the good faith of Deppe in going upon the property of the company to do the assessment work. We think it was admissible for that purpose. The homicide was not the result of any controversy over the possession of the property, and the evidence did not go to the jury for the purpose of showing that the plaintiff in error was not rightfully there. The court was careful to instruct the jury that if they believed from all the evidence that the plaintiff in error, in good faith and in the honest belief that he had the legal right so to do, entered upon the company's property for an honest purpose, he had the right to retain such possession, and it could not be forcibly interfered with or taken from him, except by due process of law, and that to defend such possession he had the same right as though he were legally the possessor thereof and in his own house.

It is contended that the court erred in striking out testimony given by the plaintiff in error as to what occurred when Deppe, Dackins, and Weir arrived on the property. He said: "Apparently by arrangement they all rushed in there together." This was clearly not competent testimony. It was evidence only of a deduction which the witness drew from the appearance of things. If there were facts or circumstances which indicated that the men rushed in there by arrangement, it was competent to prove them; but it was not competent to prove the impression made upon the mind of the witness.

It is assigned as error that the district attorney was permitted to ask

the plaintiff in error on cross-examination whether he had not formerly, and under the name of Charles R. Mains, been convicted in the Northern District of California of the crime of using the United States mails in a scheme to defraud. To this it is sufficient to say, for reasons stated below, that the district attorney clearly had the right to ask the question. Under the ruling of the court the witness was not required to answer the question, and did not answer it.

The trial court, over the objection of the plaintiff in error, admitted the record of the District Court of the United States for the Northern District of California of the conviction of the plaintiff in error of said offense. It is contended that this was error on two grounds: First, that to admit in the trial court, for the purpose of impeaching or affecting the credibility of a witness therein, the record of his conviction in the United States court for the District of California, was to give extra-territorial effect and force to a judgment of that court, the effect of which is necessarily limited to the jurisdiction in which the offense was committed, and in which the judgment was rendered. To this proposition *Commonwealth v. Green*, 17 Mass. 515-536, is cited. What the court held in that case was that a witness was not rendered incompetent to testify in the courts of Massachusetts by proof of his conviction of a felony in the state of New York, the effect of which, under the law of New York, was to render him infamous and incompetent there to be sworn as a witness, and that the judgment of conviction in that state had no extra-territorial effect. But that decision did not deny the admissibility in evidence of such testimony to affect the credibility of the witness. On the contrary, the court took pains to say of such witnesses:

"Their former condition and character may be made known to the jury to enable them to judge of their credibility, and this without depriving them of any valuable personal right by reason of their conviction abroad."

The second ground of objection to the record is that it proved a conviction, not of a felony, but of a misdemeanor, and that it was therefore not admissible under the Code of Alaska. Section 669, p. 4, of *Carter's Codes of Alaska* provides:

"It may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime."

Section 675 provides:

"But a witness must answer as to the fact of his previous conviction of a felony."

These sections were taken from the statutes of Oregon, Sections 852, 859, B. & C. Comp. Before they were adopted for Alaska, the Supreme Court of Oregon had in *State v. Bacon*, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8, so construed these provisions as to sanction the admission in evidence, for the purpose of impeaching a witness, proof of his prior conviction of a misdemeanor. It is true that in Oregon a defendant in a criminal case, who testifies in his own behalf, may not be asked whether he has been convicted of a crime, but that is because the statute which permits him so to testify expressly restricts cross-examination to the testimony which he has given on direct examination.

State v. Lurch, 12 Or. 99, 6 Pac. 408; State v. Saunders, 14 Or. 300, 12 Pac. 441; State v. Bartness, 33 Or. 110, 54 Pac. 167. In that respect the statute of Oregon differs from that of Alaska, as section 148 of the Penal and Criminal Code of that territory gives to the prosecution, without express restriction, the right to cross-examine a defendant who offers himself as a witness. We find no error in the admission of the record in evidence.

The further objection is made that the indictment was included in the judgment roll, which was admitted in evidence to prove the prior conviction of the plaintiff in error. It is a sufficient answer to this to point to the fact that the objection was not made in the court below. But, if timely objection had been made, we see no ground upon which it should have been sustained. The indictment is properly part of a judgment roll to prove a former conviction. Kirby v. People, 123 Ill. 436, 15 N. E. 33.

It is urged that the trial court erred in permitting the district attorney to take from the plaintiff in error a newspaper clipping which he held in his hand while testifying. The district attorney, while cross-examining the plaintiff in error, said:

"I see you hold in your hand a paper to which you have referred. Do you refer to that for the purpose of refreshing your memory? A. I am referring to this because to my recollection that scandal originated with Allan Weir. Q. Then you do refer to it to refresh your memory? A. Yes, sir; I do on that point."

The district attorney then requested permission to see the paper and took it from the hand of the witness. Objection was made, on the ground that the district attorney had no right to look at it. The objection was overruled. The district attorney thereafter propounded this question.

"The article referred to in this paper is headed, 'Deppe's Slayer Said to be an Ex-Convict.' Is that true? (Objection was made to the question, the objection was overruled, and the witness answered:) Yes, sir; that is true."

Conceding that it was error to read in the presence of the jury the heading of the newspaper clipping, that error was cured by the proof which was made by the record which was admitted in evidence of the former conviction. The heading of the newspaper clipping went no further than did the record proof which imported verity of the fact that the plaintiff in error had been so convicted.

It is contended that the trial court erred in permitting the district attorney to ask the plaintiff in error on his cross-examination if it was not a fact that Deppe had told him that he would bring forward his record in Michigan and California and that he wanted to take a snap-shot or kodak picture of him for the purpose of identifying him. It is argued that this question could have been asked only for the purpose of degrading the plaintiff in error, and that it had that tendency. The question was propounded after the plaintiff in error had testified that, while he and Deppe were both at Seattle, the latter was constantly lurking around his offices, invading the same, and daring him to come out; that he encountered Deppe at many times and places, and that when he met Deppe the latter would assume a threatening

attitude, and have his hand in his coat pocket; that Deppe would follow him on the street as he was going home, and would follow him to the public parks of the city, and was "trailing" him wherever he went. In addition to this testimony, the plaintiff in error testified as to threats of personal injury made to him by Deppe during that period. It was the theory of the prosecution that the acts of Deppe, in hanging around the office of the plaintiff in error and dogging his footsteps on the street, were for the purpose of taking a snap-shot picture of him, to be used for identification in looking up his record, and not for the purpose of doing him bodily harm. We do not see that it was reversible error to endeavor to obtain an admission from the plaintiff in error that such was the fact. The record shows, moreover, that the plaintiff in error introduced in his defense evidence that Deppe, during that period of time, was making inquiries concerning his record in Michigan and California.

It is contended that the failure of the trial court to instruct the jury that the evidence of the prior conviction of the plaintiff in error was to be considered only as tending to affect the credibility of his testimony was error. There was no request for such an instruction, nor was any objection made to the omission of the court so to instruct, nor is the failure of the court so to instruct assigned as error. In Kentucky, Tennessee, and Missouri it is held, contrary to the general rule, that in criminal cases the omission of the court to charge the jury fully as to any branch of the law of the case, though not requested, is ground for reversal, unless it is clear that no injury could have resulted therefrom. *Potter v. State*, 85 Tenn. 88, 1 S. W. 614; *Heilman v. Commonwealth*, 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; *State v. Banks*, 73 Mo. 592. These and other decisions are cited by the plaintiff in error. Among the cases cited are *State v. Cody*, 18 Or. 506, 23 Pac. 891, 24 Pac. 895, and *Winchester & Partridge Mfg. Co. v. Creary*, 116 U. S. 161, 6 Sup. Ct. 369, 29 L. Ed. 591. In *State v. Cody*, the majority of the court held with the rule of the states above mentioned, and thereby overruled prior decisions of that court; but *State v. Cody* was itself overruled in *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537. In *Winchester & Partridge Mfg. Co. v. Creary*, it was held that, in an action by the vendee of personal property against an officer attaching it as property of the vendor, declarations made by the vendor to a third party after delivery of the property are inadmissible to show fraud or conspiracy to defraud in the sale. In the course of the opinion the court used the following language, which is relied upon by the plaintiff in error:

"It is argued that these subsequent declarations of Webb were competent for the purpose of contradicting him as a witness in behalf of the plaintiff by showing that he had made statements out of court different from those made as a witness in behalf of the plaintiff. No foundation was laid for any such use of those declarations. Besides, if any such foundation had existed, the court should have instructed the jury that in determining between the parties to the record the true character of the sale, the subsequent declarations of Webb were competent only as impeaching his credibility as a witness."

We understand this expression of the court to mean that, if there had been proper foundation for the admission of the declarations, it would have been the duty of the court, in instructing the jury in connection therewith, to limit such declarations to their proper use. This is far from saying that the mere omission of the court so to instruct the jury, in the absence of a request for such an instruction, would have been reversible error. We think it may be said to be the general rule that the mere omission of the court, in the absence of a specific request, to limit the effect of evidence admitted only for a certain purpose, is not error. *People v. Ah Yute*, 53 Cal. 613; *People v. Collins*, 48 Cal. 277; *Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317; *Roebke v. Andrews*, 26 Wis. 312.

It is contended that the court erred in modifying the instruction requested by the plaintiff in error on the subject of self-defense by adding thereto the following:

"The court charges you that in order to justify the homicide it must have appeared to the defendant's apprehension that he was actually in danger of his life or of receiving great bodily harm, and to avoid such danger or harm it appeared necessary to him to take the life of the deceased."

It is objected to this instruction that it conveyed the idea that the danger must be actual and positive, and that it excluded the consideration of the appearances of danger, which under the law would justify homicide in self-defense. We do not so read the instruction. It expressly authorized the jury to acquit the plaintiff in error if they found that it appeared to his apprehension that he was actually in danger. It authorized the jury to consider apparent actual danger, and the court immediately thereafter properly charged the jury on the subject of the appearance of danger to the plaintiff in error.

It is assigned that the court erred in giving an instruction requested by the plaintiff in error by omitting the following portion thereof:

"Any demonstration with a deadly weapon which puts another in fear is an assault. Any act done which constitutes menace and the beginning of violence toward another is an assault."

The court charged the jury that:

"An assault is an unlawful physical force partially or fully put in motion creating a reasonable apprehension of immediate physical injury to a human being."

No fault is found with that instruction, but it is contended that the requested instruction should have been given. We do not think the court erred in refusing it. It is not true that any demonstration with a deadly weapon which puts another in fear is an assault. A careless demonstration with a deadly weapon might put another in fear, and yet it would not be an assault, and the same is true of other demonstrations that might be suggested.

Error is assigned to the refusal to give an instruction to the effect that if the jury believed from the evidence that Deppe was a man of violent or vicious character, and this was known to the defendant, that fact, taken together with threats against the life of the defendant, if any were proved, would give him the right to act in self-defense

upon a less aggressive act indicating apparent danger to life than if his assailant was a man of ordinarily well-disposed character for peace. In that connection the plaintiff in error cites the case of *Roberts v. State*, 68 Ala. 166, in which it was said:

"Where the character of a man is notoriously turbulent and bloodthirsty, and his threats are brutal, ferocious, and recently made, his armed entry upon the premises of his assailant might readily be inferred by a jury as being of so hostile a character as to place such assailant in imminent danger."

We think the court was justified in refusing the instruction, for the reason that it included the word "vicious." Whatever may be the rule as to the threats of a man of violent character, there is certainly no ground for instructing the jury that the threats of a man of vicious character are to give any greater right to a defendant to kill in self-defense than would the threats of a virtuous man. A man of vicious character may be as peaceable as another. We find no ground of reversal in the refusal of the court to give the requested instruction, especially in view of the fact that the court gave correct and ample instruction on the subject of the law of self-defense.

It is contended that the court erred in giving an instruction defining manslaughter. This is said to be error for the reason that the evidence, if it proved the plaintiff in error to be guilty at all, proved him to be guilty of murder in the first degree, and that there was no evidence upon which to find him guilty of a different offense. It is contended, further, that, if the evidence authorized the court to instruct the jury on the subject of manslaughter, the instruction which the court gave by reading the statute of Alaska was wholly insufficient. We find it unnecessary to consider the merits of these contentions, for the reason that no objection was made to the instruction when given, and no request was proffered for further instructions.

It is contended that the court erred in charging the jury that no mere threats made by the deceased before or at the time of the killing, unaccompanied at the time of the killing with any intent to carry them into execution, are sufficient to justify the killing, or to reduce it to a lower degree of homicide than murder. It is said that this instruction is contrary to the rule announced in *Thompson v. United States*, 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146, in which the court said:

"An instruction that former threats to kill defendant cannot excuse him if there was nothing indicating a deadly design against the defendant at the time of the killing is erroneous in omitting all reference to deceased's conduct showing a present intention to carry out the previous threats."

But the charge as given by the trial court did not omit all reference to deceased's conduct. It expressly referred to the conduct of the deceased and correctly announced the rule that threats unaccompanied at the time of the killing with any attempt to carry them into execution are insufficient to justify homicide. As applied to the facts of the case, we think the instruction given was correct. If the evidence had been that the deceased came into the cabin where the plaintiff in error was, holding a pistol or other weapon in his hand, a dif-

ferent instruction might have been called for; but the evidence all is that he came empty-handed, and that if he made any attempt, as to which the evidence was conflicting, it was an attempt to reach for his pistol after he observed the threatening acts of the plaintiff in error.

It is earnestly insisted that the court erred in giving the following instruction:

"You are instructed that the law of self-defense was as much the right of the deceased, William Deppe, as it was that of the defendant; and if you shall find and believe from the evidence in this case, beyond all reasonable doubt, that the deceased, William Deppe, was attacked by the defendant when deceased was attempting to retreat through the door of the house where the homicide happened, and that he would have withdrawn or retreated if given a reasonable opportunity to do so, then you are instructed that the defendant is not entitled to be acquitted on the ground of self-defense."

It is claimed that this was an invasion by the court of the province of the jury, forbidden by section 191 of the Alaska Code of Civil Procedure, which provides that in charging the jury the court "shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact." It may be conceded that an instruction which assumes the existence of a fact which should be left to the jury for ascertainment is erroneous, and that such error is not cured by a general instruction that the jury are the exclusive judges of all the facts. But does this instruction assume the existence of a fact which should have been left to the jury for ascertainment? It was the theory of the prosecution that the circumstances as disclosed by the evidence justified the inference that no time was given to the deceased to comply with the order to get out, and that the shot followed immediately, and that the deceased would have retreated through the door if he had been given an opportunity to do so. We think that the most that can be said against the instruction is that it is open to the objection that a portion of it assumes the existence of evidence which is not in the record, evidence that the deceased at the time when he was shot was attempting to retreat through the door. But the exception was not confined to that part of the charge. It was directed to an entire paragraph, portions of which were not subject to objection, and it did not point out the defective portion, so as to bring it to the attention of the court, and thus afford an opportunity to remedy it. Such an exception will not be considered in an appellate court. *Cass County v. Gibson*, 107 Fed 363, 46 C. C. A. 341; *Columbus Const. Co. v. Crane*, 98 Fed. 946, 40 C. C. A. 35; *Railroad Company v. Varnell*, 98 U. S. 479, 25 L. Ed. 233; *Mobile & Montgomery R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Newport News and Miss. Valley Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887.

There are other assignments of error, directed to portions of the charge and to refusals to charge, which we have carefully considered, but in which we find no ground for reversal.

The judgment of the District Court is affirmed.

BURRELL et al. v. UNITED STATES, to Use of FIRST NAT. BANK OF
EVERETT, WASH.

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,263.

1. COURTS—FEDERAL COURTS—JURISDICTION—PARTIES—UNITED STATES.

Act Cong. August 13, 1894, c. 230, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], requires contractors for public buildings to execute a bond to the United States to pay for all labor and materials and authorizes persons supplying labor or materials to sue in the name of the United States for their use on such bond without expense, however, to the United States. *Held* that, in an action on a bond given after such act, the United States was a mere nominal or formal party whose presence was insufficient to confer federal jurisdiction.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 843.]

2. SAME—DIVERSE CITIZENSHIP.

Where an action in the name of the United States on a public contractor's bond was brought by a banking corporation having its banking house in the state of Washington, and the contractor sued was a resident of California, and his surety a corporation organized under the laws of Connecticut, and the amount involved exceeded the sum of \$2,000, the federal jurisdiction existed because of diverse citizenship.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 857.]

3. ARBITRATION AND AWARD—JUDGMENTS—ENTRY—FEDERAL COURT.

Where, in an action in the federal court, the parties agreed to a trial before arbitrators, the court had jurisdiction to enter judgment on the award.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 466-470.]

4. SAME—ERRORS—OMISSION OF EVIDENCE.

Where an arbitration agreement provided that proof should be taken before the arbitrators in the same manner as in the trial of cases in court, and that the judgment entered on the award should be unappealable, objections made to the introduction of evidence could not be urged against a judgment entered on the award.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 450, 466-470.]

5. EVIDENCE—COMPETENCY—REBUTTAL OF EVIDENCE FOR ADVERSE PARTY.

Where, on an issue as to the sufficiency of certain mill work, defendant proved that the mill company's superintendent was incompetent because of drunkenness to perform his duties in a good and workmanlike manner, the mill company was entitled to show in rebuttal that other work of like character done contemporaneously for other parties under the management of the same foreman was good and acceptable.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 445-454; vol. 46, Cent. Dig. Trial, §§ 146-152.]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

William Lair Hill and Graves, Palmer, Brown & Murphy, for the plaintiffs in error.

Frances H. Brownell, for the defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The case shows that the plaintiff in error, who was defendant in the court below, had a contract with the United States for the erection of certain buildings at Ft. Casey, in the state of Washington. He gave the bond required by the act of Congress approved August 13, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," on which bond the *Ætna Indemnity Company* was surety.

The act of August 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, pp. 2523, 2524], is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, that such action and its prosecution shall involve the United States in no expense.

"Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant."

The *Wheelihan-Weidauer Company* supplied certain millwork in the performance of this contract, and at the conclusion thereof claimed a balance due it on that account of \$5,346.89. It assigned its rights to the *First National Bank of Everett, Wash.*, and, *Burrell*, having refused to pay the amount, the bank instituted the present action in the court below, in the name of the United States for the use and benefit of the bank. Issue was joined, the defendant *Ætna Indemnity Company* disclaiming knowledge of the state of the account, and the defendant *Burrell* admitting a liability of \$28.10, and denying any greater liability.

It is clear, we think, that the United States has no real interest, direct or indirect, in the controversy. Manifestly, it could not sue alone, for it is not entitled to any of the money. A controversy, in the sense of the judiciary act, is, as said by the court in *United States, to Use of Edward Hines Lumber Company, v. Henderlong et al.* (C. C.) 102 Fed. 2, a case "brought before some competent court of justice for forensic discussion and judicial decision. In order that the United States shall become plaintiffs in a case or controversy in a judicial tribunal, they must have some interest in the matter in issue. Where the plaintiff's statement of his case discloses that he has no interest in the controversy, and it affirmatively appears that the

right to the matter in controversy is vested wholly in some one else, it is difficult to perceive how such person can be said to have a case or controversy. The term 'parties' includes all persons who are directly interested in the subject-matter in issue, who have a right to make a defense, control the proceedings, or appeal from the judgment. Strangers to the suit are persons who do not possess these rights. *Hunt v. Haven*, 52 N. H. 162. The plaintiff is he who, in a personal action, seeks a remedy in a court of justice for an injury to, or a withholding of, his rights. The legal plaintiff is he in whom the legal title or right of action is vested. The equitable plaintiff is he who, not having the legal title to the right of action, is in equity entitled to the thing sued for. Such are the accepted definitions of the terms 'parties' and 'plaintiffs.' The United States are neither the legal nor equitable plaintiffs in the present action. They are seeking no remedy for any injury to, or for the withholding of, any of their rights; nor have they any equitable right to or interest in the thing sued for. They have neither the legal right of action, nor any equitable interest in the matter in controversy. The United States are simply a formal or modal party—a mere name, used for convenience only. The right of action is vested solely in the *Edward Hines Lumber Company*, and it, and not the United States, is the real party plaintiff in the pending controversy. The statute merely delegates authority to the laborer or materialman to use the name of the United States for his use and benefit in any court having jurisdiction of the subject-matter and the parties. It can hardly be supposed that it was the purpose of the statute to authorize a laborer or materialman to prosecute petty claims, involving only a few dollars, in this court, when a more speedy and inexpensive trial can be had in the courts of the state. This is obvious from the fact that Congress has manifested a steady purpose to restrict, rather than to enlarge, the jurisdiction of the courts of the United States. No reason is perceived why the courts of the United States should take cognizance of the suits of laborers and materialmen, unless the citizenship of the parties, and the amount involved in the controversy, are such as would give jurisdiction as in the case of other suitors. These views find support in the decisions of the Supreme Court in *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108; *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159; *Walden v. Skinner*, 101 U. S. 577, 588, 589, 25 L. Ed. 963."

By the law of Maryland, the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. A suit on such a bond was commenced in a state court of Maryland against citizens of Maryland, and was removed to the Circuit Court of the United States on the ground that the real party in interest was a citizen of New Jersey. In considering the question of jurisdiction there raised, the Supreme Court held that the case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Markley, for whose use the action was brought in the name of the state, was alone named as plaintiff; saying in its opinion:

"The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond. If the residence of these parties be in different states, the Circuit Court of the United States has jurisdiction." *State of Maryland, for use of Markley v. Baldwin et al.*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822.

Inasmuch, therefore, as it appears from the pleadings that the First National Bank of Everett is a corporation organized under the United States banking law, having its banking house at the city of Everett, state of Washington, that the defendant Burrell is a resident of the state of California, and the defendant *Ætna Indemnity Company* is a corporation organized under the laws of the state of Connecticut, and that the amount involved exceeds the sum of \$2,000, it is clear that the court below had jurisdiction of the action, on the ground of the diversity of citizenship of the parties.

The record further shows that the judgment of the court below was entered upon an award made in pursuance of the following written stipulation of the parties:

"It is stipulated and agreed by and between Brownell & Coleman, counsel for the above-named plaintiff and Graves, Palmer, Brown & Murphy, counsel for the above-named defendants, that in lieu of a trial of this case before the above-entitled court the same shall be arbitrated and decided by three arbitrators, and that the method of appointment of arbitrators and the terms and conditions of arbitration shall be as follows:

"I. Each side shall appoint an arbitrator and shall notify the other side of their appointment before the 4th day of July, 1905. The two arbitrators so appointed shall then before the 10th day of July, 1905, select a third arbitrator, and the third so appointed shall constitute the board of arbitration.

"II. Said board of arbitration shall meet at the office of Graves, Palmer, Brown & Murphy, in the city of Seattle on the morning of July 10, 1905, for the purpose of hearing testimony upon the matters involved. No postponement of the hearing shall be had except by the consent of both parties. The hearing shall last from 9:30 a. m. to 5 p. m. on each week day, with one hour's intermission for lunch, until the same has been concluded, and within three days after the conclusion of the taking of testimony, the said arbitrators shall sign an award which shall be prepared in duplicate. Said award shall be substantially in the following form, to wit:

"In the United States Circuit Court for the Western District of Washington, Northern Division.

"United States of America, for the Use and Benefit of the First National Bank of Everett, Plaintiff, v. Alfred W. Burrell and the *Ætna Indemnity Company*, Surety, Defendants. No.—.

"We the undersigned three arbitrators appointed in the above-entitled cause, having heard the evidence adduced, and the arguments of counsel, do find in favor of the plaintiff in the sum of \$—, with interest thereon from the — day of —, 19—.

"Dated this — day of July, 1905.

" "_____
" "_____
" "_____

"A decision of any two of the arbitrators shall be deemed a decision of the board, but no decision shall be reached without the knowledge and in the presence of all three arbitrators.

"III. In the taking of testimony before the arbitrators, the board shall follow a procedure which shall be so far as is practicable the rule of procedure in the trial of cases in the above-entitled court.

"IV. Upon the award of the arbitrators which shall be executed in duplicate, and one copy delivered to the attorneys for each party, either party shall be entitled, on five days' notice to the other, to move the above-entitled court for the entry of a judgment for the amount of the award, with interest thereon from the date fixed in the award, which judgment shall thereupon be entered, and if for any reason the above-entitled court shall refuse to enter judgment thereon judgment may be entered in the superior court of the state of Washington, for King county as on an arbitration and an award in accordance with the statute in such case made and provided.

"It is further stipulated and agreed that such judgment shall be unappealable, and shall not be stayed. This clause is of the very essence of this stipulation, and was finally consented to by both parties as a consideration moving toward the arbitration, and it was in consideration moving toward the arbitration, and it was in consideration of this agreement that the trial of this case was postponed from June 20, 1905, at the request of the defendants, upon which date the case was set for trial. Each side shall pay the costs of their own witnesses and of the arbitrator appointed by it; the cost of the third arbitrator, which shall not exceed \$10.00 per day, shall be paid one-half by each side.

"Dated this 20th day of June, 1905.

"Brownell & Coleman,
"Attorneys for Plaintiff,
"Graves, Palmer, Brown & Murphy,
"Attorneys for Defendants."

It is contended on the part of the plaintiff in error that a federal court is not authorized to enter judgment on an award so made. The decisions of the Supreme Court are to the contrary. The suit of *Burchell v. Marsh et al.*, 58 U. S. 344, 15 L. Ed. 96, involved a case in which one of the parties sued the other for debt, who, in his turn, claimed damages for the manner in which he was sued. One of the claims made by the party who was sued was for damages for the violence of the agent of the creditors, and the referees to whom the case was submitted for arbitration heard evidence upon that subject. Afterwards, a bill in equity was filed in the Circuit Court by the losing party to the arbitration proceedings, to set aside the award on the ground that it "was made either from improper and corrupt motives, with the design of favoring said Burchell, or in ignorance of the rights of the parties to said submission, and of the duties and powers of the arbitrators who signed the said award." The trial court having entered a decree annulling the award, the Supreme Court reversed it with directions to dismiss the bill, but without prejudice to any legal defense, saying, among other things:

"Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. 'In order,' says Lord Thurlow (*Knox v. Symmonds*, 1 Ves. 369), 'to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence;

but in case of mistake it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award."

In *Hecker v. Fowler*, 69 U. S. 123, 128, 17 L. Ed. 759, the Supreme Court said:

"Circuit Courts, as well as all other federal courts, have authority to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States. Practice of referring pending actions is coeval with the organization of our judicial system, and the defendants do not venture the suggestion that the practice is repugnant to any act of Congress. On the contrary, this court held, in the case of the *Alexandria Canal Co. v. Swann*, 5 How. 89, 12 L. Ed. 60, that a trial by arbitrators, appointed by the court, with the consent of both parties, was one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as a trial by jury, and, in the judgment of this court, there can be no doubt of the correctness of that proposition."

In *Thornton v. Carson*, 11 U. S. 596, 3 L. Ed. 451:

"Two actions of debt, commenced at law by Carson against Thornton, upon two bonds for the payment of money, were referred, by consent, under a rule of court, to arbitrators, who awarded that the first action 'should be marked and considered settled, and that the other also should be marked and considered settled; provided that the defendant, Thornton, in conjunction with the trustees of the Gold-Mine Company of North Carolina, should convey and secure, by a deed and assurance legally executed, with proper and usual covenants unto John K. Carson, his heirs and assigns, for the benefit of the said John and the heirs of Thomas Carson, deceased, on or before the 1st day of January, 1811, one-eleventh part of all the minerals and mines that might thereafter be found upon a tract of land, in the county of Montgomery, and state of North Carolina, which, by deeds bearing date the 5th of December, 1805, was conveyed by the said John K. Carson to the said William Thornton, and by the said William Thornton to the said trustees of the Gold-Mine Company; and that, if such conveyance and assurance should not be made on or before the said 1st of January, 1811,' then, in the first suit judgment should be entered up by the court for the plaintiff (Carson), for the penalty of the bond, to be released on the payment of a certain sum expressed on the award, and also in the second suit judgment should be entered for the plaintiff, for the penalty of the bond, to be released on the payment of another sum also expressed in the award; and that upon receiving such conveyance and assurance Carson should convey to Thornton five shares in the Gold-Mine Company of North Carolina, which Carson had subscribed for on the 1st of April, 1806."

Judgment having been entered by the trial court for the amount of the money mentioned in the award, the Supreme Court of the United States affirmed the judgment. See, also, *York & Cumberland R. Co. v. Myers*, 59 U. S. 246, 15 L. Ed. 380; *Robinson v. Mutual Ben. Loan Ins. Co.*, Fed. Cas. No. 11,961; *New York Working Co. v. Schnieder*, 119 N. Y. 475, 24 N. E. 4.

Indeed, it is difficult to see any difference in principle between the stipulation upon which the judgment here appealed from was based and a stipulation by the counsel in the cause to the effect that the plaintiff was entitled to a judgment in the sum of so many dollars. We have entertained and considered the appeal, notwithstanding the clause of the stipulation to the effect that the judgment entered upon the award should be unappealable, because, if the contention of the

appellant that no judgment could legally be entered upon an award in a federal court was well taken, perhaps he should not be bound by his agreement not to appeal from the judgment entered thereon; but, being of the opinion, as already indicated, that the contention is not sound, it would seem that the appellant should be precluded from questioning, on appeal from such judgment, any alleged error in the arbitration proceedings. Nevertheless, we have looked into his complaint in that regard.

One of the assignments of error is as follows:

"The court erred in overruling the motion of defendants to resubmit the cause to the arbitrators for errors of law predicated upon the following stipulation of fact with reference to the introduction of evidence before said board of arbitration wherein four competent witnesses were introduced on the part of plaintiff over the objection and exception of counsel for defendants to the effect that other millwork furnished on other buildings by the real party in interest, the Wheelihan-Weidauer Company, was unobjectionable and was furnished in a good and workmanlike manner and particularly that at Ft. Worden, which was prepared, some just prior to and some contemporaneously with the millwork at Ft. Casey, which is the millwork in controversy in this action, and that the same was of similar plan, design and workmanship and practically performed under the same management as that at Ft. Casey as more fully set forth in the stipulation of fact as follows, to wit:

"It is hereby stipulated and agreed by and between the respective parties, through their respective counsel in open court, that in the exceptions filed to the award of the arbitrators in the above-entitled matter according to the statutes of the state of Washington, and in passing upon whether judgment shall be entered upon the award of said arbitrators in this cause, the following testimony of four competent witnesses was introduced on the part of plaintiff over the objection and exception of counsel for defendants, namely, to the effect that other millwork furnished on other buildings by the real plaintiff in interest, the Wheelihan-Weidauer Company, was unobjectionable and was furnished in a good and workmanlike manner, and particularly that at Ft. Worden, which was prepared, some just prior to and some contemporaneously with the millwork at Ft. Casey, which is the millwork in controversy in this action, and that the same was of similar plan, design and workmanship, and practically performed under the same management as that at Ft. Casey, the testimony having been introduced in rebuttal by plaintiff after defendants had attempted to show by four competent witnesses that the superintendent of the Wheelihan-Weidauer Company was incompetent by reason of drunkenness to perform his duties in a good and workmanlike manner.

"The above stipulation is entered into by the parties hereto without the plaintiff in any manner waiving his right to question the right of the court to consider such testimony in entering judgment or conceding in any manner whatsoever that the fact therein set forth has any relevancy or materiality under the agreement of arbitration or under the statutes of the state of Washington in such case made and provided or the decision of the Supreme Court of the state of Washington thereon.

"Dated this 21st day of August, 1905.

"Brownell & Coleman,

"Attorneys for Plaintiff,

"Graves, Palmer, Brown & Murphy,

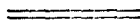
"Attorneys for Defendants."

That errors of the sort indicated in the foregoing assignment of error cannot be urged against an award is well settled in the state of Washington, where this case arose, and elsewhere. *School Dist. v. Sage*, 13 Wash. 352, 43 Pac. 341; *Burchell v. Marsh*, 58 U. S. 344,

15 L. Ed. 96; York & Cumberland R. Co. v. Myers, 59 U. S. 246, 15 L. Ed. 380; Wilson v. Wilson, 18 Colo. 615, 34 Pac. 175; 1 Am. & Eng. Encyc. of Law, p. 710.

According to the stipulation of the parties, the testimony introduced before the arbitrators of which the plaintiff in error complains was that of four witnesses to the effect that other millwork furnished on other buildings by the real plaintiff in interest, the Wheelihan-Weidauer Company, was unobjectionable and was furnished in a good and workmanlike manner, and particularly that the work done by the Wheelihan-Weidauer Company at Ft. Worden, at the same time and under the same management, and of the same character, was satisfactory; such testimony having been introduced in rebuttal by the plaintiff after the defendants had attempted to show by four competent witnesses that the superintendent of the Wheelihan-Weidauer Company was incompetent by reason of drunkenness to perform his duties in a good and workmanlike manner. Such rebuttal testimony was clearly admissible, for, when the competency of the foreman of the company was attacked by the defendants to the suit, it was certainly competent for the plaintiff to show that other work of like character, done contemporaneously for other parties, under the management of the same foreman, was good and acceptable. "By their fruits ye shall know them. Do men gather grapes of thorns, or figs of thistles?"

The judgment is affirmed.



DELAWARE, L. & W. R. CO. v. KUTTER et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 72.

1. APPEAL AND ERROR—CASE TRIED TO COURT—GENERAL FINDING—MATTERS REVIEWABLE.

When, upon a trial without a jury in a federal court, the findings of fact and of law by the court are general, exceptions to a ruling denying a motion for judgment for the defendant present for the consideration of an appellate court the question whether upon the whole evidence, with all the inferences which a jury could justifiably draw from it, the plaintiff was entitled to recover; the general finding is to be accepted as equivalent to the verdict of a jury on all matters of fact, and the appellate court cannot review the weight of the evidence.

2. JUDGMENT—MATTERS CONCLUDED—SECOND ACTION ON DIFFERENT DEMAND.

When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action, and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence; but every matter necessary to the disposition of the case as made by the pleadings is included in the conclusive effect of the judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1248–1258.]

3. SAME.

An action to recover a sum of money alleged to be due from defendant to plaintiff under a contract, and a subsequent action for wrongful ter-

mination of the contract by defendant, although based upon the same contract, are upon different demands, and where the only defense pleaded in the first action was a breach of the contract by plaintiff, a judgment in his favor therein is conclusive only upon that question in the second action, unless it is shown that other matters were actually litigated and decided.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1248-1258.]

4. RAILROADS—CONTRACT TO SECURE TRAFFIC—VALIDITY—MONOPOLIES—CARRIERS—UNDUE PREFERENCE.

Defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business and was to receive as compensation a percentage of the freights earned therein. It was provided that he should charge rates not in excess of those charged by competitive roads, and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and plaintiff was not given a monopoly of the milk traffic. *Held*, that such contract was not ultra vires nor void as contrary to public policy, especially as practically construed by the parties in its execution; nor was it in violation of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] or of section 3 of the interstate commerce act of Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155] as giving an undue and unreasonable preference to plaintiff.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 434; vol. 9, Cent. Dig. Carriers, §§ 83-85; vol. 35, Cent. Dig. Monopolies, §§ 10, 12.]

5. CONTRACTS—RULES OF CONSTRUCTION—LEGALITY.

The fundamental rule is that a contract will be construed, if possible, as having been made for a legal, rather than for an illegal, purpose and it should not be relaxed when a vicious construction is sought for by the party who made the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 734.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

W. D. Guthrie and H. D. Hotchkiss, for plaintiff in error.

Augustus Vaulbyck, for defendants in error.

Before WALLACE, LACOMBE and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below, and by this writ of error seeks to review a judgment for the plaintiffs in an action tried by the court without a jury. The action was brought to recover damages for the breach by the railroad company of a contract dated July 9, 1886, made with Robert E. Westcott, which was to remain in force for the term of 10 years, and the duration of which was extended September 30, 1892, for the further term of 5 years.

By the terms of the contract Westcott undertook to use his best endeavors "to build up, develop, increase, facilitate, and conduct the business of transportation of milk" over the lines of the defendant's railroad; that he would be wholly responsible for the milk transported over said lines, and save the defendant harmless from all claims arising from or connected with the milk business, except those from acci-

dents and casualties to its trains or its own negligence; that he would save the defendant harmless from all liability for loss of life or injury to any person doing business over its lines on his account; that he would not charge for transportation of milk "rates in excess of those charged by competitive railroads for similar services"; and that he should monthly pay over to the defendant 80 per cent. of all charges collected by him for the transportation of milk during the preceding month, retaining 20 per cent. thereof in full compensation for his own services. The defendant on its part undertook to receive, load, and transport, at and from all stations on its lines, all the milk furnished at said stations for transportation, and to transport the same upon its trains at such times as might be best calculated to promote its business; that it would not permit any of its agents or servants to do any act to prevent or interfere with the developing, building up and conducting of the milk business of Westcott, and would grant him the exclusive privilege of transporting milk over its said lines "so far as it was permitted to do so by law"; that it would furnish sufficient depot accommodations for the conduct of the milk business, render such assistance to the messengers of Westcott accompanying the milk trains as might be necessary for the prompt loading and unloading of such milk, and promptly retransport and return to the several stations the empty milk cans used in the transportation of the milk. The contract was by its terms "subject to revision after three years, and at the end of any one year thereafter on giving three months' notice," and in case of any difference between the parties, provided for a submission to arbitration.

By its answer the defendant admitted the execution of the contract and alleged as a justification for terminating it (1) that the contract was *ultra vires*, and contrary to public policy; (2) that it was made in violation of the acts of Congress known as the "Anti-Trust Act" and the "Interstate Commerce Act"; and (3) that Westcott had violated the contract by entering into other contracts with competitive railroads inconsistent with his duty to the defendant and the obligations of his contract.

The plaintiffs by their reply to the answer set up as a bar to the defense alleged by the defendant the estoppel of a former adjudication in an action between the parties in the Supreme Court of the state of New York.

The trial judge did not make special findings of fact or of law, but made a general finding that the plaintiffs were entitled to recover \$137,853, and interest and ordered judgment accordingly.

The evidence upon the trial was sufficient to establish the following facts: Before the contract was made the milk traffic of the defendant was of insignificant volume. Westcott immediately proceeded to create and develop it. His plan of operation was to establish creameries contiguous to the lines of the defendant, and procure proprietors who would purchase the milk of the farmers in the vicinity, prepare it for market, and ship it by the defendant's lines to New York City to their own consignees. In carrying out these operations he caused creameries to be built, costing from \$1,800 to \$3,000 each, at all available places along the lines of the defendant, advancing his own

money to do so when necessary, and secured purchasers or lessees of the creameries who became the proprietors, and who bought the milk of the farmers, and shipped it to New York. The freight rates to these shippers were always fixed by the defendant until 1897, when the defendant adopted the rates recommended by the Interstate Commerce Commission, but Westcott collected the freight and paid over monthly to the defendant its proportion thereof. He employed messengers who assisted in loading the milk upon the trains, cared for it en route, helped to deliver it to the consignees, and who after it was delivered returned the empty cans to the trains of the defendant to be sent back to the points from which they had been previously shipped. By Westcott's exertions and the investment of a large amount of his own money, he secured a milk traffic for the defendant which in 1899 had become very extensive.

While developing this traffic Westcott entered into similar contracts with other railroad companies having lines connecting with the defendant's lines, and built up a milk traffic on these lines which became a feeder of the defendant's traffic. After this traffic had been developed, the defendant ran its milk cars over the lines of the other companies, collected the milk at the various stations on their lines, and transported it to its own line and thence by its own line to New York, charging a through rate for all shipments, which was divided upon a mileage basis between the defendant and the other companies. The first of these contracts was between Westcott and the Delaware & Hudson Canal Co., of the date of February 19, 1891; the second was between Westcott and the Cooperstown & Charlotte Railroad Co., the road of which was a branch of the Delaware & Hudson Canal Co., of the date of June 1, 1893; the third was between Westcott and the Elmira, Cortland & Northern Railroad Co., the road of which was a branch of the Lehigh Valley Railroad Co., of the date of August 18, 1893.

During the first six years of the business the outlay and expenses of Westcott, in carrying out the contract were about \$200,000, and his commissions were something less than \$155,000; but by March, 1899, the contract had become very valuable to him. At that time Mr. Sloan, who had theretofore been president of the defendant, was succeeded by Mr. Truesdale. Very shortly after Truesdale became president he notified Westcott that he was dissatisfied with the contract. Several interviews took place between Truesdale and Westcott, the last being in July, 1899. In the course of these interviews Truesdale insisted that the contract was too profitable to Westcott, and his percentage must be reduced; and met Westcott's claim to the stipulated percentage by asserting in substance: "Contracts made before my coming do not stand." Truesdale also insisted that the freight should be collected directly by the defendant, and although this change of method involved a considerable loss by way of interest upon his bank account to Westcott, the latter consented. Thenceforth, the freight was collected by the defendant. During these interviews Truesdale raised no objection to the so-called competitive contracts into which Westcott had entered with other railroad companies, although all of them were known to Truesdale, having been shown to him by Westcott.

Among these contracts, besides those which have been mentioned, was one made between Westcott and the New York Central & Hudson River Railroad Co., of the date of July 1, 1896, by which Westcott undertook to develop a milk traffic for the lines of the West Shore Railroad, of which the New York Central Company was the lessee, and another was between the same parties and of the date of July 1, 1898. Both of these contracts related to territory which was not contiguous to the defendant's lines; and when they were made there were no more places along the defendant's lines where creameries could be located advantageously. The first provided by its explicit terms for a future contract such as was embodied in the second. Its terms were considered by the president of the defendant, and by the general manager and the general freight agent of the defendant. It was entered into and performed by Westcott with the sanction of President Sloan, and was not regarded by Westcott or the officers of the defendant as relating to competitive traffic. Neither contract had any practical tendency to divert traffic from the defendant, because the New York market, to which the milk was to be carried, was so extensive that the additional supply would have no appreciable effect in influencing the demand. That market absorbed a steadily increasing supply; the supply for 1901 being practically a quarter greater than in 1897. That the defendant did not lose any traffic in consequence of these contracts is plain. Until Truesdale terminated the contract with Westcott the defendant's traffic had steadily increased; afterwards it decreased. The cause of this decrease is explained by the fact that the Lehigh Valley Railroad Company and the Delaware & Hudson Canal Co., as soon as they found that Westcott was no longer in charge of the defendant's milk traffic, discontinued routing over the defendant's lines the milk traffic from the Elmira, Cortland & Northern Railroad and the Cooperstown & Charlotte Railroad, thus diverting from the defendant's line during the first year after the termination of the contract nearly a third of its entire milk traffic.

February 1, 1900, Truesdale, as president of the defendant, notified Westcott that the contract would be treated as no longer in force, assigning as the only particularized reason that Westcott had violated his contract by entering into similar contracts with other railroad companies, competitors of the defendant, with the purpose and effect of diverting the milk traffic from its railroad to the other railroads. At the same time the defendant notified shippers that it had terminated all relations with Westcott, and excluded his messengers from his cars. Thenceforth, the defendant assumed exclusive control of the milk traffic over its lines.

When the contract was terminated the defendant had in its hands the freight moneys which it had collected since July 1, 1899. Upon its refusal to pay over to Westcott his proportion of these moneys Westcott assigned his demand to one Paul. In February, 1900, Paul, as assignee of Westcott, brought an action in the Supreme Court of the state of New York to recover the amount, al-

leging as the cause of action the terminated contract, the collection of the freight by the defendant from July 1, 1899, to February 1, 1900, and the refusal of the defendant to pay over to Westcott his percentage thereof. The defendant contested the action, and set up as a defense in its answer that it was not liable to Westcott under the terminated contract because he had violated the covenant therein contained to use his best endeavors to build up, develop, increase, and conduct the business of transportation of milk over the defendant's railroad, and, in disregard of his covenant, had endeavored to and did permanently divert the milk traffic from the defendant's lines and turn the same over to other and competitive railroads. The answer further alleged that in violation of the said covenant Westcott had entered into the two contracts with the New York Central & Hudson River Railroad Co. which had been referred to. The action was brought to trial in June, 1901, and a verdict rendered therein for the plaintiff for \$77,648. Thereafter judgment was duly entered in that action, and upon an appeal by the defendant to the Appellate Division of the Supreme Court of New York the judgment was affirmed.

The present action was brought after the expiration of the contract term. At the time of the trial the amount owing from the defendant for the percentage arising to Westcott under the contract, less the amount which it would have cost Westcott to perform his part of the contract, was that found by the trial judge.

Besides the facts which have been mentioned it was shown upon the trial that Westcott had made another so-called competitive contract, the existence of which does not appear to have been known to Truesdale when the latter terminated the contract. This contract was made with the Delaware & Hudson Canal Co., August 21, 1899. His earlier contract with that company, that of February 16, 1891, related to the development of the milk traffic upon and along one of the lines of the company known as the "Albany & Susquehanna Division"; and among other things it provided that at the expiration of five years the railroad company should have the right to readjust any of the terms of the contract, excepting only those fixing the percentage of revenue payable to Westcott. While this contract contemplated that the traffic developed should be carried by the company to Binghampton, where its line connected with the defendant's line, and thence by the defendant's line to New York City, it provided that the company should have the right to transport "milk and other dairy products to Albany, and ship dairy products to New York via Albany." In August, 1899, that company decided to develop a milk traffic upon other of its lines, and Mr. Young, its president, entered into negotiations with Westcott for that purpose. Westcott objected to making any new arrangement which would divert the milk traffic of the Albany & Susquehanna division from the defendant's lines at Binghampton, but Young insisted that under the existing contract his company was entitled, if it desired, to ship to New York via Albany. At the same time Young promised that until the termina-

tion of the existing contract his company would continue to carry the traffic of the Susquehanna division via Binghampton. These negotiations resulted in the new contract. Although the contract permitted the company to carry the traffic via Albany, no change was in fact made in the mode of conducting it until after the defendant terminated its contract with Westcott, but all the milk shipped on the Albany & Susquehanna division, was transported to Binghampton as before.

Upon the facts thus presented, the defendant upon the trial moved the court for a judgment in its favor upon the grounds that the defense alleged in its answer had been established, and that there was no evidence to support a judgment for the plaintiff. The assignments of error are based upon the exceptions taken by the defendant to the refusal of its motion.

When, upon a trial without a jury, the findings of fact and of law by the court are general, the exceptions to a ruling denying a motion for judgment for the defendant present for the consideration of an appellate court the question whether upon the whole evidence, with all the inferences which a jury could justifiably draw from it, the plaintiff was entitled to recover. The general finding is to be accepted as conclusive upon all matters of fact, and as equivalent to the verdict of a jury, and the Appellate Court cannot review the weight of the evidence. *Lancaster v. Collins*, 115 U. S. 225, 6 Sup. Ct. 33, 29 L. Ed. 373; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373.

In the present case a jury would have been justified in finding—and it is to be presumed in support of the general findings that the court found—that the defendant, at the instigation of its president, Truesdale, had arbitrarily and dishonorably repudiated a contract which both parties had performed for six years, which they had then extended for nine years more, which they had then performed for seven more years, and which the defendant had regarded as fair and reasonable, when Truesdale, having determined to end it because it was too profitable to Westcott, and having cast about for an excuse, assigned one which was unfounded. If Truesdale had really believed the so-called competitive contracts were really competitive, it is extremely improbable that he would not have said so in the interviews with Westcott after they had been brought to his attention, and when he was insisting that Westcott should abate his commission. However this may be, the justification assigned by Truesdale for terminating the contract was not valid if these contracts were not entered into by Westcott for the purpose of diverting the milk traffic of the defendant, and did not have any such effect. The contract between Westcott and the defendant did not obligate Westcott to give his whole time and personal services to the business of the defendant or to the business of developing its milk traffic, or not to engage in other business. If it is true, as it may be assumed the court below found, that when the two other contracts were made the milk traffic of the de-

fendant had been fully developed so far as it depended upon his efforts, and the development of a similar traffic in behalf of the New York Central & Hudson River Railroad would not, in view of the sources of supply and demand, practically interfere with the milk traffic of the defendant, there was no breach of obligation on the part of Westcott.

If it had been proved that Westcott had violated the contract by any act which tended to diminish the milk traffic of the defendant, it would be quite immaterial that Truesdale or the defendant assigned a wrong reason for terminating it, and there would have been a meritorious defense to the action. So, also, if the contract was *ultra vires*, or illegal, the defendant was at liberty to repudiate it so far as it remained executory, although its conduct was despicable in adhering to the contract during the many years when it was profitable, and repudiating it only because it could make more money by doing so.

The judgment in the former suit estops the defendant from again litigating the defense that Westcott had violated the contract; but it does not estop the defendant from the benefit of the other defenses which have been interposed, because there was no evidence in the court below that these defenses were litigated in that action. The cause of action for the money in the hands of the defendant, which it had collected as the percentage of Westcott under the contract, was for a different demand than that involved in the present action. When a judgment in an action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. The operation of a judgment upon the demand involved in the action in which the judgment was rendered, and its operation as an estoppel in another action between the parties upon a different demand, are essentially different. So far as the demand involved in the first action is concerned, the judgment closes all controversy; its validity is no longer open to contestation, whatever might have been alleged or proved against it at the trial. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it. But in a subsequent action between the same parties upon a different demand, it is an estoppel only upon the matter actually controverted and determined in the former action. The circumstance that both demands arise from the same contract is not controlling, and does not tend to establish their identity. *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Sparhawk v. Wills*, 72 Mass. 163; *Andover Savings Bank v. Adams*, 83 Mass. 28. *Perry v. Dickerson* is precisely in point. There the plaintiff had brought an action to recover damages for an alleged wrongful

dismissal from the defendant's employment before the expiration of the stipulated time, and had recovered judgment therein. He brought a second action to recover wages earned during the time he was actually employed, and due and payable before the wrongful dismissal. The court held that the two claims constituted separate and independent causes of action, and that the former judgment was not a bar in the second. If the demand in the former action had been the same as in the present, it would have been merged in the former judgment and the present action for that reason could not have been maintained. The general doctrine applicable to cases like the present is stated in *Russell v. Place*, *supra*, as follows:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example if it appear that several distinct matters may have been litigated, upon one or more of which judgments may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the principal point involved and determined."

See *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956.

In the present case, although the record does not specifically denote the grounds of the decision in the former action, it does disclose what issues were litigated and what must have been decided in order to result in a recovery for the plaintiff. There is included in the conclusive effect of a final adjudication every matter necessary to the disposition of the controversy as made by the pleadings; and if the determination of a question is necessarily involved in the judgment, it is immaterial whether it was actually litigated or not. *Freeman on Judgments*, § 272 (4th Ed.). "The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein." See *Aurora City v. West*, 7 Wall. 103, 19 L. Ed. 42; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 398, 17 Sup. Ct. 905, 42 L. Ed. 202.

The defendant contested the right of the plaintiff to recover on the allegations that Westcott had violated his covenant to use his best endeavors to build up and increase the milk traffic of the defendant, and had diverted that traffic to other and competitive railroads. Its answer did not allege the invalidity or illegality of the contract. The only issue presented by the pleadings was whether or not Westcott had been guilty of a breach of the contract. The adjudication against the defendant necessarily decided that he had not, as that was the only issue presented for the consideration of the court. If the validity, or the legality of the contract, was drawn in question in any manner upon the trial, the fact was not proved in the court below, and certainly cannot be inferred from the pleadings and the judgment.

Inasmuch as the former judgment concludes the defendant upon the issue tendered by its answer in that action, and estops it in the present action from asserting that Westcott violated his covenant by diverting, or endeavoring to divert, the milk traffic from the defendant to other railroad companies, or from asserting that he violated the covenant in any other way, it is unnecessary to consider whether any of the contracts made by him were theoretically competitive, or were upon any considerations violative of the contract; and it is quite immaterial whether the evidence introduced upon that issue in the trial of the former action is or is not the same as was introduced upon the trial of the present action.

If the contract was ultra vires, it was not so in the narrow sense of the term, but in the sense that its performance would involve a wrongful perversion of the powers conferred upon the corporation. An implied condition attaches to all legislative grants of corporate powers that they are conferred not merely as the privilege of the recipient to be used at its discretion, but as a quasi trust to be exercised for the benefit of the public as well. Consequently any contract of a corporation by which it disables itself from performing its duties to the public, or subordinates to its private interests the rights and conveniences which it impliedly undertakes to secure to the community, is beyond the lawful power of the corporation. Such a contract is contrary to public policy, and is invalid on that ground also. The concrete inquiry in the present case is whether the necessary tendency of the contract was to disable the defendant from performing its obligations to the public by depriving shippers of milk of some of the rights or privileges to which they were entitled at the hands of a railway carrier. If it did not have that tendency, it could not operate to restrain trade; and if it did not contravene some statutory prohibition, it was in all respects a legitimate corporate act.

The contract doubtless contemplated such a business relation and arrangement between the parties as followed its execution. Its purpose, so far as the defendant was concerned, was to enable the defendant to acquire a traffic which would have to be created, and which could not be satisfactorily built up and developed by the ordinary agencies of the defendant, and which the defendant conceived required the co-operation of Westcott. The peculiar conditions of the undertaking necessitated risks and responsibilities which the defendant was unwilling to assume, and the traffic could not be successfully developed and retained unless it was conducted with such a just regard to the interests of shippers as to be advantageous to them as well as to the defendant. In order to obtain this traffic without investing its own resources, and to carry it on with a minimum of inconvenience, expense, and risk to itself, the defendant saw fit to engage Westcott, and to put him in practically exclusive charge of the whole undertaking, upon terms and conditions which would be likely to be mutually advantageous to both parties. All this was in furtherance of its own business; and the remuneration Westcott was to receive, and the duration of the arrangement, were matters which concerned none but the parties to the agreement and which they were at liberty to settle between themselves. It

cannot be questioned that railroad companies may lawfully make all necessary arrangements for increasing their own business and for expeditiously and economically carrying it on. *United States v. D. L. & W. R. R. Co.* (C. C.) 40 Fed. 101; *Barney v. Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115. It is certainly competent for a railroad company to employ a traffic manager, and give him exclusive charge of that branch of the business to which his duty relates, and to contract with him for a specified period of service, and pay him a commission by way of compensation. It is likewise competent for a railroad company, in the absence of any legislative prohibition, to make an agreement with the producer or shipper of a particular class of shipments, for good and sufficient reasons to carry them on any terms which the company may deem reasonable. *Fitchburg R. R. Co. v. Gage*, 12 Gray (Mass.) 393. As was said by the Supreme Court of Ohio in a case where the contract was to carry for a manufacturer at a fixed rate for a term of 10 years:

"We have a right to assume that the contract was to the mutual advantage of both parties, that it was made in good faith, and that its performance for the whole term would not have been injurious to the interests of the stockholders, or in any way suspend or abridge the powers conferred on the corporation to discharge the duties owed to the public as a common carrier for all on equal terms." *Railroad Co. v. Furnace Co.*, 37 Ohio St. 321, 41 Am. Rep. 509.

The contract treats Westcott, not only as the manager of the defendant in developing and conducting its milk traffic, but also as a representative of the shippers who was entitled to have every reasonable accommodation afforded to them and to himself in aid of the defendant's covenants to facilitate the traffic. It has but two features which are open to criticism as tending to deprive shippers of some of their rights and privileges, or to favor Westcott at their expense. The provision that Westcott will charge for the transportation of milk rates not in excess of those charged by competitive railroads for similar service suggests that he is to be permitted to fix the rates subject to that restriction. If he could fix the rates solely as his own interests might dictate, it would be open to him to make rates prejudicial to the traffic or to particular shippers. But the limitation itself provides an ample protection against such an abuse of his authority, as no shipper would have just cause to complain unless his rates were in excess of the common standard for similar services. The contract does not in terms authorize Westcott to fix the rates, and may fairly be construed as intended to give him the usual authority of a manager to do so in first instance, and subject to revision by the company. The construction placed upon it by the acts of the parties themselves negatives the inference that it was intended to delegate the ultimate power to Westcott, as from the inception of the arrangement the rates were always fixed by the defendant. Where the terms of a contract are equivocal the practical construction given to it by the parties themselves is very persuasive of its real meaning. The other provision open to criticism is that which gives to Westcott the exclusive privilege of transportation. But this provision also is carefully qualified so that it may not be construed as encroaching upon the legal duty of

the defendant to other shippers. There seems to be no fair reason to infer that the qualifying terms of this provision were artfully employed to mask the purpose of the parties to give Westcott a monopoly of the milk traffic. None was actually ever given to him. It may be read as an amplification of the preceding part of the covenant by which the defendant obligates itself not to permit anything to be done on the part of its agents or servants which will interfere with Westcott's conduct of the business. The ingenuity of counsel for the plaintiff in error has been strenuously exerted in the effort to provert a contract which is capable of an innocent meaning into one which was devised to effect iniquitous ends by devious means by their own client. The fundamental rule is that a contract will be construed, if possible, as being made for a legal rather than for an illegal purpose. *Hobbs v. McLean*, 117 U. S. 569, 6 Sup. Ct. 870, 29 L. Ed. 940; *United States v. Railroad Co.*, 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173. Its application certainly should not be relaxed when a vicious construction is sought for by the party who has made the contract; and especially in a case like this where it appears that at least three other railway corporations had entered into similar contracts. Looking at all its provisions, the contract is one which is not obnoxious to any just criticism. It is analogous in some respects to that which was before the court in *Chicago, etc., R. R. Co. v. Pullman Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97, where it was alleged that the agreement sued on was void as against public policy because of the exclusive rights given to the plaintiff for the term of 15 years in respect to drawing room and sleeping cars furnished by plaintiff to the defendant, supplemented by the stipulation that the defendant would not contract with any other party to run that class of cars over its road during the period of 15 years. The court said:

"The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of the passenger traffic. Its duty, as a carrier of passengers, was to make suitable provision for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business it was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing room and sleeping cars, it was a matter of indifference to the public who owned them. * * * We are of opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing room and sleeping cars to be used by its passengers, and, as a means to induce the plaintiff to perform this public service and to incur the expense and hazard incident thereto, from giving it an exclusive right to furnish cars for that purpose. * * * The suggestion that the agreement is void, upon grounds of public policy, or because it is in general restraint of trade, cannot for the reasons stated, be sustained."

The contention that the contract was void by the act of Congress (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) to "protect trade and commerce against unlawful restraints and monopolies," may be briefly disposed of. The contract undoubtedly operated upon interstate commerce as well as upon interstate

traffic; but if the views which we have expressed are correct as to its meaning and effect, it did not have any tendency to create a monopoly, or evidence any conspiracy in restraint of trade. It could only operate in restraint of trade by permitting Westcott to charge such extortionate rates to milk shippers as would discourage shippers; and this it did not permit or contemplate.

The contention that the contract contravened the provisions of the interstate commerce act may likewise be briefly disposed of. The argument for the plaintiff in error is that the contract is obnoxious to section 3 of that act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) because it gave an undue and unreasonable preference to Westcott in the business of transporting milk. That act deals with the effects or results of contracts, and has no operation directly upon the contracts themselves; but assuming that the contract is void if the contention that it gave an undue and unreasonable preference is sound, the case is not one where any such preference was given. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. *Wight v. United States*, 167 U. S. 516, 17 Sup. Ct. 822, 42 L. Ed. 258. The mere circumstance that there is, in a given case, a preference or advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. *Texas & Pacific R. R. Co. v. Interstate Commerce Com.*, 162 U. S. 219, 220, 16 Sup. Ct. 666, 40 L. Ed. 940. To come within the inhibition of the act "the positions of the respective persons or classes between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other." *Interstate Commerce Com. v. B. & O. R. R.*, 145 U. S. 263, 282, 12 Sup. Ct. 844, 36 L. Ed. 699. Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the interstate commerce act "leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." *Interstate Commerce Com. v. Alabama Mid. R. R. Co.*, 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453; *Id.*, 168 U. S. 144, 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The privileges accorded to Westcott were only those which were incident to the anomalous relations existing between him and the defendant created by the contract. It is quite inconceivable that

there were or could have been any shippers of milk who would have been willing or able to undertake his duties and responsibilities. In consideration of his assumption of peculiar obligations and hazards, the defendant gave him exceptional privileges appertaining to his relation as a manager of the traffic; this was not an undue and unreasonable preference.

The assignments of error which have been considered are the only ones which have been argued at the bar or on the brief of counsel. The repudiation of the contract was without any justification, for even if the contracts with the New York Central Railroad Company were theoretically competitive, they had been consented to by the officers of the defendant. The repudiation, as has been said, was announced when the contract had nearly expired, and when the defendant would shortly have secured exclusively for itself all the profits of the valuable traffic built up by Westcott. It was repudiated for sordid motives, and with an arrogance born of the scorn of consequences. The appropriation of Westcott's percentage of the money, which the defendant had actually collected for him, was morally no better than larceny. Although Truesdale was primarily responsible for this conduct, and the directors of the defendant may not have been personally cognizant of it, they cannot escape their share of the moral responsibility which ensues from endeavoring to establish the defenses interposed in the earlier action and in this action. It is conduct like Truesdale's, by those who manage the affairs of great corporations, that has aroused the spirit of resentment in the public mind which is so intense today, and which is not unlikely to result in legislation, and in municipal interference, which will bring serious loss upon stockholders.

We find no error in the rulings of the court below, and the judgment is accordingly affirmed.

LACOMBE, Circuit Judge. I am individually of the opinion that the contract of 1898 with the N. Y. Central Railroad was a breach of the plaintiff's contract with the defendant, because it was calculated to expose the Delaware, Lackawanna & Western R. R. to a competition which would operate to reduce the amount of its milk traffic. But that question is no longer open here. I concur in the finding that the evidence clearly shows that the defendant's officers knew of this contract and did not disapprove it, and in the conclusion that the prior judgment has conclusively established the proposition that neither such contract nor its carrying out is a breach available in defense. As to the second Delaware & Hudson contract, which I am fully convinced was a competing contract, the circumstance that both parties to it agreed that it should not go into effect until after the termination of the contract in suit, which agreement was strictly adhered to, in my opinion, eliminates it from consideration as a breach.

As to the other defenses I concur in Judge Wallace's opinion, and therefore concur in voting to affirm.

CRICHFIELD v. JULIA.

(Circuit Court of Appeals, Second Circuit. June 16, 1906.)

No. 229.

1. CONTRACTS—CONSTRUCTION—PERFORMANCE.

Where plaintiff agreed to use his best endeavors to secure concessions from the government of Venezuela to authorize the removal of asphalt from a mine in that country, which plaintiff agreed to obtain for defendant, the contract was performed by plaintiff procuring an assignment to defendant of a concession from the government to the vendor of the mine.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1249-1280.]

2. SAME—ACTIONS—EVIDENCE.

Where, in consideration of plaintiff's endeavors to procure an asphalt mine for defendant, the latter agreed to pay plaintiff \$5,000 cash and preferred stock in a corporation to be organized to operate the mine of the par value of \$100,000, and thereafter defendant participated in the organization of the corporation and turned over the mine to it in return for stock, furnishing the only property which the corporation had, evidence that such corporation was organized with a capital stock of \$50,000, which was afterwards increased, and that a portion of the stock was issued for the property in various concessions connected therewith, etc., was not objectionable for failure of proof that such was the corporation contracted to be formed.

3. DAMAGES—BREACH OF CONTRACT—UNCERTAINTY.

Where defendant agreed to pay plaintiff \$5,000 and a portion of the preferred stock of a corporation to be organized to exploit an asphalt mine in consideration of plaintiff's services, and the plaintiff performed his part of the contract, and the corporation, by working the mine, had received and was receiving large amounts of valuable asphalt, plaintiff was not precluded from recovering the value of the stock contracted to be issued because of uncertainty as to its value, for the reason that defendant purposely refrained from issuing preferred stock so that there was no market value therefor.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 5.]

4. SAME.—DETERMINATION.

Where defendant, in consideration of plaintiff's services, agreed to pay him \$5,000 and certain preferred stock in a corporation to be formed, but, after forming the corporation defendant purposely refrained from issuing such preferred stock, plaintiff was entitled to recover an amount equal to the value of such stock, if issued, to be determined with reference to the value of the corporation's assets and activities.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 285-289.]

5. ERROR, WRIT OF—RULINGS ON EVIDENCE—PREJUDICE.

Where there was evidence, unobjected to, showing that defendant actually took part in the formation of a corporation to exploit a particular asphalt mine, defendant was not prejudiced by the admission of copies of telegrams offered for the same purpose.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4161-4170.]

In Error to the Circuit Court of the United States for the Southern District of New York.

See 137 Fed. 969.

147 F.—5

Writ of error by defendant in the court below to review judgment for plaintiff entered upon the verdict of a jury in the United States Circuit Court for the Southern District of New York.

L. Laflin Kellogg, for plaintiff in error.

W. B. Crisp, for defendant in error.

Before TOWNSEND and COXE, Circuit Judges, and PLATT, District Judge.

TOWNSEND, Circuit Judge. This action was brought to recover \$100,000, for damages for breach of contract. The material recitals in the said contract are summarized by the court in its charge to the jury as follows:

"The contract was entered into in the city of Mexico. It contains a recital that the plaintiff represented that he knew of the location of certain large and valuable asphalt deposits in Venezuela; that he believed them to contain more than 2,000,000 tons of crude asphalt, of a good quality for paving purposes, and that to the best of his knowledge and belief a concession could be obtained from the government of Venezuela, and also from the owners of the lands on which said deposits are located, authorizing the mining and exporting of asphalt therefrom on favorable terms, and further recited that 'the said George W. Crichfield, being engaged in the asphalt paving business, is desirous of securing the ownership and control of an asphalt deposit of the magnitude and character described by the party of the second part.'"

In these circumstances, the parties agreed to visit said location. The plaintiff agreed to—

"Use his best endeavor to secure concessions in favor of George W. Crichfield, granting the exclusive right to mine and ship said asphalt on reasonable and equitable terms satisfactory to the said Crichfield."

And the defendant agreed as follows:

"In the event of obtaining of the said concessions in favor of the said Crichfield, and the acceptance of the same by him, the said Crichfield agrees that he will pay in cash, United States currency, unto the said John P. Julia the sum of five thousand dollars (\$5,000), and will also guaranty to organize a corporation to handle said deposits, and will issue to said Julia preferred stock therein, guarantied to pay six per cent. dividend, gold, annually, to a par value of one hundred thousand, said stock to be issued within six months after the date of such concession."

The exceptions challenge the action of the court in the admission and exclusion of certain testimony, and in its charge to the jury and in certain refusals to charge, and especially in the refusal of the court to direct a verdict for defendant or for nominal damages only.

The first exception argued is that the court should have directed a verdict for the defendant because the plaintiff never secured such concessions as were called for by the contract. On this point the court charged the jury as follows:

"The defendant has contended here that this third clause should be construed as calling for the procuring of a concession directly from the government to him. I do not so read the contract, and I instruct you that it is not susceptible of such an interpretation, or rather, is not to be confined to such an interpretation. What is contemplated should be obtained was what in ordinary parlance we speak of as a mine. That means a certain part of the

soil, a certain part of the earth's surface, in which there are mineral deposits, and in which a person obtains, not only a full right of ownership so far as the soil is concerned, but also the right to remove the minerals from the soil and to export them and do what he pleases with them. The ownership comes in one way and the right to remove the mineral comes in another way. The right to remove the mineral is called a concession, and so far as the evidence shows, the government did make a concession in regard to this very Inciarte mine; made the concession to Guzman, who, when he sold the title to the mine the title to the real estate in which the mine was located, at the same time sold and conveyed all his right, title and interest in the concession which he had received from the government, and it is under such concession that the mine has been worked. Therefore, however the concession was obtained, whether directly from the government or by transfer from some one who has already obtained the concession from the government to himself, in his own name, was immaterial. The material point is that after inspection of the deposits Crichfield was to be satisfied that they contained the quantity indicated, and that their location was satisfactory, permitting mining and exportation without extraordinary expense, and that it could be shipped on reasonable terms."

This exception is not well taken. All that the plaintiff agreed to do appears from the portions of the agreement quoted above. He was "to use his best endeavor to secure concessions," etc. The vendor of the mine procured a concession from the government giving him the exclusive right to take said asphalt from the mine in question; its title was examined by defendant's attorney and was transferred to the defendant; the transfer was approved by the government, and defendant expressed himself as satisfied with the title and concession. These facts showed a substantial and complete fulfillment of the terms of the contract, and the jury, under appropriate instructions, found in favor of the plaintiff. The trial court, against the exception of defendant, received evidence as to the formation of the company which was organized and took the mine in question, to the effect that said company was organized with a capital stock of \$50,000, which was afterwards increased to \$1,000,000, of common stock, at a par value of \$100 a share; that \$300,000 of this stock was left in the treasury, and that \$700,000 thereof was issued for the property and various concessions connected therewith; and that there were no other mines and deposits, and that the only property for which the \$700,000 was issued was the mine and the railroad concession. It is argued that this evidence was inadmissible, because it did not appear that this company was the one organized by the defendant pursuant to the terms of the agreement, or that he was even an organizer or director of the company, or had any voice in its organization or as to the amount or kind of stock to be issued. The evidence shows that the defendant so far participated in the organization of the company that he turned over the property in question to the company in return for the shares of stock of the company, and thereby furnished, so far as appears, the only property which the company had, and which made it a substantial corporation. In these circumstances, the court was justified in submitting the evidence to the jury, and the jury were justified in their finding thereon, that this was the company organized by the defendant under the agreement.

The other exception to the admission of evidence, that it failed to show that any preferred stock was issued, and that, therefore, the jury were allowed to speculate as to the value of the preferred stock, the issuance of which was provided for by the agreement, may be considered in connection with the exceptions to the refusal of the court to direct the jury that the plaintiff was not entitled to substantial damages, on the ground that the contract was too indefinite and uncertain to warrant a recovery for more than nominal damages and that the proof was insufficient to sustain a finding for substantial damages.

Upon this branch of the case the court charged the jury as follows:

"As a matter of fact, the company was organized and the company did issue stock; and by that same company the Inciarte property was taken on, and the railroad concession was taken, and the property was improved in various ways, in the buildings and fixtures of all kinds, boats and what not. If that company had provided for preferred stock, and had issued it and it had gone upon the market and had been dealt in, of course you would have a very convenient method of ascertaining what that preferred stock was worth. But no preferred stock was provided for in the organization of that company, none was issued, and none ever has been issued; therefore, what you have to do, if you can, is to determine what was, at the time that that preferred stock should have been turned over, its fair and reasonable value if it existed. Even although no preferred stock was issued, if this common stock had been put upon the market, and bought and sold, you might have something very tangible to enable you to reach some sort of an opinion as to what would have been the value of 1,000 shares of preferred stock, superior to the common stock. But there had been no sale, no transaction, no dealings in the stock, so far as we know; and the problem which you have before you is an extremely difficult one, I must concede, and I think you will agree with. One hundred thousand dollars worth of preferred stock does not necessarily mean \$100,000. You are business men enough to know that; that there is preferred stock of old and established companies, which have been going on for years and have been making considerable money, that is not worth par. And with regard to new companies, it is within your knowledge that the face value of stock, whether it is common or preferred, does rarely import that that is its real value. All that was promised to the plaintiff was, not \$100,000 in money, but 6 per cent. preferred stock of the company, which should be organized to operate this particular property.

"Another way of approaching this subject is to see what property there is. So far as appears, all the property that the company has ever owned consisted of this mine, Inciarte, and the railroad concession, the railroad that it has built, the improvements on the property and the plant that it has made down there, the improvements that it has put in the way of equipment, and so forth. If all that there was to be issued was \$100,000 of preferred stock, and you could find out, reasonably and satisfactorily to yourselves as to what the value of all the property of the company was, then perhaps you might be able to make a calculation which would satisfy your own minds that you were making a fair and reasonable appraisement of this \$100,000 worth of preferred stock. But, unfortunately for that method of proceeding, this contract does not contain restrictions with regard to that preferred stock which would enable you to adopt that method. It engages that the plaintiff in the event of the carrying out of the contract, should have \$100,000 of the preferred stock, but there is no promise or guaranty as to whether the total preferred stock of the company shall be \$100,000 or \$1,000,000. Moreover, there is no restriction in this contract as to whether or not the company which is to issue the \$100,000 of preferred stock to Julia, and to others if necessary, shall not issue bonds. Of course, you as business men are perfectly aware that \$100,000 of preferred stock,

when that is the total issue of preferred stock, is worth much more, when it is bottomed on property worth any given amount than if the total issue of preferred stock is \$1,000,000. You know perfectly well that if you have a certain property, which is the total property of the company, and you have common and preferred stock out against it, the value of the preferred stock would be one thing if there were no bonds at all outstanding and that the value of the preferred stock would be a different thing if there were bonds; and it is perfectly possible that bonds may be out which are superior to the preferred stock to an amount so large as to reduce the preferred stock practically to nothing at all.

"As I told you before, the burden of proof here is upon the plaintiff, and he must satisfy you on each branch of the case. He is under obligation to furnish you with satisfactory testimony from which you can determine the damages, not as a mere matter of blind guess work, but by a process of reasoning and examination which will enable you to satisfy your minds, as intelligent business men, that you are reaching a fair and proper conclusion upon the evidence. * * *

"All the property that we have any evidence of is that in Venezuela, this mine and railroad concession, and the railroad that was built and the improvements that were made, and the improvements in equipment and plant. The total amount of bonds that were issued is \$500,000. It makes no difference in regard to the common stock whether it was issued to a large amount or a small amount, because that would not affect the value of preferred stock. If the preferred stock had been issued, that would be superior to the common stock. If the officers of the company chose to violate the laws of New Jersey by issuing common stock to the value of \$700,000 when the property was not really worth \$700,000, or was not worth anything at all, that has no bearing on the plaintiff's claim here. The only question here for you is, have you such evidence here that you as intelligent business men can say that, six months after the date of that concession, \$100,000 of the preferred stock of that company, if issued to Julia, would have been worth so much money. You must reach such result, not by blind guessing, but by some process of reasoning."

By this fair and accurate statement the court fully presented to the jury the situation, as disclosed by the evidence, the issue between the parties, the evidence upon which the claim for substantial damages was predicated, the difficulties in the way of an ascertainment of actual damage, and, suggesting to them the limitations upon their right to proceed upon unwarranted assumptions as to values, warned them against awarding speculative damages. No exception was taken to the statements as to the evidence, none could have been successfully maintained. The single exception, and the one which, in connection with the exception to the refusal to direct a verdict for nominal damages, properly raises the only substantial question in the case, was taken to the following statement to the jury:

"What you have to do is to consider what was, at the time of the transfer, the value that that preferred stock should have had."

After the entry of the verdict the court entertained a motion for a new trial, and in denying said motion wrote a memorandum, in which it stated the grounds upon which, in its judgment, the jury were justified in their finding of substantial damages. A portion of said memorandum is as follows:

"The only point, therefore, which will now be discussed, is whether, conceding that the jury were properly instructed to find substantial damages upon the testimony, their verdict is excessive. The problem submitted to them was 'what would 1,000 shares of 6 per cent. preferred stock of this

company have been worth on the day the plaintiff was entitled to receive it?" Defendant contends that no intelligent answer can be given to that question; that it is pure guesswork to name any sum. Incidentally it may be remarked that this contention, if sound, will secure a reversal upon the exceptions to the charge. But in addition it seems to the court that there were sufficient factors proved to warrant an intelligent deduction. Had the preferred stock been issued, it would have ranked below the \$500,000 of bonds; but that \$500,000 was all put into the property, in building railroads and wharves, putting up houses and plant, buying machinery, boats, etc. Since the asphalt deposit, when developed, turned out to be a valuable one, and the company a going concern, there is no reason to infer that the proceeds of the bonds was lost or seriously depreciated when invested there. On the contrary, the bringing together of all these materials in a place where their use could earn money presumably made their aggregate value higher than the total separate values of the units composing the plant. The jury were fairly warranted in concluding that the improvements put upon the property were of sufficient value to meet the prior lien of the \$500,000 bonds. Besides the improvements, there was the original deposit of asphalt, with the concessions which gave the right to mine and export it; and besides the bonds, there was the issue of \$700,000 of common stock. One witness testified that the stock was given out as a bonus to purchasers of bonds. The secretary of the company testified that it was issued for the property; i. e., the asphalt deposit and concessions. Whether the issue of common stock was large or small, it would rank below preferred stock, which latter, after the bonds were provided for, would take all the balance of the property up to the extent of preferred stock issued. The evidence showed that in three years 30,000 tons of asphalt were removed, and sold here at \$20 to \$25 a ton. Of course, there were large sums to be deducted from that selling price for expenses of production, freight, etc.; but it was a perfectly fair inference that there was money in the business, or it would not have been continued for so long. There was evidence, too, from which the jury were warranted in finding that the total deposit was 200,000 tons. Under these circumstances, it is not an unreasonable deduction that the Inciarte mine itself, exclusive of the improvements, was worth not merely the 100,000 bolivars which were paid for it, but at least \$100,000 over and above the sum which was spent upon the improvements. Undoubtedly this result is reached largely by inference from facts proven, and may fairly be described as in one sense speculative, but it is not more so than many verdicts which have been sustained; and if it be assumed that there was no error in allowing the jury to figure out substantial damages from the testimony, the \$75,000 they agreed upon was well within the limit which such testimony indicated."

It is claimed that the verdict was speculative, in that it determined what would have been the value of the one thousand shares of 6 per cent. preferred stock agreed to be paid, when no preferred stock was ever issued, when no value was shown for the common stock which was issued, and when the contract failed to provide what amount of preferred stock should be issued, or whether it should be subject to an issue of bonds. Damages are speculative when the probability that a circumstance will exist as an element for compensation becomes conjectural. *Anderson's Dictionary of Law*. The term "speculative damages" is usually applied in cases of breach of contract where money is sought for loss of uncertain or remote profits not within the understanding of the parties, or where there is uncertainty as to whether the party has been in fact damaged, or whether the damages result from the act of the other party, or where they are wholly uncertain in measure or extent. *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; 8 American

& English Encyclopædia of Law (2d Ed.) 609. The rule against the recovery of uncertain damages has been generally directed against uncertainty as to cause rather than uncertainty as to measure or extent; that is, if it is uncertain whether the defendant's act caused any damage, or whether the damage proved flowed from the defendant's act, there may be no recovery of such uncertain damages; whereas uncertainty which affects merely the measure or extent of the injury suffered does not bar a recovery. 8 American & English Encyclopædia of Law (2d Ed.) 614; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Bluegrass Cordage Co. v. Luthy & Co.*, 98 Ky. 583, 33 S. W. 835. We have frequently had occasion to consider this question in this circuit, and have approved the rule that mere uncertainty as to amount would not preclude recovery in actions to recover compensation for breach of contract to sell or manufacture, or for failure to deliver property which has no recognized market value, and that the party who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which, by reason of his breach, is unobtainable. In *re Stern*, 116 Fed. 604, 54 C. C. A. 60; *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19.

This rule is peculiarly applicable to the case at bar. Here, the finding of the jury establishes that the plaintiff fulfilled his contract, the evidence shows that a corporation was formed, that the defendant turned over to it the mine and concessions obtained by plaintiff for which it issued bonds and common stock, that the corporation was working the mine, had received large amounts of asphalt therefrom, and had a large amount still on hand. The evidence justified a finding that the defendant had reaped a substantial benefit from the services rendered by plaintiff under said contract, and had so far complied with his guaranty as to cause a corporation to be organized to handle said property. The sole defense now interposed to the payment of anything except nominal damages is the technical and inequitable one, that as the company was so organized as not to provide for the issuance of any preferred stock, the defendant is relieved from all liability under the contract, because having by his own act deprived the plaintiff of the means of accurately showing what would be the value of such stock, the law will not permit the plaintiff to resort to the best evidence obtainable as to such value, provided such evidence is speculative in the sense of being incomplete or uncertain.

It is argued that, in order to fix the value of the preferred stock which plaintiff was to receive, the contract must have contained a provision defining the amount of preferred stock to be issued, and that, in the absence of a provision as to whether it was or was not to be subject to a bond issue, its value was utterly unascertainable. But we think, in the absence of any words or definition of limitation, that the use of the term "preferred stock," in connection with defendant's guaranty of interest, may fairly be taken to indicate stock whose par value is to be based upon the actual value of the property it represents, and not upon any fictitious or speculative value. If the stock were

so affected by a bonded indebtedness as not to have a substantial value representing a par value it would be a preferred stock merely in name, and would not represent the understanding of the parties as evidenced by the agreement and the defendant's guaranty. It is further argued that the guaranty that the stock would "pay 6 per cent. dividend, gold, annually," in no way formed a basis for establishing its value, because, *inter alia*, if no dividends were earned, none could be demanded by the owner of the preferred stock, notwithstanding the guaranty. If this be so, it supports the presumption that the preferred stock was to be of substantial value, as suggested above, because if it were not of a substantial value, such as the par value, so that dividends might be earned, the owner of the preferred stock would receive nothing in return for his services. We must assume that the plaintiff would not have agreed to take worthless or nondividend paying preferred stock.

We have examined the cases cited by defendant in support of the proposition that the damages were too uncertain to form the basis of a substantial recovery. Most of them relate to alleged losses of prospective profits in business ventures or to claims asserted where there was no competent evidence of actual damage. Thus in *Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083, the damages which the court disapproved were claimed for loss of profits under a stipulation which the court found was only a subordinate and indefinite provision and not involved in the main purpose of the contract. In *Watts v. Weston*, 62 Fed. 136, 10 C. C. A. 302, there was no evidence as to damages because, while the parties had provided that a price should be mutually agreed upon from month to month, they had failed to make any further agreement as to what said price should be, or to provide any other means for its ascertainment. In *City of Memphis v. Brown*, 20 Wall. (U. S.) 289, 22 L. Ed. 264, the evidence offered rested upon the mere opinion of witnesses as to value based upon supposed conditions which never existed and were not contemplated by the parties. *Reed v. McConnell*, 101 N. Y. 270, 4 N. E. 718, was a case of attempt to prove, by opinions of witnesses, damages under a contract for future profits. In *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937, the court sanctioned evidence such as was allowed in this case, by saying that in the absence of market value the value of the use of the property during detention was a proper basis for estimating damages, and that the books of the company showing its earnings at such a time were competent evidence of its probable earnings during the time of its detention. *Boston & Albany Railroad Company v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006, was a case where damages were improperly allowed, based on the plaintiff's estimate of what his earnings had been in a business which he had sold out, and on his statement that he intended to resume a new business venture. In *Warren v. Stikeman*, 84 App. Div. 610, 82 N. Y. Supp. 1003, the plaintiff introduced evidence as to the par value of stock, and rested without proof of any other fact relative to its value. In *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760, the only evidence in the case showed that the stock had no market value, but the court said as follows:

"In the present case no facts of special character relating to damages were alleged, nor were any established by the evidence further than the mere fact that the stock of the company had no market value. If, notwithstanding that fact, the stock may have had an actual value, a different question would have been presented, for the plaintiff could not be subjected to loss, nor could the defendant be permitted to profit by the fact that the stock had no market value at the stipulated time for delivery. Then other means than those afforded by the market would be resorted to under the contract, as within the contemplation of the parties to ascertain the amount requisite to full indemnity to the plaintiff."

The decisions in *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216, and *Sturgis v. Clough*, 1 Wall. (U. S.) 269, 17 L. Ed. 580, have no bearing on the question presented here. We have been unable to find any case which supports the contention of the defendant. The general rule, as stated by the court below, is that the plaintiff is entitled to recover what would have been the market value of such preferred stock, if it had been issued. If there be no market value, then the question is as to what would have been its actual value. The question, therefore, for the jury to determine here was what would have been the real or intrinsic value of this stock, in view of the proved assets of the corporation.

"If the property to be delivered has no market value, its real value is to be ascertained by such elements of value as are attainable." 3 *Sutherland on Damages*, 1921.

Where no proof is available as to whether stock has market value, intrinsic value, ascertained from value of corporate assets and amount of liabilities, may be taken as the basis for the assessment of damages. *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563; *Industrial & General Trust, Ltd. v. Tod*, 180 N. Y. 215, 232, 73 N. E. 7.

In such a case it is "perfectly competent to resort to other modes of proof to establish its actual value, and this may very properly be done by proof of its dividend earning capacity, the value of the assets of the corporation. * * * In the absence of evidence of actual sales the market value is presumptively the par value." *Trust and Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129.

"In the absence of better evidence the market value of all the property of the company may be shown with the view to arriving at the proportionate value of the shares in controversy." *Hewitt v. Steele*, 118 Mo. 463, 475, 24 S. W. 440, and cases cited; *Murray v. Stanton*, 99 Mass. 345.

In *Dyer v. Rich*, 1 Metc. (Mass.) 180, the plaintiff entered into a contract with defendants whereby they agreed that, in consideration of the transfer by him to a certain corporation of a patent owned by plaintiff, they would transfer to plaintiff 10 shares of the capital stock of said company of the par value of \$500 each, and that, thereafter, \$80,000 should be paid in to the capital stock of the company, making the whole capital \$100,000, and that the shares into which the stock was to be divided should not exceed 200, so that each share should be of the par value of \$500. The defendants having broken the contract, Chief Justice Shaw stated the rule of damages as follows:

"As to the rule of damages the court are of the opinion that the plaintiff is entitled to recover the value of the 10 shares such as they would have been worth had the full \$80,000 cash capital been paid in, in addition to the \$20,000 which was the estimated value of the patent. The question for the jury is, what would have been the value of 10 shares in such a capital stock, raised for and appropriated to such a branch of manufacture, had it been made up at the time stipulated and the company ready to proceed in good faith to operate upon such capital pursuant to their charter. It might have been worth somewhat more or less than the par value; so much as it would have been worth in money we think the plaintiff entitled to recover."

Here, the evidence introduced by the plaintiff tended to show what the market value of the property was, for the purpose of showing what would have been the real value of the preferred stock. It was the duty of the defendant, if he claimed that this value was excessive, to introduce evidence in reduction of such value, in accordance with the principle applied in the leading case of *Armory v. Delamerie*, 1 Strange, 505. There, the plaintiff, being a chimney sweeper's boy, found a jewel, and carried it to the shop of a goldsmith, who, under pretense of weighing it, took out the stones and returned only the socket, and the plaintiff sued in trover. Chief Justice Pratt said:

"As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the jury that, unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did." *Redding v. Godwin*, *supra*.

In *Murray v. Stanton*, 99 Mass. 345, where there was a question as to the value of stolen bonds and it appeared they had no market value, the court held that evidence was admissible to show that they belonged to a set of bonds secured by a mortgage on a road on which a certain section had been graded and which was worth about the amount of said bonds. There, referring to cases where property has no market value, the court said as follows:

"In such cases the real value is to be ascertained from such elements of value as are attainable. The promissory note of an individual may have no market value. But proof of the solvency of the maker, or that the note is secured on real estate, in whole or in part, would require that some value, according to the fair estimate of its probable proceeds, should be put upon it."

In *Industrial and General Trust, Ltd., v. Tod*, *supra*, the defendants, who were a committee of bondholders, agreed to submit certain plans of organization to the bondholders, who should enter into said organization. The committee caused the property to be foreclosed, bought it themselves, and tendered to the bondholders stock in another company. Plaintiff thereupon brought an action for damages for breach of contract. There the court said as follows:

"The measure of damages is suggested by what the plaintiff has lost. It has lost its bonds without its fault, in spite of its protest and through the action and negligence of the defendants, as the jury might have found. Those bonds no longer exist as securities, for they are a lien upon nothing and are worth nothing except as vouchers. The bonds, as bonds, are gone, and the plaintiff is entitled to recover the value thereof as of the date when

the agreement was violated by the defendants. Such a recovery would make good the loss, but as the bonds have had no market value for years, how is the loss to be admeasured? The common law will not halt or surrender because the situation is novel, and the ordinary methods of proving values are not available, but will resort to some practical means that will be just to both parties. The bonds were worth something, as was shown by the sale when the defendants made the only bid for the property covered thereby and bought it at the upset price required by the court. These bonds were the first lien upon a going railroad, 119 miles long, with land, depots, rolling stock, wharves, and appurtenances. * * * The value of the bonds was approximately the intrinsic value of the property upon which they were the first lien and the value of the plaintiff's bonds was the proper proportion of that amount, not exceeding in either case the face of the bonds and interest unpaid. Upon proof of the facts, some of which were shown and some excluded by the trial court under objection and exception, showing what kind of a railroad it was, its mileage, grade, curvature and bridges: * * * it was for the jury to estimate the value of the bonded property according to their sound judgment and draw the proper inference as to the proportionate amount that the plaintiff should recover in order to make good the loss it has sustained. It was entitled to its aliquot part of what the road would have sold for, after due allowance for the reasonable expenses of making a sale. The defendants cannot assess the damages which they are to pay, nor pay them in anything but money. This method of establishing the value of property which had no market value has received the sanction of the courts of this and other states"—citing numerous authorities. 3 Sutherland on Damages, 1921.

It is unnecessary to further discuss this question. This review of the authorities shows that the evidence was sufficient to justify the court in submitting the whole question of damages to the jury, and that the jury were justified in awarding substantial damages. Exception was also taken to the reception by the court of certain telegrams tending to show that defendant actually took part in the negotiations and transactions between the plaintiff and the owner of the mine. The proof, however, showed that a motion to produce these telegrams had been served upon the defendant, that they had not been produced, and that the originals had been sent, or authorized, or received by, or shown to the defendant. It is unnecessary, however, to consider the technical question as to whether there was a sufficient basis for the introduction of these copies, because it appeared from other evidence, not objected to, that the defendant did actually take part in the transactions referred to, and said evidence disclosed all that was material on the question at issue, so far as the copies of the telegrams are concerned. Therefore, even if these copies might otherwise have been objected to, it appears from the whole evidence that the defendant suffered no prejudice by their introduction. The exception is therefore overruled. The judgment is affirmed.

ANDRUS v. BERKSHIRE POWER CO.

(Circuit Court of Appeals, Second Circuit. June 16, 1906.)

No. 279.

1. WATERS AND WATER COURSES—FLOWING LANDS—ELECTION OF REMEDIES—INJUNCTION—ESTOPPEL.

Complainant, a riparian proprietor, on being approached by defendant's agents prior to the construction of a dam by defendants in the river below complainant's property, made no objection to the erection of the dam, but refused to discuss the amount of the damages he would demand for injuries to his property by backwater until after the dam had been erected and the damages actually sustained could be ascertained. Defendant completed the dam without any protest on complainant's part, or seasonable or definite notice that complainant intended to enjoin the construction of the dam, until defendants had refused to pay complainant's demand for \$5,000 damages, made a year after the original conversation between complainant and defendant's agents, after which complainant filed the bill for injunction and damages. *Held*, that complainant's acts amounted to an election to accept redress for the overflow of his land by an award of damages, and he was therefore not entitled to an injunction.

2. INJUNCTION—DENIAL—BILL—RETENTION TO AWARD DAMAGES.

Where, in a suit to restrain the flowing of complainant's land by the construction of a dam, complainant was not entitled to an injunction, but was entitled to maintain a bill in equity for the assessment of damages on the theory of a continuing trespass, it was error for the court to dismiss the bill on denying an injunction; complainant at his election being entitled to have the case referred to a master for the assessment of damages.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Appeal from a decree dismissing upon final hearing bill for injunction. The opinion of the court below is reported in 145 Fed. 47.

Walter Artz, for appellant.

Henry Stoddard, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. Complainant is a resident of Massachusetts, and owns a dairy farm which borders on the Housatonic river in said state. Defendant is a Connecticut corporation, and under authority conferred by its charter has built in Connecticut a dam across said river, and is using the water power thus obtained for supplying electric light and power to the inhabitants of various towns in the state of Connecticut, and in furnishing light for streets and public buildings in said town. Said dam has caused the water of the river to set back on complainant's farm, flooding and undersoaking it and stopping the drainage of a considerable portion of his meadow land.

Prior to the incorporation of the defendant, one Roraback, then its promoter and now its president, called upon complainant in reference to the proposed dam. He told complainant that he was inter-

ested in the proposition to build such a dam, and, according to his testimony, explained to complainant the proposed height of the dam, and said that he had secured rights for the flowage of property below complainant's house, and that it was his judgment and that of the engineers that the property of complainant would not be damaged, but that he "desired to be on the safe side, and, rather than go ahead and take chances on the matter, I wished to ascertain from Mr. Andrus whether, if something should happen which we were not looking for and his property should be damaged, whether he would be willing to take up the settlement of damages with us." He testified that complainant said he did not see how the dam could damage his property, but he thought the proper way would be to wait and see, and that he then asked complainant whether he meant by this he would be willing to take damages for his property if it were injured, and complainant said he would, and that they talked over together the way in which such damages were assessed.

Eddy, another witness for defendant, testified that he had a conversation with complainant after the dam was built, in which complainant told him that Roraback, in the original interview, had suggested that in case of a disagreement over damages, if there should prove to be any, the matter might be adjusted by leaving it to arbitration, and that at complainant's request he (Eddy) explained to complainant the usual method of appointing arbitrators.

On several occasions, after the construction of the dam, conferences were held between complainant and defendant's agent as to the amount of damages, in the course of which complainant took defendant's agents over the property, explained fully the various items of damage, stated in a general way his estimate of damages, and fixed a definite figure at which he would settle, and, finally, after the dam was completed and a year had elapsed since the first interview, complainant told Roraback:

"I would rather he would take the water off my farm than to take any price."

All the testimony in the case was taken in open court. The court held that the conduct of complainant was such that he ought not to be permitted to obtain an injunction against the maintenance of the dam, and dismissed the bill. Assuming that the court below would have properly exercised its discretion in refusing, upon the foregoing evidence, the extraordinary relief prayed for, the question here presented is whether such discretion was properly exercised, in view of the evidence introduced by complainant.

By virtue of the provisions of the statute of frauds an easement cannot be created in lands by parol, and even a parol license, not coupled with an interest, to do particular acts on land is ordinarily revocable, because otherwise it would be within the prohibition of the statute. Therefore the complainant should not be denied an injunction against the undisturbed enjoyment of his land, without clear proof of such facts as would disentitle him to such relief in a court of equity. If, however, it conclusively appears that complainant failed season-

ably to assert his claim to relief by injunction, and expressed a willingness to accept such damages as he could obtain in an action at law or under the ordinary procedure in equity, and deliberately consented to forego any claim for damages until the dam had been built and his actual damages ascertained, he ought to be held to the consequences of such conduct, and it would be inconsistent with such an understanding to permit him to cause the dam to be removed by a mandatory injunction.

In the determination of the questions raised, we have eliminated the testimony of witnesses for defendant, so far as it is contradicted or qualified by complainant, and have not taken into account the fact that the finding of the court below was based upon the testimony of witnesses produced before the judge, where he had an opportunity to observe their demeanor and to test their credibility. The material portions of the testimony of complainant as to his original conversation with defendant's agent Roraback are as follows:

"[Roraback] said he came up through the neighborhood calling on the farmers in the interest of the dam that they was contemplating putting up down the river, and wanted to know what I thought about it. Well, I told Mr. Roraback that I hadn't had occasion to think much about it; in fact, I didn't know much about it. I had heard they were going to put up one, and he said to me that the water he didn't think would damage me, because the engineers, I think he said, had ascertained that the water would not be raised above two inches higher than it was at the bridge that was near Beebe's—what is called the 'Bartholomew Bridge.' And he said that rise of the water would run out up somewhere near the Blodgett Bridge; that is, the railroad bridge where my crossroad comes out on the highway up the stream over a mile from the other bridge. I replied that we couldn't tell; we would have to wait and see, meaning that we would wait to see when the water was raised, that we couldn't tell then where it would come. I think that is all the conversation on that matter we had. I know it was."

In his affidavit on application for a preliminary injunction, complainant had omitted the statement which he testified he thought defendant's agent made about the engineers having ascertained "that the water would not be raised above two inches higher than it was at the bridge." This omission was called to his attention on cross-examination, but was not satisfactorily explained.

Complainant's subsequent attitude and action in regard to the matter of damages, according to his testimony, is as follows: After the dam had been built, Eddy, one of defendant's agents, came to look over the damaged land, and complainant—whose "object was to show him what the damage was as near as I could; that was the most we talked about"—went over the land with Eddy, and asked him "if he had the power to settle the damage if I gave him the damage," and "told him I guess there would be no use telling him if he couldn't settle it." Complainant then said as follows:

"I told Mr. Eddy that I thought that the power company ought to close up their dam, raise their flashboards, and make that dam tight to hold the water and keep it there until it filled up, set the water back all they could for a few days, so that the people could see what they had to contend with. That was my idea. We were in the dark, and didn't know how much flood we were going to have, how much rise, or anything about it, really, where it

would come to or stop; and I thought it would be a good plan to close it up, set the water up there so that we could see what we had got to contend with."

Eddy testified as follows as to his conversation with complainant—that complainant said:

"Mr. Roraback came to his [complainant's] house and informed him that the erection of the dam was in contemplation, but he didn't think it would affect Mr. Andrus's land, but that if it did affect his land he wanted to assure Mr. Andrus that he or his company would see that Mr. Andrus's damages were paid, and, furthermore, he said that Mr. Roraback had at that time suggested that in case of disagreement over the damages, if there should prove to be any, the matter might be adjusted by leaving it to arbitration, and either on that occasion or on my next visit, I can't be positive which, Mr. Andrus asked me further about the method of appointing arbitrators, and I explained to him the usual method of appointing them. That is all that I recall on that line."

Complainant was not recalled in rebuttal to deny or qualify the testimony of Roraback, nor that of Eddy, quoted above, confirming Roraback both as to the original conversation and as to complainant's agreement to accept damages, if there should prove to be any. On the undisputed facts and on complainant's own testimony as to his conversations with Eddy and Roraback, the situation of the parties was as follows: Before the organization of the defendant corporation, Roraback, representing the parties in interest or acting as its promoter, undertook to ascertain from the farmers, whose property was likely to be affected if the proposed dam were built, what action they would take in the matter, and to make agreements with them as to prospective damages. He called on complainant, and stated that he did not think the dam would damage complainant, but wanted to know what he thought about it, and complainant said:

"We couldn't tell; we would have to wait and see, meaning that we would wait to see when the water was raised, that we couldn't tell then where it would come."

Roraback had blanks for the proposed agreements with him; but, in view of complainant's refusal to express any opinion and insistence on waiting to see what the amount of rise would be after the dam was built, Roraback was prevented from making an agreement, and without any intimation of objection he was invited to go forward in the way suggested by complainant and to build the dam and then and thereby ascertain the damage. Accordingly, after the organization and incorporation of defendant, it went on with the construction of the dam, and completed it without any protest on the part of complainant, and without any seasonable or definite notice of complainant's intention to claim any extraordinary remedy by way of injunction, but, on the other hand, if the uncontradicted testimony of Eddy is to be believed, with an admission of an understanding with Roraback, and an expectation on the part of defendant, that complainant would accept money compensation for such money damages as he might find he had suffered. It was not until defendant had refused to pay complainant's demand of \$5,000 damages, made a year after the original conversation and long after the dam was completed, that

complainant intimated that he would take any measures which would interfere with the maintenance of the dam. The bill was filed one year and six weeks after said original conversation.

It is to be borne in mind that there is in this case no evidence of fraud or misrepresentation on the part of defendant's agent Roraback. There is no evidence to contradict his statement that his opinion as to damage was based upon statements made to him by his engineers or upon information derived from other sources. In fact, he was prevented from testifying as to whether he relied in any respect upon the topographical maps of the locality made by the government, by the objection made by complainant's counsel to the question and its exclusion by the court. The complainant was originally entitled to assert his property rights either by a bill for an injunction against a threatened trespass or by an action at law for damages after the trespass was committed. When defendant's promoter called on him and stated its plans, complainant had the right either to elect which course he would pursue or to refuse to make such election. In the latter event, if he had told defendant that if it erected the dam without his consent it must do so at its own risk, or that if damage resulted he would bring proceedings to enjoin the maintenance of the dam, there would have been no question as to the equity of his present position. But, by reason of his original insistence that "we would wait and see, meaning that we would wait and see when the water was raised," so that the damages might be ascertained by having the dam built, by his failure to object to the building of the dam, by his subsequent conversations and conduct in reference to the amount of damages, and by his delay in asserting any right inconsistent with a claim of compensation in money for damages, we think he may properly be held to have invited or licensed the defendant to proceed with the building of the dam, and to have elected to use this method of ascertaining what the damages would be. And, as defendant has acted under said invitation or license, and now stands ready to pay all lawful damages thus ascertained, it would be contrary to equity and good conscience to set the machinery of the court in motion to redress the grievances now claimed, by a revocation of the license and a destruction of the property created under the license at an expense of more than \$100,000, when the complainant, by his original conduct and subsequent laches and apparent acquiescence, has induced or permitted defendant to believe that he would not interfere with the maintenance of the dam provided his just damages were paid.

In reaching this conclusion it is not necessary to invoke the application of the doctrine of estoppel, or of waiver, or even of an irrevocable license, although in many well-considered cases it is asserted that such a parol license cannot be revoked by injunction after the licensee has expended money and labor in pursuance of the license. "There is also considerable support for the doctrine that the permission to flow after it has been acted upon may be enforced in equity on the same ground on which the courts of equity enforce parol contracts for the sale of land after there has been partial performance. Says Judge Redfield: 'If such a license be given by parol, and expense in-

curred on the faith of it, so that the parties cannot now be placed in statu quo, there would seem to be the same reason why a court of equity should grant relief as in any other case of part performance of a parol contract for the sale of land or any interest therein; i. e., to prevent fraud.' In Pennsylvania it has been explicitly held that 'expending money or labor in consequence of a license to divert a water course, or use a water power in a particular way, has the effect of turning such license into an agreement that will be enforced in equity'; and the decision, as appears by the context, and also by subsequent cases, is not based upon any distinction between licenses which are to extinguish and those which are to create an easement or servitude, but is applicable to both. The same doctrine is held in Indiana. * * * But it may well be said that in any case of a parol contract relating to lands it is the particular right or privilege promised that the parties have in view, rather than the means or instrument by which it is to be created or given, and the court will only be adapting the proper means to the end at which the parties aimed, if it shall direct a legal assurance to be executed. If relief be given by awarding a perpetual injunction against disturbing the enjoyment of the license, the same end would be reached and the licensor at the same time would only be held to the exact terms of his promise." Cooley on Torts, 365, 366, 367. See, also, *McBroom v. Thompson* (Or.) 37 Pac. 57, 42 Am. St. Rep. 806.

The complainant has come into a court of equity asking for the extraordinary remedy of injunction. This remedy is not given *ex debito justitiæ*. It is one which is granted or withheld in the sound discretion of the court, in view of all the circumstances of the particular case. "It should be remarked, however, that in those cases in which the questions of nuisance or no nuisance have been raised in a court of equity, the conclusion of the court to grant or deny relief in the particular cases is not always a guide to a court of law when it comes to pass upon similar facts. The relief which equity gives by way of injunction is so severe in its consequences that it is never granted except upon a case clearly and conclusively made out. To break up a man's business in a case of doubt, or even of slight inconvenience, would be an abuse of power. The court of equity wisely and justly, in such cases, declines to interfere, and sends the plaintiff to a court of law for damages." Cooley on Torts, 710, 711.

We conclude, therefore, that the court below exercised a sound discretion in refusing the injunction. In holding that the application for this injunction should be denied, we do not wish to be understood as suggesting any limitation upon complainant's right to obtain adequate damages for this trespass by any appropriate proceedings in a court of equity, or by one or more actions at law, for such trespasses upon his property rights as have been or may be hereafter committed by reason of the erection and continued maintenance of the dam.

The principles announced and applied in the opinion of the Supreme Court in *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, are controlling upon us in the disposition of this case. There, as here, the defendant had no power to appropriate property in an ad-

joining state, and a court of equity at the inception of the trespass, at the instance of complainant, would have interfered by injunction. There, too, the contest was between the demands of public service, and the rights of a private individual which could be measured in money, and suit was not brought until after the work had proceeded for a long period, in that case for two years. The court said as follows:

"It is true the testimony discloses that the plaintiffs and the city have been trying to agree upon the amount of compensation, but that shows that the plaintiffs were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work. It is one thing to state a right and proffer a waiver thereof for compensation and an entirely different thing to state the same right and demand that it should be respected. In the latter case the defendant acts at his peril; in the former he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter the plaintiff holds out the single question of the validity and extent of the right; in the former he presents the right as the foundation of a claim for compensation, and his threat to enforce the right if compensation is not made is simply a club to compel payment of the sum he deems the measure of his damages. Further, the testimony shows that the city was settling with other parties similarly situated, and paying out large sums of money for the damages such parties would sustain. So it is not strange that the city acted on the assumption that the only matter to be determined was the amount of the compensation. If the plaintiffs had intended to insist upon the strict legal rights (which for the purposes of this case we assume they possessed), they should have commenced at once, and before the city had gone to expense, to restrain any work by it. It would be inequitable to permit them to carry on negotiations with a view to compensation until the city had gone to such great expense, and then, failing to agree upon the compensation, fall back upon the alleged absolute right to prevent the work. If they had intended to rest upon such right and had commenced proceedings at once, the city might have concluded to abandon the proposed undertaking and seek its water supplies in some other direction. If this injunction is permitted to stand, the city must pay whatever the plaintiffs see fit to demand, however extortionate that demand may be, or else abandon the work and lose the money it has expended. While we do not mean to intimate that the plaintiffs would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one."

Counsel for complainant has attempted to distinguish this case, especially in view of the greater period of delay lasting for two years. But we think this is immaterial, in view of the fact that over a year elapsed between complainant's invitation to defendant to build the dam and experiment as to the amount of damages, and the filing of the bill. Defendant's words and acts and failure to act in this case, as fully pointed out, furnish a much stronger argument against the interference of a court of equity than that presented in *New York City v. Pine*.

The decree of the court below may be reversed, and the cause remanded to the court below, with instructions to the court to set aside its decree and enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages to which complainant may be entitled by reason of the construction, maintenance, and use of the dam complained of, and fixing the time within which defendant will be required to pay such damages, and

providing for the issuance of the injunction prayed for upon failure of defendant to pay the same, and that upon such payment a decree be entered in favor of defendant, or, at the option of complainant, the decree below may be affirmed, with costs, without prejudice to complainant's rights to bring an action at law for said damages.

THOMAS v. GREAT NORTHERN RY. CO. et al.
(Circuit Court of Appeals, Ninth Circuit. June 20, 1906.)

No. 1,293.

1. REMOVAL OF CAUSES—PERSONS JOINTLY SUED—SEPARABLE CAUSES OF ACTION—COMPLAINT.

In the absence of a showing of fraudulent misjoinder of parties defendant, the case made in the complaint against defendants jointly sued is determinative of the right to remove the cause to the federal court.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 94, 115.]

Separable controversy ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—PARTIES—JOINDER.

Under the Washington state law a servant may be joined with his master in an action by another servant for personal injuries alleged to have resulted from their negligence, whether the negligence of the servant consists in nonfeasance or misfeasance.

3. REMOVAL OF CAUSES—SEPARABLE CONTROVERSIES—DETERMINATION—TIME.

On an application for the removal of a cause to the federal court, the question whether there is a separable controversy between plaintiff and each defendant which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition to remove, independent of the allegations of such petition or in the affidavit of petitioner, unless petitioner both alleges and proves that defendants were wrongfully made joint defendants for the purpose of preventing removal.

4. SAME—PETITION—INTENT.

Where a petition for the removal of a cause to the federal court, on the ground that a separable controversy existed between plaintiff and a nonresident defendant, alleged that the resident defendant was joined for the purpose of preventing a removal of the action, but did not allege that said defendant was "wrongfully or fraudulently" made a party defendant, and it appeared that plaintiff was entitled to sue the defendants jointly, the petition was insufficient to justify a removal.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 166-179.]

5. SAME—FEDERAL JURISDICTION—WAIVER.

Where, after a cause had been erroneously removed to the federal court over plaintiff's objection, that court sustained a demurrer to the complaint in so far as it affected the resident defendant, plaintiff, by amending his complaint and proceeding as against the nonresident defendant in the federal court, did not waive his objection that the cause had been erroneously removed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 216.]

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

The plaintiff in error brought an action in the superior court of the state of Washington for Spokane county against the defendant in error and Peter McDonald to recover damages for personal injury. He alleged in his complaint that the said McDonald was the foreman of his codefendant, the Great Northern Railway Company, and had charge of certain work in its shops; that the plaintiff in error was unfamiliar with such work and the tools used therein, as said McDonald knew; that said McDonald gave him a chisel with which to do certain work, and, when he complained that the chisel did not appear to be in first-class condition, said McDonald negligently and willfully told him that it was good, and was all right, and ordered him to go ahead and use it; that through a defect in said chisel in a few minutes thereafter a piece of iron struck the plaintiff in error in the eye, ruining the sight thereof. The complaint alleged that the defendants in said action were jointly and severally negligent, in that they negligently failed and neglected to furnish him safe tools and negligently failed to warn him of the danger in using the same. The cause was removed to the Circuit Court upon the petition of the railway company on the ground that the controversy was wholly between the plaintiff and the petitioner. After the removal the plaintiff in error moved to remand the cause to the state court. The motion was overruled. Thereafter the demurrer of McDonald to the complaint on the ground of his misjoinder as a party defendant was sustained by the Circuit Court and the action was as to him adjudged to be dismissed. The plaintiff in error then amended his complaint and therein made the railway company the sole defendant. Upon the issues so presented by that complaint the cause was tried, and the jury, under instructions of the court, returned a verdict for the defendant in error.

F. W. Dewart, for plaintiff in error.

M. J. Gordon, Charles A. Murray, and W. W. Hindman, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error, among other assignments, that the Circuit Court overruled the motion of the plaintiff in error to remand the cause to the state court. In *Alabama Great Southern Railway Co. v. Thompson*, Admr. (Jan. 2, 1906) 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, the Supreme Court reviewed its former decisions, expressed the purport of their meaning, and finally determined the doctrine that the case made in the complaint against defendants sued jointly is, in the absence of a showing of fraudulent misjoinder, determinative of the right of removal. The court first reviewed *Chesapeake & Ohio R. R. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; and, after quoting therefrom, said:

"It is patent from the language just quoted from the opinion that, conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the nonresident defendant to remove the action to the federal court."

From that decision the court quoted with approval the following:

"It has often been decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the Circuit Court of the United States, under Act March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509], upon the ground of a separable controversy

between the plaintiff and himself, although the defendants have pleaded severally and the plaintiff might have brought an action against either alone."

And quoting the language in the opinion of the court in *Louisville & Nashville Railroad Company v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63, in which the Chief Justice had said, "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint," the court proceeded to remark:

"The language is used of an action begun in the state court, and it is recognized that the plaintiff may select his own manner of bringing his action and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit. The question may be raised by answer and the right of the defendant adjudicated, but the question of removability depends upon the state of the pleading and the record at the time of the application for removal. *Wilson v. Oswego Tp.*, 151 U. S. 56, 66, 14 Sup. Ct. 259, 263, 38 L. Ed. 70. And it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal."

Under the decisions of the Supreme Court of the state of Washington, a servant may be joined with the master in an action to recover damages for personal injuries alleged to have resulted from their negligence, whether the negligence of the servant consists in nonfeasance or misfeasance. *Lough v. John Davis Co.*, 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848; *Howe v. Northern Pacific Ry.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949. The action in the present case, therefore, was one which could be brought and enforced in the courts of that state. That a federal court in the same jurisdiction might rule differently as to the liability of the servant, where his negligence consisted in nonfeasance, is no ground for removal. In the *Alabama Great Southern Railway Company Case* the court said:

"The cases are in difference as to whether a common-law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleged a joint cause of action. Does this become a separable controversy, within the meaning of the act of Congress, because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal."

It remains to be considered whether the cause was removable upon the allegations of the petition of the railway company in which it was alleged that McDonald, its codefendant, was not a proper party defendant in said action, had no interest in said suit, and, if liable at

all, was separately liable, and that he was made a party defendant "for the sole and only purpose of preventing a removal of said action by your petitioner." In the Dixon Case the court held that, if the liability of the defendants as set forth in the complaint was joint and the cause of action entire, then the controversy was not separable as a matter of law, and that the plaintiff's purpose in joining certain defendants was immaterial. The court said:

"The petition for removal did not charge fraud in that regard, or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry."

In Louisville, etc., R. R. Co. v. Wangelin, 132 U. S. 599-601, 10 Sup. Ct. 203, 204, 33 L. Ed. 473, the court said:

"The question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In Plymouth Min. Co. v. Amador Canal Co., 118 U. S. 264-270, 6 Sup. Ct. 1034, 1038, 30 L. Ed. 232, the court said:

"The averments in the petition that the defendants were wrongfully made to avoid a removal can be of no avail in the Circuit Court upon a motion to remand until they are proven, and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant."

In the case at bar there is no allegation that McDonald was wrongfully or fraudulently made a party defendant. The sole allegation is that he was made defendant for the purpose of preventing the removal of the action. This averment presented no question for the decision of the court. The motive of the plaintiff in joining defendants was immaterial so long as he was acting within his right. No evidence was taken upon that averment of the petition, nor did the court pass upon the question thus attempted to be presented. The motion to remand was denied upon the ground that no cause of action against McDonald was stated in the complaint.

It is contended that the plaintiff in error cannot be heard to insist that the cause was not removable for the reason that after the court had overruled his motion to remand and sustained the demurrer of McDonald, he voluntarily amended his complaint and made the defendant in error the sole defendant, thereby submitting to the jurisdiction of the Circuit Court. The sole question however, is whether the case was one properly removable from the state court as it stood in that court at the time when the petition was filed. That question is to be determined by the condition of the pleadings and the record at the time of the application for removal and not by the allegations of the petition or the subsequent proceedings which may be had in the Circuit Court. *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514; *Wilson v. Oswego Tp.*, 151 U. S. 56, 66, 14 Sup. Ct. 259, 38 L. Ed. 70. If the petition had alleged that McDonald was fraudulently or wrong-

fully made a defendant for the purpose of preventing a removal, and the plaintiff had thereafter voluntarily dismissed as to him, his act might have been construed to be an admission of the truth of that allegation. But that is not what was done. After the removal, and after the court had denied the motion to remand and had sustained the demurrer of McDonald to the complaint, the plaintiff was compelled either to submit to a dismissal of his action or amend his complaint in accordance with the ruling of the court. He could not, before final judgment, review in an appellate court the action of the trial court in overruling his motion to remand. *Bender v. Pennsylvania Co.*, 148 U. S. 502, 13 Sup. Ct. 640, 37 L. Ed. 537. Nor could he obtain mandamus to compel a remand. *Ex parte Hoard*, 105 U. S. 578, 26 L. Ed. 1176. By amending his complaint as he did, and submitting to trial, he did not give the court jurisdiction.

The judgment is reversed, and the cause is remanded to the Circuit Court, with instructions to remand the same to the state court, whence it was removed.

NATIONAL BANK OF COMMERCE v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. June 25, 1906.)

No. 1,288.

INDIANS—INDIAN LANDS—SALE—DEPOSIT OF PROCEEDS.

Act Cong. May 27, 1902, c. 888, § 7, 32 Stat. 275, authorizes the adult heirs of any deceased Indian to whom allotted lands have been patented to sell inherited lands subject to the approval of the Secretary of the Interior, and provides that when so approved full title shall pass to the purchaser, the same as if a final patent without restriction on the alienation had been issued to the allottee. *Held*, that where lands were allotted to an Indian citizen under Allotment Act 1877, restraining alienation for 25 years, the act of 1902 did not vacate the trust of such lands held by the United States, but, on the sale of the lands with the consent of the Secretary of the Interior by the heirs of the deceased allottee, the trust attached to the proceeds, which was only payable to such heirs under rules prescribed by the Interior Department.

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Jesse A. Frye and Alfred E. Gardner, for plaintiff in error.

H. P. Burdick and R. E. Evans, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The defendant in error, as the assignee of one Henry Taylor, an Indian, brought this action to recover from the plaintiff in error the sum of \$1,830; the same being the share of said Henry Taylor in the proceeds derived from the sale of allotted land in the Yakima Indian reservation. The sale was made by the heirs of the deceased allottee, James Taylor, and the money was deposited with the plaintiff in error to the credit of said

Henry Taylor, to be paid to him in accordance with certain rules and regulations promulgated by the Secretary of the Interior and the Commissioner of Indian Affairs. The sale was had under the authority of section 7 of the act of Congress of May 27, 1902 (32 Stat. 275, c. 888), which provides as follows:

"That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the state or territory where the same is situate: Provided, that the sale herein provided for shall not apply to the homestead during the life of the father, mother, or the minority of any child or children."

The cause was submitted to the Circuit Court upon the pleadings and an agreed statement of the facts. Thereupon judgment was rendered for the defendant in error for the recovery of said sum and costs.

The question arising upon the writ of error is whether the proceeds of such a sale are payable directly to the heir of the deceased allottee, or are to be held in trust for his benefit, and paid to him in such sums as meet the approval of the Secretary of the Interior and the Commissioner of Indian Affairs. It is admitted that Henry Taylor is a citizen of the United States, is an Indian of the Puyallup tribe, lives his own independent life, and is not dependent upon the government nor under official control. The land which was sold was allotted to James Taylor under the General Allotment Act of 1887. That act declared that the land should not be alienated by the allottee within a period of 25 years from the date of the allotment. Under the terms of the act the allottee was allowed the use and occupation of the land, and the only limitation upon his title was the restriction against alienation within the specified period. The plaintiff in error contends that the proceeds of the sale took the place of the land upon which there had been restriction against alienation, and that the government of the United States as the guardian of Henry Taylor had the power and authority to exercise supervisory control over the money. The defendant in error contends that the act of May 27, 1902, removed that restriction as to lands of a deceased allottee by expressly declaring that the adult heirs of such an allottee may sell and convey the lands inherited from such decedent, that the power to sell is thus expressly vested in the heirs and is not given to any officer of the government of the United States, that the power to sell and convey implies the power to receive the proceeds of the sale, that Congress might have imposed restrictions upon the use of the money, and might have required that the money be held in trust for the heirs of such deceased allottees, but that it has not seen fit to do so. It may be admitted that such was the contemporaneous construction placed upon the act by the Secretary of the Interior and the

Commissioner of Indian Affairs. In their rules promulgated on October 2, 1902, it was provided that the consideration money of such sales should be deposited in a bank or with a United States Indian agent "to be paid to the grantors or their order upon presentation of the deed duly approved by the Secretary of the Interior or by the President." It was not until September 16, 1904, that amended rules were promulgated, requiring that all proceeds of such sales be deposited in United States depositories to the credit of the heirs and subject to their checks in amounts of \$10 per month with the approval of the agent in charge and in larger amounts only when authorized by the Commissioner of Indian Affairs. The heirs of James Taylor, in order to effect the sale, expressly assented to the terms of the amended rules. That assent was expressed in a supplemental petition which they were required to make, and which was presented in compliance with a letter to Henry Taylor from the superintendent of the Yakima Indian reservation, notifying him that such supplemental petition must be signed before the land could be sold and that otherwise the Secretary of the Interior would not approve the sale. The plaintiff in error contends that this requirement of assent to the amended rules was not authorized by law, that it can have no binding effect upon Henry Taylor or his assignee, and that conditions in an executory agreement or contract inserted at the dictation of officers of the government *colore officii* and in excess of lawful authority are void, citing *United States v. Humason*, 6 Sawy. 199, Fed. Cas. No. 15,421, and *United States v. Mynderse*, 11 Blatchf. 1, Fed. Cas. No. 15,851.

The contemporary construction placed upon an act of Congress and adhered to and followed by the head of the department to whom is intrusted its enforcement is in doubtful cases generally persuasive argument in favor of such construction; but here the first construction was adhered to but for a short period of time, and the new construction is entitled to as much consideration as was the first. In arriving at the intention of Congress in enacting the statute, it is important to bear in mind prior legislation and the declared policy of protection which the government has pursued in dealing with the Indians and their lands. The purpose of the statute evidently is that lands inherited from deceased allottees by heirs who had and were living upon allotments of their own, might be sold and converted into money, rather than remain untilled and unoccupied. It may be admitted that if the intention of the statute is to terminate the trust as to all lands so sold and to give the proceeds to the heirs free from restriction, the Secretary of the Interior had not the power to frustrate that intention in this instance by imposing the terms which were inserted in the petition for leave to sell, and that such terms, notwithstanding that they were assented to by the petitioners, were not binding upon them. But was it the intention of Congress to terminate the trust? There is in the act itself no express declaration of such an intention. The statute provides that the lands may be sold with the consent of the Secretary. It thus permits a change in form of the trust property from land to money. This change may be effected

only with the consent of the trustee represented in the person of the Secretary of the Interior. No citation of authority is needed to sustain the general doctrine that into whatever form trust property be converted, it continues to be impressed with the trust. That doctrine must be applied to the present case in the absence of the expressed intention of Congress to terminate the trust. We find in the act no ground for saying that such was the intention. The act, while it provides that the land may be sold, does not provide for the payment of the proceeds to the heirs of the deceased allottee, nor does it remove any of the restrictions upon the use and enjoyment of the trust property nor withdraw the property from the control of the Secretary of the Interior. We construe the act as expressing the intention of Congress, not to end the trust but to permit a change of the form of the trust property. The property being held in trust by the United States for a period which had not yet expired and which period was subject to further extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form. Henry Taylor is, it is true, a citizen of the United States, and has severed his tribal relation. His interest in allotted lands, however, whether as an original allottee or as the heir of a deceased allottee is as much affected by the trust imposed upon it for his protection as is the similar interest of any Indian who has not been made a citizen, and who has not severed his tribal relation. The granting of citizenship does not affect the character of the title to land allotted to the Indian, nor is the restriction against alienation inconsistent with citizenship. *Beck v. Flournoy Live Stock & Real Estate Co.*, 65 Fed. 30, 12 C. C. A. 497; *United States v. Flournoy Live Stock & Real Estate Co. (C. C.)* 69 Fed. 886; *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532.

Since writing the above our attention has been directed to the case of *United States v. Thurston County*, 143 Fed. 287, in which the Circuit Court of Appeals for the Eighth Circuit construed the statute of May 27, 1902, as we have construed it.

The judgment is reversed, and the cause is remanded, with instructions to enter a judgment for the plaintiff in error.

METROPOLITAN RUBBER CO. v. PLACE.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 241.

1. CORPORATIONS—SALARY OF OFFICER—ACTION TO RECOVER.

A by-law of a corporation provided that the salaries of its officers should be fixed at the end of each year's service at the annual stockholders' meeting, and authorized the treasurer to advance during each year, in respect to such salaries, a sum not exceeding, "to the president, \$7,700." Plaintiff was president for a number of years, during the later ones of which no stockholders' meetings were held. At the last one held his

salary for the last preceding year was fixed at \$9,000, and such sum was regularly paid to him thereafter for two or three years, and after that payment was deferred for business reasons. Owing to changes in the business, the duties of the president were less onerous during the later years, until plaintiff sold his stock and retired from the presidency. *Held*, that the provision of the by-laws implied an agreement by the corporation that the president should be paid a salary, and that in an action to recover the arrears, in view of the fact that there had been some lessening of the services performed by plaintiff since his last annual salary was fixed, the court properly submitted the question of their reasonable value to the jury.

2. SAME—ACTION AGAINST—ABATEMENT BY DISSOLUTION.

The provision of Gen. St. Conn. 1902. § 3396, that corporations which are dissolved shall be deemed to continue so far as to enable them to prosecute and defend suits by and against them, applies to a corporation originally organized under the general laws of the state, although afterward reorganized under a special act, and the dissolution of such a corporation does not abate an action pending against it.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2483.]

3. SAME—PROCEEDINGS FOR DISSOLUTION—CONCLUSIVENESS OF DECREE BARRING CLAIMS.

A decree entered in a statutory suit for dissolution of a corporation, barring all claims against the corporation which were not presented for allowance pursuant to a previous order of the court, of which due notice was given, concludes all creditors or claimants so far as relates to the assets of the corporation of which the court acquired possession, the proceeding being essentially one in rem, but cannot affect the right of a creditor who was a nonresident of the state to maintain an action against the corporation on his claim, unless he was brought in by personal service upon him or appeared in the suit.

In Error to the Circuit Court of the United States for the Southern District of New York.

Guy Cunningham and Charles Neave, for plaintiff in error.

A. C. Shenstone, for defendant in error.

Before WALLACE, LACOMBE and COXE, Circuit Judges.

WALLACE, Circuit Judge. This action was brought against a Connecticut corporation to recover salary alleged to have accrued to the plaintiff as its president for the period from March 1, 1898, to March, 1901. The defense was originally a denial of liability, but by suggestion upon the record and by supplemental answer the further defenses were interposed of the abatement of the action by the dissolution of the defendant since the commencement of the action, and a subsequent decree barring the plaintiff's demand made by the state court of Connecticut in an action brought for dissolving and winding up the corporation.

The assignments of error present the questions of the general right of the plaintiff to recover salary upon the facts proved, of the effect of the dissolution of the corporation as an abatement of the action, and of the effect of the Connecticut decree.

It appeared upon the trial that the plaintiff had been, from the organization of the defendant in 1890, its president and one of its largest stockholders. In 1893 a by-law was adopted by the corpora-

tion, providing that the respective salaries of the president, treasurer, and secretary "for the calendar year be fixed at the annual stockholders' meeting," and authorizing the treasurer to advance during each year in respect of such salaries a sum not exceeding, "to the president, \$7,700." In 1895 the annual meeting of stockholders, which should have been held in March, was not held; but in June, at a special meeting of the stockholders, at which all of them were represented, the corporation fixed the salary of the president for the preceding year at \$9,000. No further action was ever taken by the corporation in regard to the salaries of its officers. For the ensuing three years the salary of \$9,000 was regularly paid to the plaintiff as theretofore in monthly installments. The first month's salary for 1898 was likewise paid. Shortly before the last payment the defendant discontinued an important branch of its business, and in consequence the services required of the president were materially curtailed, and much less time was subsequently devoted by him to its business. In 1899 the treasurer and principal stockholder of the defendant became insane, and a temporary treasurer was appointed, and in March, 1900, a treasurer was regularly elected. Evidence was given by the plaintiff tending to show that after the original treasurer became insane his successors recognized plaintiff's demands for his salary, but suggested reasons why payment should be deferred pending negotiations for the formation of a trust between the defendant and other concerns. In 1901 the plaintiff sold his stock in the corporation, and terminated his relations with it.

Upon the foregoing facts we have no doubt that the trial judge properly left the case to the jury, with the instruction, in substance, that, if they found that the plaintiff after 1898 continued to perform large and important services for the defendant as its president, he was entitled to be paid a salary commensurate with their value.

It is well settled that the officer of a corporation, who is a stockholder, is not entitled to compensation for the services performed by him as such officer, in the absence of any agreement or expressed assent by the governing body of the corporation that he shall be paid. In the absence of some promise in advance, the law implies that such services are performed without expectation of reward, and because of the interest of the stockholders in the affairs of the corporation.

It is plain that the corporation in the present case, by its by-law, had promised that a yearly salary should be paid its president, and that the amount should be fixed after the expiration of each year of service. It was the meaning of the by-law, not that no salary should be paid unless one should be fixed at the annual meeting, but that one should be paid and the amount fixed at the annual meeting, unless it was considered that none should be allowed in excess of that which the treasurer had in the meantime advanced. Its true construction is not that the advances may be made at the discretion of the treasurer, but that he have the requisite authority to make them up to the specified limit. The by-law rebuts any presumption that the officers named in it were to serve without compensation, and is in

effect a promise of salary to the president of at least \$7,700 per annum.

The case is in some respects like that presented in *Farmers' Loan & Trust Co. v. Housatonic R. R. Co.*, 152 N. Y. 251, 46 N. E. 504. In that case resolutions had been annually adopted to pay the president a specified sum "for the ensuing year." By the last resolution there was "voted to the president a salary of \$5,000 a year." Thereafter there was no resolution of the directors for 15 years, but the corporation continued to pay the salary of \$5,000. A new president was elected, and served for two years without drawing any salary. The court, after suggesting that the resolution might be treated as standing authority for the payment of the salary of \$5,000 to the individual who might fill the office, said:

"If that was not so, it was at least a question for the jury whether, from the existence of the resolution, the acquiescence of the directors, and the conduct of the plaintiff, it was not so understood and treated by the parties concerned."

The circumstance that the duties of the plaintiff became less onerous to himself, and his services less valuable to the defendant, by reason of the relinquishment by the corporation of one branch of its business, did not absolve the defendant from all liability. It is only when there is such a change in the business of the corporation that the officer has no longer any duties to perform that the contract to pay salary may be considered abandoned or dissolved. *Long Island Ferry Co. v. Terbell*, 48 N. Y. 427. When the change is such as to minimize the value of the services, it is to be expected that the directors will take action to reduce the future salary; and, if they do not, it may be reasonably presumed that both parties understand the previous arrangement to be still in force.

It is unnecessary to decide whether the plaintiff would have been entitled to recover the amount of salary which had been fixed by the by-law, or at the meeting of stockholders in 1895, as the case was not left to the jury upon this theory. If there had been no change in the nature and extent of the services rendered by the president, in view of the fact that for several years subsequently that salary had been paid to him by the corporation, and in view of the explanation why no salary was paid during the remainder of his term of service, we think the jury would have been warranted in allowing him the amount which had been fixed by the corporation in 1895. When there has been a contract for service for a year, and the same service is continued for the succeeding year without any new contract, it is to be implied that the parties have assented to the renewal of the original contract. *Wood, Master & Servant*, § 96.

The contention that the action abated by the dissolution of the corporation would undoubtedly have to prevail, were it not for the effect of the Connecticut statute. Chapter 198, § 3396, Gen. St. Conn. 1902. The statute provides that all corporations "which are dissolved by voluntary action, or by decrees of court, or by act of the General Assembly, shall be deemed to continue so far as to enable them to prosecute and defend suits by and against them." It is

argued that this provision does not include corporations of Connecticut, which have been incorporated by a special act of the General Assembly, and only applies to those which have been incorporated under the general laws of the state. The present corporation was originally incorporated under the general laws, and was reorganized pursuant to a special act passed in 1890. The averment of the complaint is that the defendant "is a corporation duly organized and existing under the laws of the state of Connecticut," and the answer admits this averment in hæc verba. The special act of 1890 did not dissolve the old corporation, and may be regarded as amendatory in substance and effect of the existing grant of corporate powers. This view is consistent with the averments and admissions of the pleadings. We think section 3396 applies, and that the action did not abate. Consequently it will not serve any useful purpose to enter upon an analysis of the statutory law of Connecticut previous to the revision of 1902 to ascertain whether section 3396 is intended to apply only to corporations organized under the general law.

The defense that the Connecticut decree was a bar to the action rests upon the following facts: After the present action had been commenced, and in March, 1902, a suit in equity was brought in a Connecticut state court pursuant to the provisions of the Connecticut statutes by certain stockholders of the defendant to obtain a dissolution and wind up the affairs of the corporation. The statute authorized the court in which the suit was brought, among other things, to limit a time not less than four months for creditors to present their claims. The plaintiff was not named or served with process as a party to that suit. In May, 1902, the court made an order that all creditors present their claims within four months. The plaintiff did not prove his claim. In April, 1903, the court made a final decree adjudging, among other things, that all claims against the corporation, including specifically the plaintiff's claim, had been forever barred. The only notice of the order to creditors to prove their claims which was ever given to the plaintiff was by publication in a Connecticut newspaper and the mailing of a copy addressed to him. During all the time from the commencement to the final decree in Connecticut the plaintiff was a citizen and resident of the state of New York.

The Connecticut suit was of the nature of a proceeding in rem, and concludes all creditors of the corporation, as well as all other persons interested in the res, so far as its decree dealt with the assets of the corporation of which the court acquired possession; and this is so whether the creditors were made parties in person or not, or whether or not there was ever any personal service of process upon them, if the substituted service was made in the manner authorized by the statutes of Connecticut; but the decree could not otherwise affect their demands against the corporation, unless these demands were adjudicated after due notice and an opportunity to be heard had been given to them; and this notice could only be effectually given as to nonresidents of the state by personal service of process. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Hart v.*

Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; Cole v. Cunningham, 133 U. S. 107, 114, 10 Sup. Ct. 269, 33 L. Ed. 538; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918. As the Connecticut court never acquired jurisdiction of the person of the plaintiff, it cannot be seriously questioned that its decree could not affect his right to recover in this court. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338; *Leadville Coal Co. v. McCreery*, 141 U. S. 475, 12 Sup. Ct. 28, 35 L. Ed. 824. See, also, *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357.

The judgment is affirmed.

ÆTNA INDEMNITY CO. v. AUTO-TRACTION CO.*

[(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)]

No. 1,260.

1. GUARANTY—INDEMNIFIED GUARANTOR—DISCHARGE.

Under Civ. Code Cal. § 2824, providing that a guarantor who has been indemnified by the principal is liable to the creditor to the extent of the indemnity notwithstanding the creditor, without the guarantor's assent, may have waived the contract or released the principal, where a guarantor had taken security from his principal for the performance of a contract for the manufacture of automobiles, the guarantor was not discharged by the buyer's rescission of the contract after breach by the manufacturer and the commencement of a suit to recover money paid on the contract.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, § 75.]

2. SAME—INDEMNITY—EVIDENCE.

In an action to recover on a guaranty of performance of a contract, evidence held sufficient to establish that the guarantor had taken indemnity from his principal.

3. EVIDENCE—DECLARATIONS OF AGENT.

Where declarations were made by the agent of a guarantor in connection with its assent to plaintiff's rescission of the contract guaranteed and stated reasons for the guarantor's refusal to refund the amount paid by plaintiff under the contract, such declarations were not objectionable as admissions made by an agent concerning past transactions.

In Error to the Circuit Court of the United States for the Northern District of California.

The defendant in error filed a complaint against the plaintiff in error and the Universal Automobile Company, a corporation, in which it alleged: That on June 30, 1903, a contract was made between the Universal Automobile Company, the defendant in error, and A. H. Eddy, in which it was agreed that the automobile company should, within 47 days from the date of the payment of the first installment by the other parties to the agreement, manufacture for them four automobiles for the consideration of \$4,500, of which they were to pay 50 per cent. on the execution of the agreement, 25 per cent. when the vehicles were assembled, and the remaining 25 per cent. upon their delivery. That on October 24, 1903, a further agreement was made between the parties that the time for the completion of said vehicles should be extended to December 1, 1903, and that on the same day, in consideration of such extension, the automobile company, as principal, and the plaintiff in error, as surety, executed to the defendant in error and said Eddy a bond in the sum of \$3,600, conditioned as follows: "The condition of this obligation is such,

*Rehearing denied October 29, 1906.

that if the above bounden Universal Automobile Company, its successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform, the covenants, conditions, and agreements in a certain contract, dated June 30, 1903, executed by said Universal Automobile Company with said Auto-Traction Company and said A. H. Eddy, for the construction and completion of certain automobiles, the time for the construction of which said automobiles has been extended to December 1, 1903, contained, on its or their part to be kept and performed, at the time, to wit, December 1, 1903, and in the manner and form in said contract specified—then the above obligation shall be void; otherwise, to remain in full force and virtue.”

The complaint alleged: That the automobile company never manufactured any of the vehicles, and failed, refused, and neglected so to do. That in pursuance of the contract the defendant in error and said Eddy paid the automobile company on June 30, 1903, \$2,500, and on August 10, 1903, \$1,000. That on December 16, 1903, they served on the plaintiff in error and the automobile company, severally, written notices that on account of the failure of said automobile company to complete and deliver said vehicles, as provided in the agreement, they rescinded said agreement, and demanded the return of the moneys paid, together with interest thereon at 7 per cent. per annum. That before the commencement of the action, the said Eddy assigned and transferred to the defendant in error all his right and interest in said contract and in said bond. That none of said money had been repaid to the defendant in error; wherefore it demanded judgment for \$3,500, and interest thereon at 7 per cent. per annum. The plaintiff in error demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action as against it. The demurrer was sustained. Subsequently the defendant in error filed an amended complaint, setting forth the agreement of June 30, 1903, and the undertaking of guaranty, and alleging the failure of the automobile company to comply with the terms thereof, making no reference to the rescission of the agreement, and alleging a breach of the contract, to the damage of the defendant in error in the sum of \$3,500. The plaintiff in error filed its separate answer to the amended complaint, and, as matter of defense, alleged the rescission of the contract by the defendant in error, both by the written notices above referred to, and by the allegations of the original complaint, in which it was alleged that the contract was rescinded. The action was tried on the issues raised between the plaintiff in error and the defendant in error. A jury trial was waived, and the court made findings of fact. The findings which are pertinent to the questions now presented in this court are in substance the following: That at the time when the plaintiff in error executed the agreement of guaranty, the automobile company, as principal, executed to it a bond of indemnity, wherein and whereby it fully indemnified it against any loss or liability that might be occasioned or caused to it by reason of its execution of said guaranty undertaking. The court further found that notices of rescission were given on or about December 16, 1903, as set forth in the original complaint, and found “that before the service of said notice upon and the delivery of the same to said Aetna Indemnity Company, the said Aetna Indemnity Company consented to the rescission of said contract by said plaintiff and said A. H. Eddy.” The court found, as a conclusion of law, that the defendant in error was entitled to judgment against the plaintiff in error for the sum of \$3,500, with interest from December 23, 1903, at 7 per cent. per annum, and for costs.

Judson C. Brusie and Aylett R. Cotton, for plaintiff in error.
William A. Bowden, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is the contention of the plaintiff in error that the rescission of

the contract released and discharged it from its obligation upon the contract of guaranty; that, by the rescission for nonperformance, the contract was entirely set aside, and the relation between the parties thereto was as if the contract had never been made, and that the party rescinding could recover only upon a quantum meruit, and could not allege a breach of the contract; and that the guarantor could become liable upon his written guaranty only in the event of a breach of the contract which he guaranteed. We can discover no substantial reason for holding that the giving of the notice of rescission or the filing of the original complaint should release the plaintiff in error from its liability as it was sought to be enforced by the amended complaint. There is nothing in either act to show that the defendant in error intended to release the plaintiff in error. On the contrary, the opposite intention is clearly expressed in both. Nor can the plaintiff in error contend that it has in any way been prejudiced by such action of the defendant in error. Its relation to the automobile company was in no wise altered thereby, nor was it prejudiced thereby. The automobile company had done nothing to carry out the contract. It had not even commenced the manufacture of the vehicles. It had broken its contract in toto. It was under obligation to return the purchase money which had been advanced by the other parties thereto, and this was all that was sought to be obtained by either the notice of rescission, the original complaint, or the amended complaint. But whatever may have been the effect of the notice of rescission and the commencement of the action, the judgment is in our opinion sustainable, on the ground that the plaintiff in error had been indemnified upon the liability which it assumed on the bond. In section 2824 of the Civil Code of California it is provided:

"A guarantor who has been indemnified by the principal is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal."

The terms of this statute are sufficiently comprehensive to include the case of a rescission of a contract. The section is taken from the statutes of New York in which the courts of that state have deduced the rule "that a surety taking security from his principal loses his privileges as a surety and becomes a trustee for the creditor." *Moore & Barney v. Paine*, 12 Wend. (N. Y.) 123. See, also, *Smith v. Estate of Steele*, 25 Vt. 427, 60 Am. Dec. 376. But the plaintiff in error questions the sufficiency in law of the evidence to support a finding that it was indemnified. The evidence consists, first, in the letter of the plaintiff in error of date December 4, 1903, written in answer to the demand of the defendant in error for the return of the money which had been advanced on the contract. In that letter it is said:

"As we are fully protected from any loss, we cannot take any steps at this time."

In addition to this, there was the testimony of the attorney for the defendant in error that he had seen the bond given by the automobile company to the plaintiff in error which he said was a bond to protect

the latter "against any possible loss, or any possible liability that might be occasioned or caused" by reason of the bond given for the faithful performance of the contract, that the agent of the plaintiff in error exhibited the document to him in his office. There is testimony also of another attorney for the defendant in error that the agent of the plaintiff in error said to him:

"Give me a little time to see Gen. Hart, who is the president of the Universal Automobile Company, and, if it is as you say, the amount will be paid, because it makes no difference to us; we have got full security; we are fully indemnified by the Universal Automobile Company."

Mr. Eddy testified that he notified the manager of the plaintiff in error that the automobile company had failed to complete the vehicles "and we should hold them, the Ætna Indemnity Company, liable for the money. The manager looked over some papers he had on the desk, and said it did not make any difference to them, that they were wholly protected and we could do whatever we desired in regard to collecting our money." The record shows, moreover, that the agent of the plaintiff in error signed a stipulation by which it was agreed that the indemnity bond should be produced in court on the trial of the cause and in addition to that it appears that he was subpoenaed to produce that instrument at the trial; but that the paper was not produced. The plaintiff in error contends that no more appears from all this evidence than that the Universal Automobile Company executed its bond to the plaintiff in error, and it argues that such an instrument without surety does not amount to indemnity. We do not so understand the evidence. It is true, that the witness who saw the bond testified that it was in the form of a bond given by the Universal Automobile Company to the Ætna Indemnity Company; but it does not appear from that statement that the witness meant to say that it was a bond without a surety. There is more reason to infer from his testimony that it was a bond with surety, for such is the general understanding of the use of the word "bond." It would have been an idle act for the plaintiff in error to take from its principal the latter's own undertaking without surety to hold it harmless. The plaintiff in error had full opportunity to produce the bond in court. It chose not to do so, but to rely upon technical objections and such defects as might be found in the evidence which was offered to prove that it was indemnified. Under those circumstances it cannot complain that it is taken at its word when it said through its manager that it was fully protected from any loss. Every intendment and presumption is against the party who might remove all doubt by producing the document. *Cross v. Bell*, 34 N. H. 82.

The plaintiff in error objected to the admission in evidence of the letter of the plaintiff in error and the declarations of its manager concerning the indemnity received from the automobile company, on the ground that the manager or officer of a corporation cannot make admissions as to past transactions so as to bind the corporation, and contends that it was error to admit such evidence. We find no merit in the contention. The declarations were made

in connection with the assent of the plaintiff in error to the rescission of the contract, and as ground for refusing to meet the obligation which it had assumed, and to pay the money which was due to the defendant in error, and as ground for relegating the defendant in error to his legal remedy by an action. But, aside from the evidence of such declarations, there was sufficient in the testimony of the witness who saw and examined the bond to sustain the finding of the court that the plaintiff in error was indemnified.

The judgment of the Circuit Court is affirmed.

PENNSYLVANIA R. CO. v. DURKEE.

(Circuit Court of Appeals, Second Circuit. June 7, 1906. On Rehearing, July 6, 1906.)

No. 273.

EVIDENCE—PRIVILEGED COMMUNICATIONS—INFERENCE FROM REFUSAL TO WAIVE STATUTORY PROHIBITION.

Code Civ. Proc. N. Y. §§ 834, 836, which provide that a physician "shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," unless such provision is expressly waived by the patient on the trial or by stipulation of counsel, enacts a rule of public policy as well as of private right, which can only be abrogated by an express waiver in the manner provided, and no inference may be drawn by a jury adverse to the cause of a patient because of his failure or refusal to make such waiver.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 97.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon writ of error to review a judgment entered upon a verdict in favor of defendant in error, who was plaintiff below. The action was to recover damages for personal injuries sustained in consequence of a collision between two trains; the plaintiff being at the time a passenger upon one of them.

Henry G. Ward, for plaintiff in error.

A. G. Schuerman, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. There are only two assignments of error; one to a refusal to charge a request, the other to instructions given to the jury upon refusing to charge as requested. The request was:

"That the jury have a right to infer, from the refusal of the plaintiff to permit Dr. Peterson to testify as to what he treated [plaintiff] for and what he found her condition to be, that his testimony would be unfavorable to her."

In refusing it the court said:

"I charge, on the other hand, that it is her privilege and her right, awarded to her by the law, to object to her physician giving any evidence, and

that you are not permitted to infer, because she exercised that right, that the physician would have given evidence in one way or the other, favorable or unfavorable. Simply, the law boldly and wholly shuts it out, except at her instigation; but that she was treated by Dr. Peterson appears according to his statement, and you have a right to consider that fact, and only that, as far as his evidence is concerned."

The accident happened February 21, 1901, and it was alleged that as a result plaintiff received a severe concussion of the spine, severe injuries to the head and nerves of the head and nervous system, and to the nerves of the body and limbs, and a shriveling and wasting of the left arm and hand resulting therefrom. It is quite apparent that it might be desirable for the defendant to show, if it could, that she had suffered from some of these nervous injuries before the accident. Upon the trial a witness, Dr. Peterson, was called by the defendant. After qualifying as a specialist in nervous and mental diseases, he testified that the plaintiff was sent to consult him by another physician, and that he saw her professionally four times between October 31, 1895, and March 1, 1898. He was then asked "for what trouble the plaintiff consulted him, and what he found to be her physical condition." This was objected to as "incompetent, as a privileged communication, and against the statute." The objection was sustained.

The sections of the New York Code of Civil Procedure which regulate the subject are as follows:

"Sec. 834. A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity; unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurse may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry."

Section 833 contains similar provisions as to clergymen, and section 835 as to attorneys and counselors.

"Sec. 836. The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the party confessing, the patient or the client. * * * The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such waiver. But the attorneys for the respective parties, may prior to the trial, stipulate for such waiver, and the same shall be deemed sufficient therefor."

In the brief of defendant in error it is asserted that the privilege accorded to the patient under section 834 may be waived by failure to object, and cannot be rendered effectual except by the interposition of an objection. No cases are cited in support of this proposition, and in the absence of any controlling decision we would be inclined to hold the converse. Section 834 in explicit and peremptory language forbids the physician from disclosing any information obtained in a professional capacity, and it is not apparent why such prohibition should not bind him, whether the defendant sits silent or raises an objection. Until the express waiver in open court, which section 836 provides for, it is the duty of the witness to refuse to betray the confidence reposed

in him as a professional man, and the trial judge would no doubt of his own motion prevent any disclosures which the statute forbids. Had it been the intention of the Legislature that the prohibition of the statute should be operative only when the patient took affirmative action to exclude the testimony by interposing an objection, presumably it would have used language appropriate to indicate such an intention. On the contrary, it has placed the prohibition on the statute book, to be lifted only upon the taking of express affirmative action by the patient to obtain a disclosure by the physician. The situation is very different from that arising when a party to a civil action, who apparently must be cognizant of the facts of some controverted issue, avoids cross-examination by not going on the witness stand, or persuades some witness to remain out of reach of a subpoena, or destroys documentary evidence. The prohibition against disclosure of professional secrets is manifestly an exercise of public policy. It secures a right to every individual which he is under no obligation to waive or abandon. "The statements of an attending physician are excluded, not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it." *Davis v. Supreme Lodge*, 165 N. Y. 159, 58 N. E. 891.

To hold that, because the patient does not waive or abandon the prohibition, inferences adverse to his side of the controversy may be drawn by the jury, would be to fritter away the protection it was intended to afford. When it is the legal right of a party not to have some specific piece of testimony marshaled against him, he may exercise that right without making it the subject of comment for the jury. The law of evidence provides that the copy of a document shall not be proved until the failure to produce the original shall be satisfactorily explained. When a copy is offered, the party against whom it is offered may, if he choose, waive this particular objection; but, if he does not, are the jury to be allowed to draw unfavorable inferences from his insisting upon the cause being tried in the orderly way in which the law provides? In a case where communications between client and counsel were inquired about, Lord Chelmsford said:

"The exclusion of such evidence is for the general interest of the community, and therefore to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which for public purposes the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?" *Wentworth v. Lloyd*, 10 House of Lords, 589.

To a similar effect are *Nat. Ger. Am. Bank v. Lawrence*, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363; *Lane v. Spokane Falls R. Co.*, 21 Wash. 119, 59 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821; *McConnell v. City of Osage*, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778.

Plaintiff in error cites two decisions in which it is held that when the defendant in a criminal trial—who, under the statute, may, if he pleases, call his wife as a witness, but against whom his wife could not be compelled to testify—fails to call his wife, the jury may infer that her testimony would have been unfavorable to him. *Commonwealth v. Weber*, 167 Penn. 153, 31 Atl. 481, and *People v. Hovey*, 92 N. Y. 554. In neither of these is there any discussion of the question or any reference to authority. In the New York case the decision is obiter, because the point was raised upon exception to the charge, which exception was taken only after the trial had terminated; the jury having brought in their verdict. The court held that such exception “did not present any question of law for the consideration of an appellate court.” The precise question as to privilege in the case of a husband or wife charged with crime was considered in the following cases. In each of them the question was discussed and authorities cited. The conclusion reached was that the rule as to drawing unfavorable inferences from the failure of a party to produce evidence “is not to be applied to those cases where the law, on grounds of public policy, has established privileges against being compelled to produce it,” and also that, “if the failure to produce the testimony is to be construed as a circumstance against the party, his privilege would be annulled and entirely destroyed.” *Johnson v. State*, 63 Miss. 316; *Newcomb v. State*, 37 Miss. 383; *Knowles v. People*, 15 Mich. 408.

The Appellate Division of the Supreme Court of New York for the First Department has apparently reached a different conclusion in *Deutschmann v. Third Ave. R. R.*, 87 App. Div. 503, 84 N. Y. Supp. 887. That case seems not to be in accord with the general consensus of judicial opinion, and, since the question is not one of interpretation of a state statute, but deals only with the general law of evidence, there is no reason apparent why this court should follow it.

The judgment is affirmed

Petition for Rehearing.

PER CURIAM. Authorities now cited which were not on the original briefs indicate that in the state courts the privileged testimony is admitted unless objection is interposed. That circumstance, however, does not modify the conclusion expressed in our opinion disposing of the cause, namely, that the trial judge correctly instructed the jury because the rule as to drawing unfavorable inferences from failure to produce testimony is not to be applied where the law, on grounds of public policy, has established privileges against being compelled to produce it.

The petition for rehearing is denied.

ATLANTIC & M. G. S. S. CO. v. GUGGENHEIM et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.),

No. 257.

1. SHIPPING—ACTION FOR DEMURRAGE—DEFENSES.

Where two vessels, chartered to carry a number of cargoes of coke between two ports, were accepted and loaded under the charter when tendered, and the freight was paid without objection, the charterer cannot set up a claimed breach of the charter in failing to keep the vessels at regular intervals apart as a defense to an action for demurrage for delay in loading where such alleged breach did not cause or contribute to the delay or otherwise cause damage to the charterer.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 587, 596.]

Demurrage, see notes to Philadelphia & R. R. Co. v. Peebles, 14 C. C. A. 637; Randall v. Sprague, 21 C. C. A. 337; Haggerman v. Norton, 46 C. C. A. 4.]

2. SAME.

Under a charter for the carriage of cargoes of coke which provided that it should be loaded on the vessels "as fast as they can receive the same," the owner is entitled to demurrage for delay in loading caused by the failure of the charterer to have a supply of coke on hand at the port of loading.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 572-574.]

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from a decree allowing the libellant \$2,474.46 for demurrage, interest, and costs, growing out of the detention by respondents of libellant's schooners Douglass and Bronson at Pensacola, Fla., on their second charter trip from that place to Tampico, Mex.

For opinion below, see 123 Fed. 330.

Charles S. Haight and John W. Griffin, for appellants.

J. Parker Kirlin and Eliot Tuckerman, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The questions involved received very careful consideration from the District Judge and the commissioner, to whom was referred the question of damages, and but little need be added to their opinions.

Under the agreement, contained in the letters which passed between the parties, the steamship company was to furnish two schooners to carry coke for the Guggenheims from Pensacola, Fla., to Tampico, Mex. The letter of the steamship company, dated July 23, 1898, concludes with the following statement:

"The first vessel is now about to leave Boston for Baltimore to load for Tampico, and proceeds thence to Pensacola, light, to enter on this contract. The second vessel to follow about two or three weeks later. We are to keep the vessels a regular period apart as much as possible, giving you full information as to their movements."

On her second trip the Douglass arrived at Pensacola on Friday, February 17, 1899. She was not loaded until February 27. The

commissioner allowed her demurrage for 6 days and 7½ hours. The Bronson arrived February 21st. Her reasonable time for loading expired on the 25th, when she went on demurrage. The loading was not completed until March 9th. She was allowed demurrage for 12 days and 5½ hours. Assuming that the statement at the close of libelant's letter, above quoted, can be construed into a positive warranty that the facts were as stated, and, also as an unconditional agreement, that the vessels should be kept about two or three weeks apart, the time to have taken advantage of a breach of this character was when the vessels reached Pensacola for the first trip. The Douglass reached there January 16, 1899, and the Bronson three days later. The respondents now contend that the former should have reached Pensacola on September 26, 1898, and the latter about October 10, 1898, and that their failure to do so was a breach of the agreement by the libelant. Notwithstanding this contention, the respondents accepted the schooners.

The inferences to be drawn from this conduct are two:

First. The respondents did not regard the language quoted as anything more than a statement of libelant's information, at the time, of the location of the Douglass and a promise to accede to respondents' wishes, as far as possible, to keep the vessels apart.

Second. If the respondents regarded the language quoted as an express agreement to deliver the vessels not later than October, it would seem that they should not have accepted them in January as a good delivery under the charter.

Two or three months after the charter complaints were made that the vessels were being delayed unduly and the libelant proposed to cancel the charter if respondents wished to do so, provided they would pay the expense to which the libelant had been put in the matter. This was declined and the agreement continued in force. Although various letters passed between the parties and complaints were made by the respondents regarding other matters the suggestion that they had the right of cancellation seems never to have been made, and both parties, after the acceptance of the schooners, proceeded upon the theory that the charter was in force. It is now, we think, too late for the respondents to avail themselves of objections which should have been made in limine. That the three day interval between the arrival of the vessels in January was not regarded as too short may be inferred from the fact that on their first and third voyages the Douglass was loaded in 45 and 36 hours, and the Bronson in 48 and 31 hours, respectively. So long as there was cargo ready for delivery there seems to have been no difficulty in getting it aboard and giving the vessels quick dispatch. The difficulty arose not because the time was limited, but because the supply of coke was limited. The libelant's promise to give the respondents full information of the vessels' movements was faithfully kept. They knew, more than three weeks before the second voyage began, when the vessels would arrive at Pensacola and had ample time to procure cargoes. The vessels were farther apart on this voyage than on the previous one. No complaint was made at any

time that they were not farther apart and no proof has been offered to show that the failure to provide more time between the arrivals of the vessels has caused damage to the respondents.

It will be observed that by no process of construction can the charter be interpreted as containing a positive covenant that the vessels should be kept apart three weeks or two weeks or ten days or any stated period; the language is "a regular period apart as much as possible." We think the libelant fully complied with the agreement unless an entirely unwarranted construction be given it. The proposition that the respondents were relieved of their obligation to supply cargo because of weather conditions is unsupported by proof and is insufficient in law. The charter provided that the coke was to be loaded on the schooners "as fast as they can receive the same." It was not so loaded. The schooners could have received the coke as fast as they did on the first and third voyages and if it had been so delivered there would have been no claim for demurrage.

The respondents seek to construe the charter as if it read:

"The coke is to be loaded on board the vessels as fast as it is received at the wharf of the Louisville & Nashville Railroad Company at Pensacola."

It is enough that it does not so read. The respondents covenanted to supply the schooners with cargo; it was their duty to do so; they failed in this duty and the failure was the sole source of the demurrage.

The master of the Bronson testified:

"Q. What was the reason for this delay in loading? A. Want of cargo. There was no coke there. It would come along in driblets; and some days we would get two cars, some days three and some days not any. Q. Would you be loaded at night during this period if coke came? A. If coke came we would. Q. What sort of weather was it at Pensacola during this second trip? A. The weather was good and mild and pleasant."

Without pursuing the discussion further it suffices to say that we agree with the District Court in the conclusions reached. We are of the opinion:

First. That the statement in the charter that the Douglass "is now [July 28th] about to leave Boston" was not an express warranty that she would reach Pensacola in September or October.

Second. That there was no agreement to keep the vessels apart for two or three weeks or for any stated period.

Third. Assuming that the charter contained such provisions they were conditions precedent which could be waived.

Fourth. That in accepting the vessels without objection and in paying the freight without notice or question, the respondents waived the breach, assuming that there was one.

Fifth. If the language quoted, *supra*, constituted a condition precedent and if there was a breach by the libelant and no waiver by the respondents it was still incumbent on the latter to prove that they suffered damage by reason of such breach. This they have failed to do.

Sixth. That on the voyage in question the vessels were kept a regular period apart, ample time being allowed to load the first before the arrival of the second, if cargo had been available.

Seventh. That the failure to provide cargo was the fault of the respondents for which the libelant is in no way responsible.

The commissioner, to whom the question of damages was referred, made a careful and conservative report and we agree with the District Judge in thinking that the exceptions thereto are without merit.

The decree is affirmed with interest and costs.

THE SARNIA.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 225.

1. SEAMEN—INJURIES—TREATMENT.

Where a seaman sustained a trifling injury to his hand, and after being treated by a physician it grew somewhat worse until the next port was reached, where it was again treated by a competent surgeon, who advised that the seaman remain in a hospital, which, however, he did not do, because of his fear of yellow fever, the ship was not liable for its failure to overrule his objection and require him so to remain; the physician having also advised that his injury was not so serious but that he could continue his voyage with comparative safety.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 39-44.]

2. SAME—EVIDENCE.

On a libel against a vessel by a seaman for alleged improper treatment of an injury, evidence *held* insufficient to warrant finding that the vessel's officers were guilty of negligence.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, in favor of libelant for personal injuries sustained while on a voyage from New York to the West Indies and return in July, 1904. The opinion of the District Judge is reported in 137 Fed. 952.

P. S. Dudley, for appellant.

W. H. Smith, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. Before leaving port, while hauling in to shift the vessel from one berth to another, a loose wire of the cable pricked libelant's right hand. No negligence on the part of the ship is charged, so far as the original injury is concerned, but it is contended that he did not receive the subsequent care to which as a seaman he was entitled. The hand gave him no trouble while in the port of New York. He worked just as well as before. But after three days from their sailing it swelled up and pained

him very much. He used oil and bread to put on the swelling and the next day called it to the attention of the first officer and captain. The first officer relieved him of work except at the wheel, and, upon his complaining, of that also; poulticed the hand for a day or two and took off some of the hard skin with a knife. Six days after leaving New York the Sarnia reached Kingston, and the captain at once called in a duly qualified physician, who made an examination, treated the hand with warm antiseptic applications, and the next day made a free incision, and there was a free discharge of pus. He diagnosed the trouble as a "whitlow" and dressed the wound with antiseptic dressing. Greco asked to be left in hospital at Kingston, but the doctor advised the ship's officers that it was unnecessary to leave him in hospital, that he could remain on board and the treatment be carried out there, and that he would probably recover in a week or 10 days. The doctor gave the chief officer instructions as to bathing, care, and dressing of the wound. The next day the vessel sailed for Port Limon, touching at Port Columbus, where there was no doctor, and at Carthaga, where they stayed only four hours. The voyage from Kingston to Port Limon occupied six days, during which time the chief officer attended to his hand every day. The libellant says he "cut it every day." The chief officer says he did not cut it, but took out pus every day as the Kingston doctor had instructed him. Probably the pain of that operation made the plaintiff believe that he was being cut. Greco admits that the first officer "put on some kind of remedy" each day and the mate's statement that he carefully obeyed the doctor's instructions is uncontradicted and inherently probable. It should be noted that this was not merely a rough seaman's effort to follow medical directions. The first officer was certificated under the German law to serve as mate on German steamships. That law required him to study for eight months in a medical school and to pass an examination, all of which he had done, and held certificate thereof.

By the time they reached Port Limon the hand was worse. Greco was at once put in charge of a competent surgeon who saw and treated him twice a day for the four days the ship remained there. The libellant says that he asked to be allowed to remain in hospital there. This is disputed by the ship's officers, and they are corroborated by the entirely disinterested testimony of Dr. Steggall, who says that he at first advised the transfer of the man from the ship to the hospital, but, upon asking the libellant if he would go to the hospital, the latter refused on account of his fear of the Limon climate in midsummer. It is at times afflicted with yellow fever. Thereupon the doctor told the ship's officers that the man could perfectly well go to New York and would receive better treatment when he got there. He also gave the first officer instructions as to treatment to be administered on the voyage home. He testified:

"The libellant's hand showed noticeable improvement during my treatment of same. I used an antiseptic treatment, i. e., lotions and dressings, and I advised the chief officer to administer the same daily during the trip to

New York. The patient needed daily attendance, and I so instructed the officer in question. The hand was suppurating, but not very much. Otherwise I would not have allowed him to go."

He sent bandages, ointment, and some solution on board for use in dressing the hand. That the decision to return to New York was in fact the doctor's seems entirely clear. The captain testified:

"If the doctor saw him four days, every day twice, he must know whether it was necessary to leave him in the hospital, or not. I am not a doctor. I took the doctor's advice. * * * He said if we cleaned the hand every day it would be sufficient for New York."

On the return voyage the *Sarnia* touched at Kingston for mail and passengers in the middle of the night and reached New York in seven days. The libelant was at once sent to a hospital, when the hand was found to be in very bad condition, the pus having burrowed extensively among the tendons, and the result is that the hand is permanently crippled. As to treatment on the return voyage there is a conflict of testimony. The libelant says the mate medicated his hand only the first day and then abandoned it and left it with the waitress. The chief officer insists that he dressed the hand every day at least once cleansing it and using the materials the doctor had sent, and that the stewardess was present and assisted. There is some indication that on some days she also dressed it a second time. The libelant admits that the stewardess (waitress, he calls her) dressed it every day with "some kind of carbolic acid and put some kind of paste over it"; and says that the paste was all exhausted before they reached New York. Since these are the materials the doctor sent aboard for the purpose, it would certainly seem that the doctor's instructions were carried out.

We are unable to concur in the conclusion that the ship is responsible for the unfortunate result. The District Judge held that the libelant should have been left in the hospital at Kingston in conformity with his request. This seems too severe a rule to apply. The expressed desire of a man with an injury apparently not serious is not to be taken as controlling. The question to be determined was a medical one, the advice of a competent physician was sought and followed, and the ship's officers should not be held negligent because they followed his advice, especially where the injury was of an apparently trifling character. As to leaving him in the hospital at Port Limon, the District Judge says that it is immaterial whether or not the libelant wished to be left there. But this was not a mere matter of preference. It was a choice of evils. When a man injured, even as Greco was, protests against being left unacclimated in mid-summer in a yellow-fever port, it is a very serious responsibility to assume to overrule his protest and expose him to what he may reasonably assume to be a deadly peril. Had he been left there and his hand healed quickly, but with the result of bringing him down with an attack of yellow fever, it might well be contended that the master was inhuman in not heeding his protest and bringing him back to the port of shipment, especially since the doctor gave assurance that the voyage might be made without risk to the hand. We are not

inclined to hold the ship liable, because the master, relying on that assurance, acceded to libellant's expressed wish. The District Judge seems to have been of the impression that the libellant was neglected, but the evidence in our opinion does not warrant such a finding. It is said that the first officer discovered the formation of pus only at Port Limon. On the contrary, he discovered it as soon as the doctor opened the swelling at Kingston, and during the six days' voyage to Port Limon tried every day to expel as much pus as he could (the libellant admits this) and followed most carefully the doctor's instructions. The phrase "some treatment was attempted" does not quite accurately describe what was done. The treatment by the chief officer and stewardess is criticized as "useless, so far as any favorable results were concerned." The test of success seems hardly a fair one, so long as they followed the instructions and used the materials and dressings with which the doctor supplied them. It is stated that the chief officer "did not apparently follow the instructions given by the physician at Kingston, but substituted a method of his own which he says he learned at school." There is no evidence to warrant such a finding. He followed the doctor's instructions closely. The witness' use of the word "school" did not import some boyish experimentation, but referred to the school where he received his eight months' medical instruction. We cannot find that Greco was negligently treated by the ship's officers. If the doctors made some error of diagnosis, as the most competent physicians and surgeons sometimes do, and thus prescribed a treatment not sufficient to insure safe return to the United States, the fault should not be charged to those who faithfully administered that treatment.

Undoubtedly a seaman who is injured, even without fault of the ship, should be properly cared for and afforded prompt and competent medical and surgical treatment, so far as the conditions (nearness to port, etc.) may admit. The libellant was relieved from duty, attention was given to him at once, and was continued till port was reached. Both at Kingston and at Port Limon he was at once afforded medical and surgical treatment. The doctors may each have made a serious mistake in this particular case, but certainly they were "competent." The one at Kingston (where claimant has an agency) was the one regularly employed, when necessary, by the American Packet Company. He was a "bachelor of medicine and master of surgery, Edinburgh University 1890," who after three years' clinical work in London, Paris, and Edinburgh, located in Jamaica, where he has been in practice for 11 years. The doctor at Port Limon was graduated from the Royal College of Surgeons of England and the Royal College of Physicians of London in 1892, was two years in the Royal Mail Steam Packet Company's service and then, in 1894, assumed charge of the hospital of the Costa Rica railroad at Port Limon, where he has been ever since. The ship's officers might fairly be entitled to conform their conduct touching any medical or surgical question to the instructions of men thus qualified to decide it.

Reference is made to *The Iroquois*, 118 Fed. 1005, 55 C. C. A. 497; *The Eva B. Hall* (D. C.) 114 Fed. 755; *The Troop*, 128 Fed. 856.

63 C. C. A. 584; and *The Svealand*, 136 Fed. 109, 69 C. C. A. 97. A perusal of the facts set forth in those cases will show how essentially different is the one at bar. To hold the *Sarnia* responsible upon the record here presented would be to extend the liability of the ship far beyond the point to which it has been carried in any reported case.

The decree is reversed with costs, and cause remanded with instructions to dismiss the libel.

THE LYNDHURST.

(Circuit Court of Appeals, Second Circuit. May 24, 1906.)

No. 207.

TOWAGE—INSECURE FASTENING OF HAWSER—LIABILITY OF TUG FOR NEGLIGENCE OF MASTER OF TOW.

Where a canal boat at the time she was taken in tow by a tug had a master on board who in accordance with the usual custom undertook to make fast the towline on such boat, the tug is not responsible for his negligence in performing such duty resulting in an injury to the tow through her going adrift by reason of the insecure fastening of the line and coming into collision with other vessels.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 24-26.]

Appeal from the District Court of the United States for the Southern District of New York.

The cause comes here upon appeal from a decree holding the steamtug *Lyndhurst* responsible for damages done to her tow, the canal boat *Philip Rafferty*, which on March 13, 1897, was in collision with a car float lying at the pier foot of Gansevoort street, North river. The opinion in the District Court will be found in 129 Fed. 843.

J. K. Symmers, for appellant.

La Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The District Judge thus briefly sets forth the circumstances of the collision:

"The boat [the *Rafferty*] had been lying stern out, light, outside of two other boats fastened on the upper side of Thirteenth Street [Pier] and was taken in tow there, about 7 o'clock in the morning by the tug, to be towed to Edgewater, N. J., for a load of coal, on a hawser, furnished by the tug and leading from her stern. [The tug had a barge on each side and therefore backed into the slip between 13th and 14th streets to pick up the canal boat.] The loop of the hawser was put by the master of the boat over her stern cleat, under directions from the tug, but it shortly afterwards slipped off, letting the boat go adrift and come in contact with the float, causing the damage complained of. The tide was ebb and the wind of some force from the northwest. The tug's liability turns principally upon the question whether she was negligent in making the boat fast. The libellant contends that the hawser was frozen and stiff and that it slipped off for that reason. Also that the tug was in fault in several other particulars, among them, that the tug failed to see that the tow was properly fastened and

permitted her to come in violent collision with a lighter. The claimant contends that the accident was wholly produced by the negligence of the master of the boat in that he did not properly fasten the hawser to his cleat."

As to the first allegation of fault the District Judge held that the weight of evidence shows that the hawser was not frozen. "The weather," he says, "had been cold, but not freezing, although by the weather records the thermometer got down to 30 degrees about 8 o'clock. Prior to that hour it had ranged from 45 degrees at 1 a. m. to 31 degrees at 7 a. m., and for the several prior days, the mean temperature was not under 45 degrees. I do not see, in view of the evidence, how the theory that the hawser was frozen can be sustained." In this conclusion we fully concur.

As to the liability of the tug he held as follows:

"I conclude that the accident was either due to the tug's omitting to see that the loop of the hawser was carefully put over the cleat, or to its being shaken loose by collision with the lighter, which was due to negligent towing."

The latter proposition may be first considered. The evidence is not satisfactory and presents many contradictions, which is not surprising in view of the circumstance that no testimony was taken until more than three years after the accident. The testimony was all taken by deposition and four years more elapsed before the cause was tried. The master of the Rafferty testified to two separate specific contacts before collision with the car float at Gansevoort Street Pier. He says that as the tug pulled him out of the slip he struck the spiles on the end of the Thirteenth Street Dock on the northwest corner of the dock. The witnesses from the tug insist that while the Rafferty was in tow she did not come in contact with this dock. The tide was a strong ebb, and there was a fresh breeze from the northwest. The tug was hauling the canal boat out stern first intending to take her over to the lee of the further shore, and there rearrange her in the tow for her destination. The canal boat started from her berth, about 20 feet inside of the end of the pier, and some 60 or 70 feet (the width of the two other boats) north of it. The hawser was about 20 or 25 feet and when the tug began hauling she (the tug) was heading diagonally across the river. Under these circumstances it might be that the effect of wind and tide before the tug got under full headway would bring the flotilla down so near the dock as to result in a contact between the spiles and the tow. But in that event, the stern being held up by the pull of the tug, the bow of the tow would tail with the tide diagonally across and down and the part brought into such contact would be the bow and perhaps some part of the port side forward. The master of the tow, however, testified positively both on direct and cross that he struck the spiles "about amidships, or maybe, a little forward of amidships, * * * on the starboard side." To do this his boat would have to be heading at least diagonally up stream, a position which she could not be in while the tug was towing her stern first, but which she would tend to assume if she were cast loose. In like man-

ner he testified that he came into contact with the lighter, which lay at the end of little Twelfth street, broadside to broadside, striking with his starboard side with the head up-stream. The chart shows that little Twelfth Street Pier lies a considerable distance inshore from the end of the Thirteenth Street Pier, and it is difficult to conceive any theory which will account for the tow reaching it while still attached to the tug. To do so the tug must immediately after starting for the Jersey shore have backed or stopped her headway, for no known or suggested reason. The narrative of the transaction given by the master of the Rafferty harmonizes fully with the theory that the hawser slipped off before the first contact with the spiles. He admits that he did not know when it slipped; was busy with fenders to ease contact with the lighter when they called to him from the tug that the hawser was gone. How long it had been gone, he does not profess to know. The witnesses from the tug are positive that the tow made no contacts until after the hawser slipped; and, in our opinion, the clear weight of testimony is to that effect. Therefore, we cannot find the tug in fault for shaking the hawser loose by negligently allowing the tow to come into collision with the lighter or the spiles.

The cause of the collisions which the Rafferty sustained was failure to put the loop of the hawser carefully over the cleat. In that proposition we concur with the District Judge, but we cannot assent to the conclusion that the tug is to be held liable for that want of care. It is suggested that in putting the loop on his cleat the master of the tow was acting as the servant of the tug. We have already held that proposition unsound in a recent decision (*Guinan v. Steam-tug Flushing* [April 2, 1906] 145 Fed. 614.) It is also suggested that it is the duty of the tug to itself make fast the lines upon all vessels which it takes in tow. The authorities cited to support such propositions do not go to that extent.

In *The Olive Baker*, 4 Ben. 173, Fed. Cas. No. 10,489, the accident was caused, or promoted, by the breaking of a line which broke apparently because it had been slackened. The slackening had been done by the captain of the tow, and the tug was held responsible. But the evidence showed that the captain of the *Olive Baker* was cognizant of the slackening and slowed down so as to enable the captain of the barge to slacken it. The court held that the "*Olive Baker*, in undertaking to tow the barge, made herself responsible for any arrangement of the towing lines that was known to and acquiesced in by her. Whatever slackening of the line took place in this case was acquiesced in by the *Olive Baker*."

In *The Pres. Briarly* (C. C.) 24 Fed. 478, the tug was held in fault "in not seeing that the tow was properly made up, and secured with lines of proper strength. Half-inch lines, even new, are not sufficient for the securing together of large barges to be towed on the Mississippi river."

In *The Sweepstakes*, 1 Brown Adm. 509, Fed. Cas. No. 13,687, the court said:

"Undoubtedly it was the duty of the tug to see that the line was securely fastened no matter what mode of fastening was adopted, and so as to hold

in all emergencies likely to happen whether ordinary or extraordinary, and the fact that it did not so hold is the best evidence that the duty was not performed."

The court, however, was dealing with failure to secure the end of the hawser which was attached to the tug. It said:

"I know of no safe rule other than to hold tugs responsible *prima facie* in all cases, for injuries resulting from the tow line slipping or giving way from its fastening upon the tug."

In *The Quickstep*, 9 Wall. 665, 19 L. Ed. 767, the court laid down the general rule:

"It was the duty of the tug, as the captains of the canal boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened. This was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault."

But the trouble in that cause arose from the parting of a line connecting one of the rear boats with the fleet and the subsequent breaking of a bridle-line which held the two forward boats together. The lines were not sufficiently strong.

In *Pedersen v. John D. Spreckles Co.*, 87 Fed. 938, 31 C. C. A. 308, the accident happened because the towing hawser was fastened to the wrong bitt on the schooner. After referring to the authorities which had been cited and holding, in general language, that in the case of canal boats and barges, "which have no life, voice, or control in making up the tow," it is the duty of the tug to see that the lines of the tow are properly, sufficiently, and securely fastened, the court proceeds:

"But such cases have no application to a case like this, where the schooner had its own officers and crew on board, and, in pursuance of the custom in this respect, took full charge, management, and control in these matters. * * * The testimony shows, without conflict, that it is the custom, in all cases where the tow has its own officers and crew on board and in charge, for the officers of the vessel to arrange all the preliminary matters, such as placing, and making fast the towline. * * * The law applicable to this case is that both the tug and the tow must exercise reasonable care and skill. While the tug was bound to exercise reasonable care and skill, she had the right to expect corresponding care and skill on the part of the schooner."

The case at bar seems to come within these principles. It is true that the master and crew of the canal boat consisted of but one man, her master, but he was as well able to hitch the loop of a hawser over a bitt or a cleat as a dozen men would be. The witnesses for the libellant themselves testify that it is customary for captains of canal boats to fasten hawsers on their own boats. This being so it would seem to be an undue application of the general language of the authorities *supra* to require the tug boat to send a man on board each boat to fasten the towing line in the presence of a master who must be assumed to be competent to make it fast himself. We are satisfied that the several contacts of the tow happened, because the hawser

was not carefully adjusted by her master over the designated cleat, and that for his carelessness in that respect the tug is not liable.

The decree is reversed, with costs, and cause remanded, with instructions to dismiss the libel, with costs.

DISSTON et al. v. McCLAIN, Internal Revenue Collector.

(Circuit Court of Appeals, Third Circuit. July 9, 1906.)

No. 33.

1. INTERNAL REVENUE—LEGACY TAXES—PASSING OF LEGACY.

Sections 29, 30, War Revenue Act June 13, 1898, c. 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308], did not impose a tax on legacies of personal estate on the ground that they were technically vested, but only upon such legacies when they came into actual possession and enjoyment, and the turning over of such a legacy to the beneficiary, and the payment of the tax were intended to be contemporaneous.

2. SAME—ANNUITY CHARGED ON INCOME OF ESTATE.

The personal estate of a testator is not subject to the payment of a legacy tax under sections 29, 30, War Revenue Act June 13, 1898, c. 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308], as a legacy of an entirety for life merely because a fixed income for life is to be paid to a beneficiary out of the whole income of the real and personal estate in the hands of trustees, and is primarily chargeable under the state law upon the personality but in such case the specific payments only are taxable as the same from time to time become due and payable to the legatee.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below see 143 Fed. 191.

Michael J. Ryan, for plaintiffs in error.

Jasper Yeates Brinton and J. Whitaker Thompson, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. The plaintiffs in error were plaintiffs below, and, as executors of the testator named, brought their action to recover from the defendant, late Collector of Internal Revenue in Pennsylvania, the sum of \$14,926.01, as for taxes alleged to have been unlawfully collected and paid by plaintiffs to defendant under protest.

The testator, Horace C. Disston, in his lifetime a resident of Philadelphia and citizen of the state of Pennsylvania, died on June 13, 1900, having first made his last will and testament, duly probated on June 19, 1900, whereby he appointed the plaintiffs in error his executors, who accepted and qualified as such. The defendant, Penrose McClain, was Collector of Internal Revenue for the United States, in and for the First Revenue District of Pennsylvania, at the time the alleged excessive and illegal payment of taxes was made to him by the said plaintiffs, to wit, on June 21, 1901. The statement of claim sets out certain portions of the will of the said Horace C. Disston, as follows:

"All the rest, residue and remainder of my estate, real, personal and mixed of whatsoever kind and wheresoever situated, I give, devise and bequeath unto my brother, William Disston, my friend, George McGowan, and the Tacony Saving Fund Safe Deposit, Title and Trust Company, in trust nevertheless, for the following uses and purposes: To keep the same invested in such securities as I may have or to invest the same as they may determine, and from the income arising from all my said estate to pay first to my beloved friend, Rachael Asch, the sum of fifteen thousand dollars per year during all the term of her natural life—such payment to be made to her by them in quarterly instalments of three thousand seven hundred and fifty dollars each, and the first instalment to be paid to her three months after my decease and thereafter quarterly, as aforesaid. Second. To invest the balance of said income in such securities as they may decide upon until the death of the said Rachael Asch. Third. Immediately upon the death of the said Rachael Asch, I will and direct that the trust estate hereby created shall cease and determine and that the trustees aforesaid shall pay over the whole of my said estate absolutely and free and clear of any trust to such persons and to such charities and in such proportions and amounts as I may direct in a paper signed by me and addressed to them, and which paper I intend to forthwith prepare. Should any person or charity so designated by me be unable from any cause to take the amount or interest so fixed and named by me, then I will and direct that such portion or interest and all the rest, residue and remainder of my estate that may be undisposed of shall be divided according to the intestate laws of the state of Pennsylvania."

Under this provision of the will, the said Rachael Asch received from the said executors the sum of \$3,750 every three months, commencing September 13, 1900, down to and including June 13, 1902, amounting in the aggregate to the sum of \$30,000, on which, as having been vested in possession or enjoyment of the said Rachael Asch prior to July 1, 1902, the date at which the repeal of the war revenue act took effect, it was claimed by plaintiffs that a tax of \$2,250, and no more, became due to the United States. The statement of claim avers that, nevertheless, on June 21, 1901, the said defendant caused to be levied and assessed on the interest of the said Rachael Asch, under the above-recited provision of the will, the sum of \$16,871.26, which sum was paid on said date under protest by the plaintiffs to the said defendant; and that subsequently, to wit, on or about May 26, 1902, the plaintiffs did, in compliance with the rules and regulations thereto prescribed, apply to the Commissioner of Internal Revenue, for the repayment of the portion of said tax which was collected on said contingent beneficial interest of the said Rachael Asch, which had not become vested prior to July 1, 1902, and also for the repayment of all the tax assessed upon the said \$30,000 in excess of \$2,250, and that subsequently, to wit, on or about September 27, 1902, the said Commissioner of Internal Revenue refused to refund the same to the plaintiffs. In other items of the will, as set forth in the statement of claim, there were other bequests of personal property to the said Rachael Asch, which were appraised at the sum of \$12,150. On these bequests, it is alleged the defendant caused to be levied the sum of \$1,215, instead of \$910.25, which was claimed to be all the tax due upon said legacy. The action was therefore brought to recover the difference between the amount of \$18,086.26, assessed and levied by the defendant and paid under protest by plaintiffs, and the sum of \$3,160.25, the amount of tax alleged to be actually due the United States.

To this statement of claim, there was a demurrer by the defendant, on the ground that the taxes paid by the plaintiffs, under protest, were lawfully assessed and collected by the defendant, under the provisions of sections 29 and 30 of the act of June 13, 1898, c. 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308] commonly called the war revenue act, and the several acts amending the same.

The relevant provisions of sections 29 and 30 of said revenue act are as follows:

"Sec. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid, shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say:"

The section then proceeds to provide a scale of taxation dependent upon amount and relationship.

"Sec. 30. That the tax or duty aforesaid shall be due and payable in one year after the death of the testator and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainor last resided within thirty days after he shall have taken charge of such trust, and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, or in which the property was located in case of nonresidents, the amount of the duty or tax assessed upon such legacy or distributive share. * * * Any tax paid under the provisions of sections 29 and 30 shall be deducted from the particular legacy or distributive share on account of which the same is charged."

The court below sustained the demurrer, and judgment was entered thereon in favor of the defendant. The grounds of the court's decision, as disclosed in the short opinion sent up in the record, seem to be that the provision of the will in favor of Rachael Asch, was in effect a legacy of a life estate in the present value of so much or all of the personal property as would be necessary to produce the income of \$15,000 a year, as ascertained by the mortality tables authorized by certain regulations of the Treasury Department, and that said life estate vested as an entirety in possession or enjoyment, immediately upon the death of the testator. The learned trial judge rests this conclusion upon what he supposes to be the authority of the decision of the Supreme Court, in the case of *Vanderbilt v. Eidman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563.

In this case, as in all cases involving questions of taxation, it must be borne in mind, as a canon of construction of universal acceptance in American and English jurisprudence, that no tax burden is held to be laid on citizen or subject, unless the legislative intention

to so impose it is expressed in clear and unequivocal language, and that in cases of doubt, statutes imposing taxes are construed most strongly against the government and in favor of citizens or subjects, and that such statutes are not to be liberally construed. No exigency for extending the meaning of such statutes beyond what they expressly and clearly import, can ever arise, because it is always within the power of the Legislature to express its intent in language so clear and unequivocal as not to admit of doubt. With these well-established maxims of interpretation in view, let us examine the language by which Congress has seen fit to impose the taxes in question, and the reasoning of the Supreme Court in the case of *Vanderbilt v. Eidman*, relied upon by the learned judge of the court below.

In the first place, it is to be noticed that the tax is imposed in general terms upon legacies and distributive shares. These words possess a definite meaning, and no confusion or difficulty need arise as to the subjects with reference to which taxation is imposed. Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the personal estate of an intestate, so a legacy is a definite gift by will of personal property, either general and pecuniary, or specific. As such, a legacy is of a specific article, or of specific articles, of personal property, or of an ascertained and definite pecuniary amount, and may be readily valued by the executor or trustee having it in charge. It is the corpus to which the legatee is entitled in possession or enjoyment. The legacy in question, under the will of the testator, is not a sum certain given once for all to the legatee, but a yearly sum of \$15,000, to be paid to Rachael Asch in stated quarterly payments during the term of her natural life, out of the income of the whole estate, real and personal, of the testator, devised and bequeathed to trustees for the purposes of his will. The natural meaning of such a provision, and of the language used, would seem clearly to be a series of legacies or bequests vesting in possession or enjoyment at stated intervals, but each, contingent, before vesting, on the legatee's being alive when it became due, the tax on which is not to be paid, as we shall see presently from the authoritative opinion of the Supreme Court in the *Eidman Case*, until and as it takes effect in possession or enjoyment.

To sustain the action of the collector, we have to ignore the fact that there is no gift to Rachael Asch of a definite sum, as an entirety, other than the quarterly payments which the trustees of his residuary estate, real and personal, are directed to make out of the income thereof, year by year, during the term of her life. Nor is any sum given to the trustees or set apart by the will, the income of which, whatever it may be, is to be for the use of Rachael Asch. To create the corpus of a legacy, the income of which will supply these definite quarterly payments, would impose upon the trustees the necessity of setting apart such an amount of money as would, in their judgment, produce the income, thus creating a principal sum or corpus which the testator has not seen fit to create in the shape of a legacy, and to so create it by the mere exercise of a judgment which may prove mistaken in its results. The sum thus arbitrarily estimated, the collector assumes the right of appraising as the legacy of a life estate in personal

property, the present value of which, for the purposes of taxation, is to be ascertained by rules and methods not designated in the taxing law, nor, as we think, authorized or contemplated thereby.

Counsel for appellee lays much stress in his argument upon the alleged fact that the fixed payments out of income, real and personal, provided for in the will, consumed the entire income from the residuary personal estate. From this he argues that this provision of the will was in effect a bequest of the whole residuary personalty, as an entirety, because the law of Pennsylvania requires all legacies in the first instance to be paid from the personal estate. This argument might have had some plausibility in its application to the bequest in the *Eidman Case* of the whole income from the residuary estate, real and personal. This was a disposition of the entire usufruct of the residuary personal estate in favor of the beneficiary for a definite period, and the intention of the testator was clearly indicated to make a gift of the entire residuary personal estate for that purpose. It was a gift of the whole income, indefinite in amount, and might be more or less. In the case at bar, however, a definite sum is to be paid to Rachael Asch out of the whole income from the residuary real and personal estate in the hands of the trustees. There is nothing definite or capable of being made definite as to the source from which the income is derived. Presumably the income collected by the trustees was more than sufficient to make these definite payments. Neither the personal estate nor real estate is bequeathed and devised as an entirety for the raising of these sums. The character of the bequest is not to be determined by the adventitious relation of the amount of the personalty to that of the realty, or by the requirement of the Pennsylvania law as to the primary application of the personalty, or by the more or less amount of income derived from the personalty. It might have happened that the testator's personal estate had been so invested as to yield an income more than sufficient to make the payments in question. The mere fact that it was found so invested as that the income was not adequate for that purpose, cannot impose a different legal character upon this provision of the testator's will, or authorize the collector to consider the whole personal estate as a legacy and taxable as an entirety, and for that purpose to ascertain its value as a life interest. Such a construction of the revenue act of 1898 is, we think, unwarranted by its plain language and unsupported by any authoritative interpretation of it.

So much for what seems to us the plain meaning of section 29, imposing the tax here under consideration. The examination and discussion of this section of the act, together with other sections having relation to the subject of its inquiry, made by the Supreme Court in *Vanderbilt v. Eidman* (*supra*), confirms the view just stated. This case, as we have said, is relied upon by the learned judge of the court below, who says:

"This income for life is exactly similar to the income devised for a certain period in the case of *Vanderbilt v. Eidman*, in which case it was conceded that such a legacy is taxable as one presently in possession and enjoyment."

That the learned judge was mistaken, and that there is a difference between the two cases, in the provision as to income, has been shown,

we think, by what has just been said. It is true that the whole income, indefinite in amount, from the residuary estate was given by the testator for a certain period to his son, and that the corpus of the fund, from which the income was to be derived, was valued by the collector for the purposes of taxation, as being a vested legacy of a life estate, but we do not think it is correct to say that the court conceded the validity of this procedure. Nor do we think the case in this respect is analogous to the case at bar. It becomes necessary, however, from the fact that it was so relied upon by the court below, to examine with some care the judgment of the Supreme Court in this case. We had occasion, in deciding at this term the case of Herold, Collector, v. Shanley, 146 Fed. 20, to consider this decision, and the reasoning upon which it is founded. The case is recent, and it so deals with this war revenue act as to throw light upon the questions with which we are here concerned.

The seventeenth clause of Cornelius Vanderbilt's will devised the residue of his estate to his executors, in trust, to collect the income and apply so much of the same as might be, in their judgment, advisable to the support and maintenance and education of his son Alfred G., to accumulate any surplus income, to be paid to him when he arrived at the age of 21 years, and thereafter to pay the net income of his estate to him, as received, until he arrived at the age of 30 years, when he was to be put in full possession of one-half of said estate, to be set apart for that purpose by the executors and trustees; and upon the further trust, thereafter to pay to the said Alfred G. the income from the balance of said estate, until he should arrive at the age of 35 years, when he was to be put in possession of the balance of said estate, and the trustees discharged. If he should die without children, or none of his children should attain majority, then the testator's son, Reginald C., was to take, etc. "The right of Alfred G. Vanderbilt to the beneficial enjoyment, as provided in the will, until he became 30 years of age, was appraised at \$5,119,612.43, and upon this sum the executors paid a death duty, under sections 29 and 30 of the Act of June 13th, 1898. * * * After payment of this amount, and subsequently to the passage on March 2nd, 1901, c. 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2308] of an amendment to the war revenue act of 1898, the Commissioner of Internal Revenue, considering that by that amendment Alfred G. Vanderbilt had become immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of 30 and 35 years respectively, assessed a death duty based upon that hypothesis." The commissioner assessed this interest as a vested estate, equal in value to the sum of the entire residuary estate, to wit, \$18,972,117.46, and upon this valuation a tax was levied of $2\frac{1}{4}$ per cent., producing \$426,872.64. But on this amount, credit was allowed for the sum of tax previously paid on the appraisement of his right to the beneficial enjoyment of the residuary estate, until he became 30 years of age, to wit, \$115,191.28. The balance of \$311,681.36, was paid by the executors under protest, but no question was made as to the former payment of the tax of \$115,191.28, on the appraised value of the right to the whole income until he

became 30 years of age. Suit was accordingly brought in the Circuit Court of the United States for the recovery only of the balance of the tax paid, after deducting this latter sum, as having been prematurely levied on the legacy of the whole residuary estate to Alfred G. Vanderbilt, when he should arrive at a certain age, as above stated. The question of the propriety of the tax levied on the appraisement of Alfred G. Vanderbilt's right to the beneficial enjoyment of the income of the residuary estate until he was 30 years of age, therefore, was not and could not have been in question either before the Circuit Court, the Circuit Court of Appeals, or the Supreme Court. The case came before the Circuit Court of Appeals from the Circuit Court, which had sustained a general demurrer to the complaint. The latter court, after stating the facts as above recited, certified four questions to the Supreme Court, the third one of which is as follows:

"Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of thirty years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?"

The other questions certified do not vary or enlarge the scope of the third question, as above recited. It will thus be seen that, in the questions submitted to the Supreme Court, there is excluded, by express language, any consideration of the right to appraise and levy a tax upon the value of the right to receive the income of the entire personal estate of the testator, for the period named. Mr. Justice White, in delivering the opinion of the court, said that the fundamental consideration involved in the questions was whether the burden imposed by the war revenue act "bore upon the right to the residue which Alfred G. Vanderbilt might possess or enjoy in the future if he lived to the age specified in the will, upon the theory that the right so to possess or enjoy in the future was technically vested." It is true that the learned justice has so framed this question as to speak of the result of its being negatived as a restriction of the burden to that which had already been assumed by the executors, by their voluntary payment of the tax on the said beneficial interest of Alfred G. Vanderbilt, in the income of the personal estate, until he arrived at 30 years of age. But we repeat that the question as to the propriety of this voluntarily paid tax was not, and could not have been, before the court, nor do we think that, in stating the question to be whether the tax was to be confined to that which had been voluntarily paid and could not be a subject of suit, or was to include that also which was paid under protest, and for which alone suit was brought, the learned justice can be taken to have conceded the legality of the former. On the contrary, the reasoning by which the illegality of the protested tax is demonstrated, tends largely to show the illegality of the tax voluntarily paid. But however that may be, it must be observed again, that the express bequest of all the income, be it more or less, from the entire residuary personal estate, during a definite period, differs widely, as regards the question here presented, from the bequest of a

definite sum to be paid yearly out of the income of both real and personal estate, collected by the trustees.

After a full statement of the questions involved, the opinion says:

"It will be observed that the duties imposed in section 29 have relation to two classes, first legacies or distributive shares passing by death and arising from personal property; and, second, any personal property or interest therein transferred by deed, grant, bargain, sale or gift, to take effect in possession or enjoyment after the death of the grantor or bargainer, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this second clause, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but the actual possession or enjoyment thereof. By any fair construction, the limitation as to possession or enjoyment expressed as to one class must be applied to the other."

The statute, Mr. Justice White says, has not subjected the two classes to different rules in imposing the tax. In this connection, he calls attention to the fact that, following the designation of the two classes, "there are five distinct paragraphs, subjecting the passing of the property taxed in both classes to a different rate of tax, dependent upon the degree of relationship of the beneficiary to the decedent, and in each, it is specifically provided that a tax is to be levied in respect only of a beneficial interest having a clear value," * * * and "that nowhere in the section is there contained language referring to technical estates in personalty, or treating them as subjects of taxation, despite the absence of the right to immediate possession or enjoyment." Attention is then called to section 30, relating to the collection of the tax imposed by section 29, by which, he says:

"The meaning of section 29, as just indicated, is made clearer. Thus, by section 30, it is provided that 'every executor, administrator or trustee, before payment and distribution [of a legacy or distributive share] to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share.' It also requires that the schedule, etc., to be furnished by an executor, administrator or trustee, to a collector, shall contain the name of each person having a beneficial interest in the property in the charge or custody of the executor, etc., with a statement 'of the clear value of such interest.'"

He then says:

"These provisions harmonize with the meaning which we have ascribed to section 29, since they clearly import that the tax is to be deducted from the beneficial interest which the beneficiary was entitled to enjoy, and from which, before payment or distribution, a deduction of the duty was to be made."

The court then proceeds to hold that the act of 1901 did not change the law of 1898, as to the subject of the tax, so as to cause it to embrace subjects of taxation which were not included prior to the amendment, proceeding as follows:

"The amendatory act, so far as necessary to be considered for the purposes of this question, re-enacted sections 29 and 30 of the original act. * * * The amendments, therefore, did not, in our opinion, justify the construction that Congress intended by adopting them to cause death duties to become due within one year as to legacies and distributive shares, which were not capable of being immediately possessed or enjoyed, and were therefore not subject to

taxation under the original act. * * * On the contrary, the amendatory act reiterated, without alteration, the provisions found in the original act as to possession or enjoyment and beneficial interest and clear value. Indeed the amendatory act contained new provisions not expressly found in the original act, * * * such as the proviso at the close of section 30, as follows: 'Any tax paid under the provisions of sections 29 and 30 shall be deducted from the particular legacy or distributive share on account of which the sum is charged,' a provision plainly importing a practically contemporaneous right to receive the legacy or distributive share, and one which would be impracticable of execution if the tax was to be assessed or collected before the beneficiary and the rate of tax could certainly be ascertained."

It will thus be seen that the argument of the court was intended to support the contention that the war revenue act imposed no duty upon legacies of personal estate on the ground that they were technically vested, but only upon such legacies when they came into actual possession and enjoyment, and that the turning over of such a legacy to the beneficiary, and the payment of the tax were intended to be contemporaneous. While we incline to think the reasoning of the court, in maintaining this proposition, tends to exclude from taxation, under the war revenue law, the interest of Alfred G. Vanderbilt in the residuary personal estate, the income of which he was to enjoy until he reached the age of 30 years, no question as to it was before the court. We are clear, however, that it cannot be taken to justify the imposition of a tax upon the personal estate of the testator in this case as a legacy of an entirety, merely upon the ground that a fixed income for life is to be paid out of the whole income of the real and personal estate in the hands of the trustees. In other words, even if a bequest of the whole indefinite income from the residuary estate be considered a legacy of the corpus of that estate, as an entirety, it does not follow that the bequest of a fixed yearly payment of a definite sum out of the whole income of the real and personal estate in the hands of the trustees furnishes legal ground for a like inference.

By confining ourselves to what the statute plainly says, and avoiding unauthorized and artificial constructions, we can find only as a subject of taxation thereunder, a series of payments to be made quarterly, each, contingent, as to possession and enjoyment, upon the happening of an event named in the will, to wit, that the legatee should be alive when the payments are to be made. The statute nowhere refers in express terms to the interest or income of a legacy, nor does it impose any tax in respect thereto, before it is actually received. If the act had intended that the interest in a fixed and definite income for life, payable out of personalty alone, much more in such an income payable *out of* the total income of the whole residuary real and personal estate, should be taxed, this intention would not be left to inference, but would be clearly expressed and a mode of estimating such an interest would be prescribed, as, for example, has been done in the collateral inheritance tax laws of the states of New York and New Jersey. In this statute, there is no mode provided for valuing such an income given to a person for life. The mode adopted by the collector in this case is entirely unauthorized by the statute, for he did not estimate by life tables the value of a life estate in a designated and ascertained fund,

but by an exercise of his arbitrary judgment, proceeded to ascertain or create the fund that would produce the income, though it had not been ascertained or designated by the testator, and then proceeded to value it by the use of the life tables. The provision in section 30 of the act of 1898, relied upon by the collector as an authorization of the procedure adopted by him, is not, in our opinion, clear and precise enough to sanction it. It provides that the executor, trustee, etc., shall make a schedule of the amount of such legacy or distributive share, together with the amount of the duty which has accrued thereon, "in such form or manner as may be prescribed by the Commissioner of Internal Revenue." In the case of *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, the schedule made out by the executors is set out in the report, and shows a legacy of the income of the whole residuary estate for life, amounting to the sum set out in the schedule. The "present value" of the life interest of the beneficiary was estimated, according to the United States tables, at a lesser sum therein stated. This is a very different case from the present, where the whole residuary personal estate is not thus disposed of. Inasmuch as the residuary estate was an ascertained sum, and its "present value" as a life estate was capable of determination by the method pursued, no question was made by the executors in this respect, and the long and interesting opinion of the court dealt with other and important elementary questions touching the history and nature of death duties.

Executive officers may be authorized to prepare blanks and forms, or prescribe in certain respects the manner of executing the legislative will, but they may not receive a delegation of the legislative power, even if such delegation were intended to be made. We think, therefore, there was no tax imposed by the act of 1898 on the interest of Rachael Asch, other than the specific payments of the annuity bequeathed to her as the same should from time to time fall due.

The judgment of the court below is therefore reversed.

THE FIN MacCOOL.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 208.

1. APPEAL—REVIEW—FINDINGS OF FACT.

While the findings of the trial judge will not be disturbed by an appellate court upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there is found to be a decided preponderance of evidence to the contrary, a finding based solely on the preponderance of the testimony is open to review and consideration *de novo* by the Appellate Court.

2. NAVIGABLE WATERS—OBSTRUCTION BY WRECK—MAINTENANCE OF LIGHTS.

The rule that positive evidence is ordinarily to prevail over strictly negative evidence applied to an issue as to whether or not lights were burning over a sunken dredge at the time she was run into by a tug in the night, and the testimony of the master of the dredge that he placed the lights on the night in question, and of himself and another witness that they were burning a very few minutes before the accident *held to*

prevail over the testimony of four witnesses, three of whom were from the tug and including the lookout who was the only one charged with the duty of looking, that they did not see any lights.

Appeal from the District Court of the United States for the Southern District of New York.

W. S. Montgomery, for appellant.

W. J. Martin, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This appeal is from a decree condemning the dredge *Fin MacCool* for the damages caused by the tug *Elder* by running upon the dredge while the latter was submerged in the Bay Ridge Channel off South Brooklyn. The accident took place about 9 o'clock on the evening of April 21st, a dark but clear night. There were numerous boats displaying anchor lights in the vicinity of the channel. The *Elder* had a scow in tow on a hawser. The dredge had been sunk by being run into by a tug on the morning of April 19th, and lay under water about 500 or 600 feet from the shore.

The court below based the liability of the dredge upon her failure to maintain a light to notify the obstruction to vessels approaching at night. The case depends solely upon the question of fact whether or not there was a proper light upon the dredge at the time of the accident. The court below in deciding the case said:

"Here are six or eight witnesses who say that they had an opportunity to look, and did look, and did not see any light. There is only one witness who says he saw a light a few minutes before the accident, and there is a stipulation that another man will testify to the same effect. It seems to me that it is a simple question of preponderance of proof. Of course, there are probabilities as to the evidence to be considered, and probabilities are of some weight; but we cannot go against the absolute testimony, and therefore I find that the libelant should recover."

As the appearance and demeanor of witnesses under examination and their apparent candor and intelligence are factors of great importance in determining the credibility of their testimony, and cannot be carried into the record upon an appeal, the rule obtains in appellate courts that the findings of the trial judge will not be disturbed upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there is found to be a decided preponderance of evidence to the contrary. The findings of the court below in the present case do not purport to be based upon any question of credibility of the witnesses, but the decision was placed upon the alleged preponderance of testimony in favor of the libelant, apparently because of the greater number of witnesses.

The learned judge fell into an error when he said there were six or eight witnesses who had an opportunity to look, and who testified that they did look and saw no light. The witnesses who testified for the libelant concerning the light on the night in question

were Sjolund, the master of the Elder; Feeley, the engineer; Anderson, the lookout; and Dragon, the master of another vessel.

The witness Sjolund was at the wheel of the tug in the pilot house, and his testimony is as follows:

"Q. How did it happen that you ran on this scow dredge?

"A. Well, I was coming up and did not see nothing which warned me from running on it.

"Q. Were you looking out for anything?

"A. Yes, sir; I was looking out.

"Q. You were at the wheel yourself?

"A. Yes, sir.

"Q. Were you alone in the pilot house at the time the thing happened?

"A. Yes.

"Q. Had there been any one with you?

"A. The steward, Maxfield, was in there a little while before that.

"Q. Did you see any lights to indicate this sunken dredge that you ran on?

"A. No, sir.

"Q. Were there any lights there?

"A. No, sir; not that I saw."

Feeley, the engineer, at the time of the accident was on duty in the engine room, and his testimony is as follows:

"Q. Had you been looking out ahead at all times before?

"A. I had several times, on both sides, out of both doors at different times; both doors were open.

"Q. Did you see any lights ahead?

"A. No, sir.

"Q. How long before you felt the shock had you looked out the last time?

"A. I guess a minute or a couple of minutes.

"Q. Did you have any purpose in looking out?

"A. No, I just looked out, the same as anybody would naturally look out of a door."

Anderson's testimony was as follows:

"Q. How were you acting that evening after leaving Bath Beach; were you on deck?

"A. Yes, sir; was on deck.

"Q. What was your duty there?

"A. On the lookout.

"Q. Were you stationed forward on the tug?

"A. Yes.

"Q. Was it your duty to report any lights to your captain if you saw any?

"A. Yes, sir.

"Q. Were you there constantly, watching lights?

"A. Yes, sir.

"Q. Do you remember running on this dredge that was sunk there?

"A. Yes, sir.

"Q. As you came up the channel just before that, did you see any lights upon it?

"A. No, sir; I saw no lights.

"Q. If there had been any there would you have seen them?

"A. Yes, sir; I think so.

"Q. You were watching so as to report to your captain if you saw lights?

"A. Yes, sir.

"Q. You say positively that there were no lights?

"A. I could not see any; no.

"Q. Was it a clear night?

"A. It was a clear night, but dark.

"Q. Good night for seeing lights?

"A. Well, dark."

Dragon was the master of the tug Flannery, which for about an hour before the accident had been lying about three-quarters of a mile from the place of the accident. He testified as follows:

"Q. You do not remember noticing any light on the dredge, do you?

"A. I could not see no light.

"Q. How far away from her were you during the evening?

"A. About three-quarters of a mile, I should think, as near as I could tell."

Another witness was called for the libellant, the engineer of the Flannery. He testified that on the evening prior to the evening of the accident he noticed a light on the dredge about 9 o'clock, which he thought was "a very bum light." He testified, however, that it consisted of two or three tubular lights, two tubes on each side, and that at times it would go down and then flare up again.

Maxfield, the steward of the Elder, testified that he had been with the captain in the pilot house for about half an hour before the collision, smoking with the captain, and left about a minute or two before the collision to go down to the kitchen; and, while he testified that he did not see any lights, also testified that he was not looking for any, and could not have seen any unless he had been standing up in the pilot house instead of sitting down.

Thus it will be seen that there were but four witnesses who testified that they did look and did not see any light on the evening of the accident; that one of these was the master, who was under no duty of special observation, was occupied with his wheel, and until within a moment or two of the accident had been engaged in gossiping and smoking with the steward; that another was the engineer on duty in the engine room of the Elder, who casually and occasionally looked out of the door, and if he did so shortly before the accident may or may not have looked in the direction of the wreck; that another was the master of another vessel lying nearly a mile distant, who had no special interest in observing the light over the wreck, and does not claim that his attention was specially directed to it. The lookout, Anderson, was the only witness whose testimony was of any real value. He ought to have seen the light, if it had been burning, and doubtless would have seen it if his attention had been sufficiently alert.

On the part of the dredge it was proved that on the afternoon of the day she was sunk a carpenter was sent to her and spiked on to the gallows frame a 3x4 scantling, and rigged it with hooks, ring, and halyard for hoisting and lowering lights, arranged to secure the light a sufficient distance above the water to be conspicuous at high tide. It was further proved that about 7 o'clock on the evening of the accident the master of the dredge who had temporary quarters on another vessel lying inshore about 400 feet away, went to the dredge and with the assistance of another man hoisted the lights upon her; and that about four minutes before the Elder struck her, intending to go to bed, he went on deck to see if the lights on the dredge were burning, and saw them burning brightly; that he then went below, partly undressed, and while yet in his stocking feet heard distress signals from a vessel which

proved to be the Elder; and that he then rowed over to the Elder and found her fast upon the wreck. It was also proved by another witness for the dredge, a watchman on a boat lying inshore about 400 or 500 feet from the dredge, that during the evening of the accident he noticed the light burning over the wreck whenever he looked in that direction; and that he saw it very shortly before the accident, and saw it disappear when the accident took place.

The case is one for the application of the rule of evidence that positive evidence is ordinarily to prevail over strictly negative evidence, and that when one or more witnesses testify that they saw an object or heard a signal upon a given occasion, their testimony is to prevail over that of a same number of witnesses, of equal candor, who testify that they did not see or hear it. There is, in such cases, no necessary conflict of evidence as to the fact in question. The observation of the fact by some of the witnesses may be entirely consistent with the failure of the others to observe it, or their forgetfulness of its occurrence. *Horn v. Balt. & Ohio R. Co.*, 54 Fed. 301, 4 C. C. A. 346-351; *Rhodes v. U. S.*, 79 Fed. 740, 21 L. Ed. 644, 25 C. C. A. 186; *Stitt v. Huidekoper*, 17 Wall. 393. Of course, in each case the opportunities of observation, and the interest prompting the witnesses to attentive observation are to be considered; and the rule referred to is not inexorable, but is to be applied with due regard to the circumstances of the particular case. The whole subject is excellently treated in 17 Cyc. pp. 801-803, where all the authorities are collected.

Upon consideration of all the evidence we are led to the conclusion that the men on board the Elder did not maintain a vigilant observation, and that the lights upon the wreck, though not seen by the lookout or any others of her crew, were visible, and ought to have been discovered.

The judgment is accordingly reversed with instructions to dismiss the libel.

UNITED STATES v. SEVENTY-FIVE BALES OF TOBACCO.

(Circuit Court of Appeals, Second Circuit. June 20, 1906.)

No. 269.

1. CUSTOMS DUTIES—FORFEITURE—FALSE ENTRY—FRAUDULENT INTENT.

Section 9, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], providing forfeiture and other penalties for the fraudulent entry of imported goods, should be construed strictly. It was not intended to apply to errors of judgment, but to acts plainly indicating a wrongful intent to defraud the government; and a mere mistake in the description of imported merchandise, unaccompanied by acts from which an intent to defraud may be presumed, is insufficient to justify forfeiture under this section.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, §§ 261, 263.]

2. SAME—ERRONEOUS DESCRIPTION OF TOBACCO.

An importation of tobacco, a part consisting wholly of wrapper, a part of filler, and a part of wrapper and filler mixed, was invoiced and entered

as "tobacco fillers." Filler tobacco was subject to a lower rate of duty than mixed tobacco or wrapper tobacco, under paragraphs 213-4, Tariff Act July 24, 1897, c. 11, § 1, Schedule F, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1648]. *Held* that, in the absence of circumstances indicating a fraudulent intent on the part of the importers, the entry could not be considered to have been made "by means of a false or fraudulent invoice," by reason of which the tobacco should be forfeited under section 9, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. St. 1901, p. 1895].

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, §§ 263, 264.]

3. SAME—COLLATERAL ISSUES—BOARD OF GENERAL APPRAISERS—JURISDICTION.

In proceedings for the forfeiture of imported merchandise, questions as to classification of the merchandise may be left undecided, to be determined by the Board of General Appraisers.

In Error to the District Court of the United States for the Southern District of New York.

The full title of this cause is United States v. Seventy-Five Bales of Tobacco (amended to Forty-Nine Bales), etc., Selgas, Suarez & Co. claimants.

At the trial below the court, Holt, District Judge, directed a verdict in the following language:

"It is, of course, the fact that a reliquidation and a reappraisement can be had in any case where property is claimed to have been erroneously appraised at first, and upon such reliquidation the proper amount of duties can be ascertained. It seems to me clearly, on the evidence as it stands now in this case, that the first appraisement, that the subsequent one was correct, and that the amount of duties to be paid upon the property should be larger than was claimed in the first place; but the question as to how much duty should be paid on the property is very different from the question whether the property itself can be confiscated for a violation of the revenue laws. The provision under which this proceeding is brought provides, by section 9, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1906, p. 1895]: 'If any importer or owner * * * shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, * * * or by means of any false or fraudulent practice or appliances whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties. * * *'

"Now, the principal point of contention between the two cases in this circuit [U. S. v. Cutajar (C. C.) 60 Fed. 744, and U. S. v. Rosenthal (C. C.) 126 Fed. 766] and the case in the Western Circuit [U. S. v. Ninety-Nine Diamonds (C. C. A.) 139 Fed. 961] seems to be whether it was necessary that the United States be deprived of its duties in all these cases. The cases in this Circuit hold that it is not essential that that should have taken place; and I concur in that view as a question of opinion, though it would be my duty to follow it in any case, irrespective of my personal opinion. I think if an importer attempts to make an entry by any false invoice, that portion of this statute comes into operation.

"Now, in this case there was an invoice which is claimed to have been false in this respect, that it described the 108 bales as 'leaf tobacco fillers.' As far as I recall, the only evidence in the case of falsehood is what appears on the face of the invoice and the entry and the oath in the ordinary form upon it. There is not any evidence, as in many of these cases, of furtive or fraudulent conduct on the part of the shippers or of the persons receiving the merchandise here, indicating a guilty knowledge on their part of the falsity of the invoice or of an attempt to smuggle generally. The whole basis of the claim, as I understand it, is that there was a false description on the face of the invoice of what this property was. Now, in order to pass upon the question whether that was such a false statement as would justify a con-

fiscation of the property, I think it is important to look at the section of the act in regard to the importation of tobacco. That is paragraph 213, Tariff Act July 24, 1897, c. 11, § 1, Schedule F, 30 Stat. 169 (U. S. Comp. St. 1901, p. 1648). That section is quite peculiar. Ordinarily, if a man describes a certain kind of property which was being imported, as another kind of property, and these two kinds of property were such as to be easily passed one for the other, but were in fact clearly distinguished from each other and paid a different duty, the jury might be justified in drawing the inference from the mere fact of such a statement made on the invoice, that it was a false statement and intentionally made in order to deprive the government of its duties; but in this case there is an assumption, I think, in the language of the statute, that a considerable quantity of tobacco which is imported in the natural course of business is neither wrapper tobacco nor filler tobacco, but is tobacco a portion of which could be used for one purpose and another portion for another purpose. The language of the act is, 'wrapper tobacco and filler tobacco when mixed or packed with more than fifteen per centum of wrapper tobacco, and all leaf tobacco the product of two or more countries * * * when mixed or packed together, * * * one dollar and eighty-five cents per pound,' and 35 cents per pound for filler tobacco. And then it says: 'Collectors of customs shall not permit entries to be made, except under regulations to be prescribed by the Secretary of the Treasury, of any leaf tobacco, unless the invoices of the same shall specify in detail the character of such tobacco, whether wrapper or filler, its origin,' etc.; and the provisions of the regulations of the Treasury Department are of the same description, as I recall it. Officers of the customs are instructed to refuse entry of any leaf tobacco the invoices of which do not specify in detail the character of the tobacco, whether wrapper or filler, its quality, and the province or district of origin.

"Now, it seems to me that if an importer looked at this act, and looked at these instructions, the natural inference for him to draw from this statute would be that in describing the tobacco in the invoice he should put it in either wrapper or filler. If it was all wrapper, he would put it in wrapper. If it was only partly wrapper, he would put it in filler, I suppose, unless he also filled in in detail the language of the act, when he might say in the invoice, 'filler tobacco mixed or packed with more than fifteen per cent. of wrapper tobacco.' In order to do that in this case, as I understand it, he would have to describe which bales were wrapper and which bales were filler. I understand that there is evidence that there was some strictly filler and some not 15 per cent, and some over 15 per cent.; and if he was to pass upon each case I should think he would have to describe it on the face of the invoice, and that might involve, in the first place, a long entry to be made on the invoice. It would require a degree of care and accuracy in making up the invoice which seems unreasonable, in view of the fact that the property is going to be examined here; and it seems to me, under these circumstances, that if a man shipping a quantity of tobacco, a portion of which is filler tobacco, mixed or packed with more than 15 per cent. of wrapper tobacco, and a portion of which is filler tobacco which is not mixed with an amount equal to 15 per cent. of wrapper, it is natural that he should describe it as filler, and that there is no legitimate inference to be drawn from the fact that he does not describe it as filler, that he is attempting to smuggle the goods into the country, or that he has the guilty purpose, which is essential to support a judgment confiscating property to the government based on the ground that a man is attempting and willfully endeavoring to cheat the government out of its duties.

"The opinion of Judge Brown in the case cited by the district attorney [U. S. v. Nineteen Bales of Tobacco (D. C.) 112 Fed. 779] is in a case very similar to the one now on trial, but in that case the invoice described the goods as 'thirty-nine bales of filler, bought as filler, to be sold as filler; value \$2,452.' Now, I think that description itself was evidence from which a jury might infer that there was a direct representation that the tobacco was absolutely filler, that it was going to be sold as filler, and no part of it was to be sold as wrapper, and that that would be a proper case to send to the jury on the evidence afforded by the invoice alone. But it seems to me in this case that, if the jury should find a verdict for the government, there is not suffi-

cient evidence upon which it could be maintained, and it would be my duty to set it aside. I think, therefore, there should be a verdict directed in this case for the claimant."

Arthur M. King, Asst. U. S. Atty.

W. Wickham Smith (William B. Coughtry and Martin Paskus, on the brief), for claimants.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. On writ of error to review a decision of the District Court for the Southern District of New York, which directed a verdict for the defendants in an action brought by the United States for the forfeiture of 49 bales of tobacco imported at Tampa, Fla.

The information charges that the invoice and entry were false and fraudulent in that the tobacco was described therein as "leaf tobacco fillers," whereas it was in truth and in fact "wrapper tobacco." The information was laid under section 9 of the customs administration act of June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895]. That section is as follows:

"Sec. 9. That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

The statute under which the property of the defendants was seized is penal in character. Proof which is sufficient to uphold a forfeiture of the importers' property is also sufficient to justify a conviction, fine and imprisonment. Such a statute must be strictly construed. Manifestly it was not intended to apply to mistakes or errors in judgment but to acts of commission and omission, which plainly indicate a willful and culpable intent to defraud the government of its lawful revenues. Fraud, whether the action be criminal or civil, must be proved; it cannot be inferred; this is elementary. A mere mistake in the description of imported merchandise unaccompanied by acts from which an intent to defraud may be presumed is, in our judgment, insufficient to justify a forfeiture under this section. *U. S. v. Ninety-Nine Diamonds* (C. C. A.) 139 Fed. 961.

An examination of the record convinces us that there was no error in directing a verdict for the defendants. Our reasons for this conclusion are briefly as follows:

First. The contention of the plaintiff that the importation was fraudulent rests wholly upon the statements of the invoice and entry

that the merchandise consisted of "108 bales of leaf tobacco fillers" and "tobacco fillers," respectively. There is nothing to show that at the time of the entry the importers knew that these statements were incorrect. The testimony upon which the plaintiff relies to establish their falsity resulted from an examination of the tobacco after it had been delivered to the importers and had reached New York.

Second. The entire importation of 108 bales was delivered to the customs officers at Tampa for examination. The usual practice of sending one package in ten to the public stores, when merchandise is entered for consumption, does not obtain at Tampa where there are no public stores. The entire importation goes to the warehouse where it is examined. It is not delivered to the importers until such examination is made and the duty paid. In the present case entry was made July 25, and the tobacco was withdrawn August 2, after an examination and payment in full of the duties levied by the collector. The tobacco remained in the custody of the customs officers for a period of eight days. It must be presumed that the importers knew of the absence of public stores at Tampa and the custom there to warehouse the entire importation. It seems incredible that men of ordinary prudence and intelligence would attempt so clumsy a fraud as the one contended for by the plaintiff—a fraud that would be detected the moment the bales were examined. In such circumstances as these a finding that the description of the tobacco as "fillers" in the invoice and entry is sufficient evidence of a fraudulent purpose must rest on the assumption that the collector was either hopelessly incompetent or was in conspiracy with the importers. There is not a shadow of suspicion resting upon the collector or any of his subordinates.

Third. Every one of the bales was carefully examined at Tampa by the acting deputy collector who had been in the tobacco business before entering the customs service and was an experienced examiner. His honesty and competency have not been questioned. The result of this examination was that he returned 6 bales as wrapper tobacco, 29 bales as having a percentage of wrapper and the balance as filler. As the 29 bales contained less than 15 per cent. wrapper, duty was assessed and paid on six bales of wrappers, and on 106 bales of fillers at the lesser rate. At the trial, the examiner testified that he never made a more careful examination than the one in question. He was confident his classification was correct and he has seen no reason since to change it. He further testified that there was nothing unusual about the present entry; that the usual practice was to enter the merchandise as described in the invoice, classify it afterwards as wrapper or filler and levy duty accordingly. It was not the custom to seize merchandise so entered. In effect the importers came to the collector and said:

"We desire to pay duty on this tobacco: It is called 'filler' in the invoice, but here it is, the entire 108 bales; examine it for yourself and let us know the amount of the duty."

Where duty is paid after such an examination we fail to see how the parties paying can be charged with a fraudulent purpose to cheat the United States. If the tobacco had been entered in the precise language

of examiner McFarlane's report, namely "6 bales wrapper, 29 bales having a percentage of wrapper, less than 15 per cent. and 73 bales of filler" it would still be open to the plaintiff, upon its present theory, to seize the tobacco because it was fraudulently invoiced and entered. The testimony shows conclusively that there is a wide diversity of opinion among expert tobaccoists as to the proper classification of tobacco into the two groups of wrappers and fillers, a carrot which is accepted as wrapper by one may be rejected by another. It is largely a matter of opinion and, within certain limits, it is so recognized both by the trade and the officers of the government. No two of the witnesses in the present controversy are in perfect accord.

Fourth. The tobacco was shipped to New York August 2d and was not seized until the 22d of August, during which time it remained in warehouse. Nothing was done to it during the interval; no attempt was made to hide it or dispose of it or mix it with other tobacco, and no objection was made when the customs officials asked permission to examine it. In short, from the beginning to the end of the transaction the conduct of the defendants—unless the statement in the invoice is an exception—has been the conduct of honest men, free from deception, quibbling and prevarication.

Fifth. Paragraphs 213 and 214 of the tariff act of July 24, 1897, c. 11, § 1, Schedule F, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1648] impose duties upon tobacco and define the meaning of the terms "wrapper tobacco" and "filler tobacco." Under these provisions and the regulations prescribed by the Secretary of the Treasury, as required by paragraph 214, it is, at least, doubtful whether the entry in question was not absolutely correct in any view which may be taken of the proceeding.

Paragraph 214 provides that:

"The term 'wrapper tobacco' as used in this act means that quality of leaf tobacco which is suitable for cigar wrappers, and the term 'filler tobacco' means all other leaf tobacco. Collectors of customs shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, of any leaf tobacco, unless the invoices of the same shall specify in detail the character of such tobacco, whether wrapper or filler, its origin and quality."

On April 1, 1903, the Treasury Department issued instructions to collectors as follows:

"Importations of leaf tobacco will be denied entry unless the invoices specify in detail the character of such tobacco whether 'wrapper' or 'filler,' its origin or quality. When an invoice fails to state whether the tobacco is 'filler' or 'wrapper' and the bona fides are beyond question, opportunity will be given to secure a corrected invoice. Where good faith is not shown, summary action will be taken."

It would seem, therefore, that under the law as interpreted by the department, the importer was limited to a choice between the terms "wrapper tobacco" and "filler tobacco," and was not permitted to describe his importation as "mixed tobacco." If, in a case like the present, he used the term "wrapper tobacco" he would be compelled to pay the high rate of duty upon an invoice over half of which was subject to the lower rate; whereas if he used the term "filler tobacco" an

examination by the examiner would enable him to classify it properly, charging to each variety its proper share of the duties.

Upon this question the district judge aptly observes:

"Now, it seems to me that if an importer looked at this act and looked at these instructions, the natural inference for him to draw from this statute would be that in describing the tobacco in the invoice he should put it in either wrapper or filler. If it was all wrapper, he would put it in wrapper. If it was only partly wrapper, he would put it in filler, I suppose, unless he also filled in in detail the language of the act, when he might say in the invoice, 'filler tobacco mixed or packed with more than 15 per centum of wrapper tobacco. * * *'. It seems to me, under these circumstances, that if a man shipping a quantity of tobacco, a portion of which is filler tobacco, mixed or packed with more than 15 per centum of wrapper tobacco, and a portion of which is filler tobacco which is not mixed with an amount equal to 15 per centum of wrapper, it is natural that he should describe it as filler, and that there is no legitimate inference to be drawn from the fact that he does describe it as filler, that he is attempting to smuggle the goods into the country."

We are clearly of the opinion that no case of forfeiture has been shown. It may be that duty on wrapper tobacco should have been paid on a larger number of bales. If so the plaintiff is still in a position to recover the correct amount.

Such controversies as this frequently arise and they should be determined by the Board of General Appraisers where justice can be done to all concerned.

To forfeit the defendants' property upon the proof shown by this record would, we think, be doing them a marked injustice.

The judgment is affirmed.

JOHNSON et al. v. HUNTER et al.*

(Circuit Court of Appeals, Eighth Circuit. August 20, 1906.)

No. 2,073.

1. PROCESS—CONSTRUCTIVE SERVICE—AFFIDAVIT FOR—ARKANSAS SPECIAL STATUTE.

Under the Arkansas Special Statute (Laws 1893, pp. 24, 119; Laws 1895, p. 88) for enforcing the payment of levee taxes upon lands in the St. Francis levee district by suits in the chancery courts, which provides that "notice of the pendency of such suit shall be given as against non-residents of the county * * * by publication," but "actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land," and under section 5679, Sand. & H. Dig., which the act makes applicable to such suits, an affidavit filed in the suit and alleging that a defendant, proceeded against as a known owner, is a nonresident of the county and is absent therefrom, and that there is not an occupant upon his land, is a prerequisite to service by publication against him, and is strictly jurisdictional in character.

2. SAME—AFFIDAVIT MUST STATE ESSENTIAL FACTS, OR PUBLICATION WILL BE WITHOUT AUTHORITY.

An affidavit for publication which is not merely informal, but entirely fails to state some of the facts made essential by statute, will not authorize service by publication.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 114, 115.]

*Rehearing denied November 16, 1906.

3. JUDGMENT—JURISDICTION—PRESUMPTIONS—COLLATERAL ATTACK.

The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent, and when it discloses the evidence upon which service by publication was had, and this was ineffectual for the purpose, it will not be presumed that other or different evidence was presented, but the judgment will be void and open to collateral attack.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

For opinion below, see 127 Fed. 219.

William M. Randolph (George Randolph and Wassell Randolph, on the brief), for appellants.

A. B. Shafer (L. P. Berry, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This is a controversy over the title to certain lands in Crittenden county, Ark., which were sold under decrees rendered in 1898 and 1899 by the chancery court of that county in suits prosecuted by the St. Francis levee district to enforce the payment of levee taxes. There were two such suits, one embracing part of the lands and the other the remainder, the proceedings in which were the same so far as they are material to the present decision. The appellants are the heirs at law of A. H. Johnson, the owner of the lands prior to and at the time of the suits, and the appellees are the holders of the title conveyed by the sales made under the decrees.

The appellants, by a bill to quiet title, collaterally assailed the decrees upon the ground, among others, that, in so far as they affect the lands now in controversy, they rest entirely upon service of notice by publication, which was unauthorized and void, because no affidavit was made or filed showing or stating the existence of conditions rendering that mode of service permissible. The appellees, by a cross-bill, affirmed the validity of the decrees, as also of the sales thereunder, and prayed that their title be quieted. The suit was commenced in the chancery court of Crittenden county and was then removed to the Circuit Court, which, upon final hearing, rendered a decree dismissing the bill and granting the relief prayed in the cross-bill. 127 Fed. 219.

The other facts material to the present decision are as follows: Johnson was a resident of the state of Ohio. He did not appear in either of the suits of the levee district and knew nothing of them. No attempt was made to bring him into court by actual service of a summons. The complaints described him as the known owner of the lands now in controversy, alleged that he was a nonresident of Crittenden county, and prayed that a warning order be issued against him and such other defendants as were alleged to be nonresidents, and that summons be issued for the resident defendants, but there was no allegation that Johnson was not then in the county or that there was then no occupant upon his lands. The complaints were

verified. Upon the filing of them, and without the making or filing of any affidavit, other than the verified complaints, the clerk, conforming to the prayer of each complaint, made and caused to be published warning orders against Johnson and such other defendants as were alleged to be nonresidents. Each decree recites that certain of the defendants, not including Johnson, were served with summons by the sheriff, and that certain other defendants, including Johnson, were constructively summoned or warned by publication. Neither decree purports to find that Johnson was not in the county when the suit was commenced, or that there was then no occupant upon his lands, or that notice to him by publication was authorized.

The suits were instituted under the Arkansas act of February 15, 1893, as amended March 21, 1893, and April 2, 1895 (Laws 1893, pp. 24, 119; Laws 1895, p. 88) which contains these provisions:

"And notice of the pendency of such suit shall be given as against non-residents of the county, and unknown owners, respectively, when such suits may be pending, by publication. * * * And as against any defendant who resides in the county where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the lands proceeded against, notice of the pending suit shall be given by the service of personal summons of the court. * * * And provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land. * * * Said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this state, except as herein otherwise provided. * * * Laws 1895, pp. 89-92.

The act also contains a form of notice, to be used when service by publication is had, which is in the nature of an extended warning order, to be made or issued by the clerk, and is required to set forth the names of the known owners who are to be thereby notified, together with a description of their lands. How the clerk is to be advised when the conditions exist, in respect of any defendant, which render service by publication permissible is not directly stated, but the provision that suits to enforce the payment of taxes shall be conducted according to the practice and proceedings of chancery courts, except as it is otherwise provided in the act, makes applicable to such suits section 5679 of Sandels & Hill's Digest, which, in respect of proceedings in the chancery and other courts of the state, authorizes the clerk to make a warning order and to cause it to be published only when it appears by affidavit filed in his office that the conditions exist which render that mode of service permissible. Such an affidavit, adapted to the terms of the levee act, and placed of record in the suit, is therefore a prerequisite to the issuance and publication of the prescribed warning order, and is strictly jurisdictional in character. *Memphis Land & Timber Co. v. St. Francis Levee District*, 70 Ark. 409, 68 S. W. 242; *McMahan v. Smith*, 69 Ark. 591, 65 S. W. 459; *Howard v. De Cordova*, 177 U. S. 609, 614, 20 Sup. Ct. 817, 44 L. Ed. 908; *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. Ed. 123; *Earle v. McVeigh*, 91 U. S. 503, 508, 23 L. Ed. 398; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836; *Brown v. St. Paul, etc., Co.*, 38 Minn. 506, 38 N. W. 698; *Murphy v. Lyons*, 19 Neb. 689, 28 N. W. 328; An-

derson v. Coburn, 27 Wis. 558; Chase v. Kaynor, 78 Iowa, 449, 43 N. W. 269; Adams v. Baldwin, 49 Kan. 781, 31 Pac. 681. We say adapted to the terms of the levee act, because the particular conditions in which constructive service is permissible in other suits, as specified in section 5679, such as "that the defendant is a nonresident of this state, or has departed from this state with intent to delay or defraud his creditors," are essentially different from those specified in the levee act and are inapplicable to suits under it. Now what are the conditions in which service by publication against a defendant, as a known owner, is permissible in suits under that act? The answer is not doubtful when the provisions of the act before quoted are read together in the light of recognized rules of interpretation. The conditions are that the defendant must be a nonresident of the county and must be absent therefrom and that there must not be an occupant upon the land. If the defendant be a resident of the county, or be present therein, or if there be an occupant upon the land, actual service of a summons is required. A defendant may be a nonresident of the county and yet be present therein so that actual service upon him can be had. If he is so present, the act plainly calls for such service. And a defendant may be a nonresident of the county and absent therefrom and yet the land be occupied by a tenant or other representative upon whom a summons can be served. If the land is so occupied, the act plainly calls for such service. Banks v. St. Francis Levee District, 66 Ark. 490, 494, 51 S. W. 830.

The Circuit Court, while seemingly conceding that service by publication in the absence of the requisite affidavit would be void, held that a verified complaint alleging the existence of conditions rendering such service permissible, may be treated as both a complaint and an affidavit, and further held that the complaints of the levee district were sufficient to sustain the service by publication because they alleged that Johnson was a nonresident of the county. We concur in the view that a complaint, if properly verified and containing what is required to be set forth in an affidavit for publication, may perform the office of such an affidavit, but we cannot assent to the view that these complaints were sufficient to sustain the service by publication. They did not contain what was required to be set forth in an affidavit. Of the three concurring conditions, without the existence of which that mode of service was not permissible, the complaints alleged the existence of one and were altogether silent in respect of the other two, that is, they stated that Johnson was a nonresident of the county but did not state that he was not present therein or that there was not an occupant upon the lands. An affidavit which is not merely informal, but entirely wanting in some of the essentials prescribed by statute, will not authorize constructive service. McMahan v. Smith, 69 Ark. 591, 65 S. W. 459; Shields v. Miller, 9 Kan. 390; Endel v. Leibrock, 33 Ohio St. 254; McGavock v. Pollack, 13 Neb. 535, 14 N. W. 659; Carnes v. Mitchell, 82 Iowa 601, 48 N. W. 941; McCracken v. Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481; Palmer v. McMaster (Mont.) 33 Pac. 132, 40 Am. St. Rep. 434.

We have not failed to observe that in *Memphis Land & Timber Co. v. St. Francis Levee District*, *supra*, and in the more recent case of *Ballard v. Hunter*, 85 S. W. 252, the Supreme Court of Arkansas seems to speak of nonresidence as if it were the only jurisdictional fact to be shown in the affidavit for publication, but we do not regard these decisions as intended to express the deliberate judgment of the court upon this subject. In one the question actually considered was whether or not any affidavit for publication was necessary, rather than what it should contain, and in the other it was whether or not a verified complaint could perform the office of such an affidavit; but in neither does the court's attention appear to have been directed to the provision, "and provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land." In the arrangement of the act, this provision is somewhat separated from the others which it is obviously designed to modify and restrain, and, in the absence of any controversy respecting it, it may well be that it was not observed by the court. Moreover, it was treated in *Banks v. St. Francis Levee District*, *supra*, as imposing restrictions upon service by publication and rendering void a decree for the sale of lands whose nonresident owners were brought into court merely by publication when, at the time, the lands were occupied by agents and tenants upon whom actual service of summons could have been had. As the object of exacting an affidavit as a prerequisite to notice by publication is to insure actual service of a summons in all cases where that is necessary, and to avoid the rendition of decrees and the creation of titles which are void, we think it is plain the statute contemplates that the affidavit shall set forth all, and not part, of what is essential to a lawful service by publication.

Did the absence of the requisite affidavit render the service by publication void and subject the decrees to collateral attack, or are they protected by a presumption that a sufficient affidavit was made and filed, notwithstanding what has been shown in that regard? The appellees strongly insist that as the chancery court of Crittenden county was a superior court of general jurisdiction and was specially clothed with authority to entertain suits to enforce the payment of levee taxes, the decrees are protected against collateral attack by a presumption that the warning order was made and published only after a sufficient affidavit had been made and filed. We assent to the premises, but not to the conclusion. The record in each suit fairly discloses that service by publication was had upon the mere allegation of nonresidence in the complaint, and, as this did not warrant that mode of service, the invalidity of the decree is shown upon the face of the record. There is, therefore, no room for presumptions, because they are indulged in respect of jurisdictional facts only when the record is silent, not when it discloses what was done and shown. 1 Black on Judgments, § 278. As was said in *Galpin v. Page*, 18 Wall. 350, 366, 21 L. Ed. 959:

"But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts

presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."

The rule so announced was reaffirmed and applied in *Settemier v. Sullivan*, 97 U. S. 444, 448, 24 L. Ed. 1110, where a judgment, although reciting that the defendant had been duly served with process, was held void upon collateral attack because of the insufficiency of the service disclosed by the record. The statute required the service to be made by delivering a copy of the process to the defendant personally, or, if he could not be found, to some member of his family at his usual place of abode, and the officer's return recited that he served the process by delivering a copy to the defendant's wife at his usual place of abode, but did not state that the defendant could not be found. The court, after observing that the inability of the officer to find the defendant was not a fact to be inferred, but a fact to be affirmatively stated in the return, said:

"Here it is contended that the recital in the entry of the default of the defendant in the case in the state court, 'that, although duly served with process, he did not come, but made default,' is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former. We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

So in *Cheely v. Clayton*, 110 U. S. 701, 708, 4 Sup. Ct. 328, 28 L. Ed. 298, where the evidence upon which service by publication was had in a divorce proceeding was disclosed by the record and was insufficient, it was held, upon collateral attack, that this controlled

a general recital in the decree that due service had been had, and the decree was declared void.

And such is the rule of decision in the Supreme Court of Arkansas. *Parr v. Matthews*, 50 Ark. 390, 393, 8 S. W. 22; *Cross v. Wilson*, 52 Ark. 312, 12 S. W. 576; *Martin v. M'Diarmid*, 55 Ark. 213, 216, 17 S. W. 877; *Gregory v. Bartlett*, 55 Ark. 30, 35, 17 S. W. 344. In the last case a collateral attack was made upon a decree of one of the chancery courts of the state resting upon notice by publication, which the record disclosed was had without prior compliance with one of the requirements of the statute, although it was stated otherwise in the decree. The court held the decree void, saying:

"The contention that the court has passed upon the sufficiency of the notice by the rendition of the decree, and that the mistake was an error in the exercise of jurisdiction, to be taken advantage of only in a direct proceeding, is untenable, because, until the foundation had been laid for the issue and execution of process, the jurisdiction of the court had not attached for any purpose. No process was ever issued in the cause in which the challenged decree was rendered; the court's determination of any question was therefore *coram non jndice* and binding upon no one. * * * The recital of the decree that there was proper notice to the parties in interest is not conclusive of that fact, but must be read in connection with that part of the record which gives, or is required to give, the official evidence of jurisdiction, as prescribed by statute. *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704; *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959. If such evidence is not required by the statute to be placed upon the record and the record recites, or is silent as to, the facts necessary to show jurisdiction, their existence will be presumed; but no presumptions are indulged when the evidence is stated upon the record (*Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704), or where the statute requires the jurisdictional facts to appear of record and they are not made so to appear. *Applegate v. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. 742, 29 L. Ed. 892; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959."

Other decisions to the same effect are *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836; *Murphy v. Lyons*, 19 Neb. 689, 28 N. W. 328; *Ely v. Tallman*, 14 Wis. 28; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457.

Our conclusion is that the service by publication was void because had without the prerequisite affidavit, as is disclosed by the record in each suit, and that the decrees were therefore subject to collateral attack.

The decree of the Circuit Court is accordingly reversed, with directions to dismiss the cross-bill of the appellees and to enter a decree according to the prayer of the appellants' bill, but omitting therefrom the tract which it is conceded was included in the bill by mistake.

PORTER v. BUCKLEY et al.

(Circuit Court of Appeals, Third Circuit. September 5, 1906.)

No. 23.

1. WRIT OF ERROR—REVIEW OF RULINGS—NECESSITY OF EXCEPTIONS.

The basis of an assignment of errors concerning matters transpiring in the course of a trial is a bill of exceptions signed by the trial judge.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1432.]

2. EVIDENCE—OPINION EVIDENCE—SPEED OF AUTOMOBILE.

It is competent for any ordinary witness to express an opinion as to the speed an automobile was making at a given time, which is not, strictly speaking, a scientific inquiry, the weight of such opinion being for the jury.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2270.]

3. SAME—COMPETENCY—RESULTS OF EXPERIMENTS.

Testimony as to the comparative amount of noise made by different makes of automobiles, based on comparisons made by the witness, was properly excluded where there was no proof of the condition of the machines with which the test was made.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2292.]

4. SAME—PHOTOGRAPHS.

Photographs of a place, if admitted in evidence, are but secondary evidence of the conditions existing at the time they were taken, and are not admissible, if objected to, without preliminary proof that they are correct and truthful representations of their originals.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1657.]

5. APPEAL AND ERROR—REVIEW OF CHARGE—EXCEPTIONS.

An exception to a charge cannot be sustained which fails to call the attention of the court to its particular infirmity.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1621.]

6. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.

A request to charge the jury to disregard the testimony of certain witnesses relating to a particular subject is equivalent to a motion to strike out all such testimony, and is properly refused, if any of it was admissible or not objected to.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 660.]

In Error to Circuit Court of the United States for the District of New Jersey.

Edward J. Fox, James Buchanan and James W. Fox, for plaintiff in error. Joseph M. Roseberry, for defendants in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge. This is an accident case. The plaintiffs (the defendants in error in this court) brought suit against the defendant (the plaintiff in error here) to recover for personal injuries sustained by the plaintiff Emaline Buckley, and for damages sustained by Samuel S. Buckley, the other plaintiff and husband of Emaline Buckley, by reason of the defendant's alleged negligence. The plaintiffs aver that the accident was caused by the reckless

management of an automobile driven by the defendant on the public road between Allamuchy and Hackettstown, N. J., which frightened the plaintiffs' horse and led to the overturning of their carriage. A joint action by husband and wife in such a case is authorized by section 21 of the New Jersey Practice Act (P. L. 1903, p. 540) which is as follows:

"In an action by a husband and wife for an injury done to the wife in respect of which she is necessarily joined as coplaintiff, the husband may add thereto claims in his own right arising *ex delicto*, and separate actions brought in respect to such claims may by order of the court or a judge be consolidated; provided, in case of the death of either plaintiff, such action shall abate only so far as relates to the cause or causes of action, if any, which do not survive."

The jury rendered a verdict of \$3,000 in favor of the wife and \$700 in favor of the husband.

In the first and second assignments of error the defendant contends that the trial court erred in admitting in evidence, over the defendant's objections, certain testimony of Julia C. Thomas, a witness for the plaintiffs, relating to the speed of the automobile. The evidence objected to is quoted in the first assignment, and consists of a number of questions with the answers thereto. The printed record shows that several objections were made by the defendant's counsel to these questions and that the objections were overruled. But the only exception taken to the rulings, or signed by the trial judge, was to the question, "About how fast was this automobile going as near as you can tell?" It is a familiar rule of practice that the basis of an assignment of errors concerning matters transpiring in the course of a trial is a bill of exceptions signed by the trial judge. *U. S. Rev. St. § 953* [*U. S. Comp. St. p. 696*]; *Metropolitan R. Co. v. District of Columbia*, 195 *U. S.* 329, 25 *Sup. Ct.* 28, 49 *L. Ed.* 219; *Clune v. United States*, 159 *U. S.* 590, 16 *Sup. Ct.* 125, 40 *L. Ed.* 269; *Lincoln Savings Bank v. Allen*, 82 *Fed.* 150, 27 *C. C. A.* 87; *Monarch Cycle Manufacturing Co. v. Roger Wheel Co.*, 105 *Fed.* 324, 44 *C. C. A.* 523; *Consolidated Coal Co. v. Polar Wave Ice Co.*, 106 *Fed.* 798, 45 *C. C. A.* 638. The first assignment, therefore, brings nothing before us except the single question, above quoted, to the allowance of which an exception was duly taken. The contention of the counsel for the defendant is that the question called for an expert opinion by a witness not qualified to give it. In *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 *Mich.* 104, Chief Justice Cooley, said:

"The motion of the train was to be compared to the motion of any other moving thing, with a view to obtaining the judgment of the witness as to its velocity. No question of science was involved beyond what would have been had the passing object been a man or a horse. It was not, therefore, a question for experts. Any intelligent man, who had been accustomed to observe moving objects, would be able to express an opinion of some value upon it the first time he saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with timepiece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony and not to its admissibility. Any man possessing a knowledge of time and of distances would be competent to express an opinion upon the subject."

Rogers on Expert Testimony (2d Ed.) p. 244, says:

"Questions as to the speed with which trains were moving are not, strictly speaking, scientific inquiries, but any man possessing a knowledge of time and distances is usually competent to express an opinion on that subject."

Lawson on Expert and Opinion Evidence (2d Ed.) p. 505, gives the following rule:

"The opinions of ordinary witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal, e. g., questions relating to time, quantity, number, dimensions, height, speed, distance, or the like."

The same rule is given in 6 Thomp. Neg. § 7754, and in other authorities that might be cited. Applying to the case in hand this rule, which we think is supported by the best authorities, we find that Mrs. Thomas testified that she had witnessed horse races and, on several occasions, had timed express trains running through Hackettstown and Rutherford, N. J., that she had never seen anything go so fast on the public highway as the defendant's automobile, and that she should judge it was going "at the rate of 40 or 50 miles an hour as the express goes through town." It thus appears that if it was necessary that her opinion concerning the speed of the automobile should be authenticated by proof that she had previously observed the speed of moving objects, that proof was furnished. The weight of her opinion was a question wholly for the jury.

The third and fourth assignments relate to the exclusion of the proffered testimony of Thomas H. Throp as to the comparative noises made by a Winton car, of the type used by the defendant at the time of the accident, and other machines, and to striking out the testimony given by him to the effect that he had made such comparisons. The testimony offered was properly excluded. While Mr. Throp testified that he had made such comparisons, there was no proof of the condition of the machines with which the comparisons were made. In view of these facts, his testimony that he had compared the noise made by a Winton car with the noises made by other machines was immaterial, and was properly stricken out.

The fifth assignment relates to the exclusion of certain photographs of the place where the accident occurred taken by Louis A. Francisco. The accident occurred on September 11, 1904. Mr. Francisco testified that he is a civil engineer, that he had had some experience as a photographer in connection with his professional work, and that he took the photographs produced by him on October 24, 1905. He was then asked this question: "Do they correctly represent the location as you found it when you were there in October of this year?" He answered that they did. The photographs, without other preliminary proof, were then offered in evidence by the defendant, objected to by the plaintiffs, and excluded by the court. Photographs are often admitted in evidence for illustrative purposes, because courts take judicial cognizance of the fact that a photograph is a light-printed picture produced by

the operation of natural laws, and not by the hand of man. But courts also know that photography is an art, and that in the hands of inexperienced or interested persons photographs may be made to misrepresent their originals. For this reason they are not admissible in evidence, if objected to, unless they have been duly verified by preliminary proofs as correct and truthful representations of their originals. In the present case the jury, amongst other things, were required to investigate the conditions, on September 11, 1904, of the place where the accident occurred. If, during the trial, the jury had been permitted to view the place, they would have had before them primary evidence of its conditions at the time of the view. Photographs of the place, if admitted, would have been but secondary evidence of the conditions at the time they were taken. When it is proposed to prove the contents of a lost instrument by secondary evidence the proof of loss is a matter preliminary to the admission of the secondary evidence, and the question of its sufficiency is for the court. The New Jersey rule is that if the decision of the trial judge upon the sufficiency of the proof of loss is liable to review on a writ of error, the onus is upon the plaintiff in error of showing that the decision was erroneous, and there will be no reversal unless it clearly appears that the court below was in error and injustice was done by the erroneous decision. *Johnson v. Arnwine*, 42 N. J. Law, 451, 36 Am. Rep. 527; *Voorhis v. Terhune*, 50 N. J. Law, 159, 13 Atl. 391, 7 Am. St. Rep. 781; *Longstreth v. Korb*, 64 N. J. Law, 115, 44 Atl. 934; *Koehler v. Schilling*, 70 N. J. Law, 586, 57 Atl. 154. We think the same general principles are controlling when a photograph of a place is offered as secondary evidence. In *Goldsboro v. Central R. Co.*, 60 N. J. Law, 51, 37 Atl. 433, the Supreme Court of New Jersey said:

"As evidence, photographs have been held admissible upon the question of identity and comparison of handwriting, and as secondary evidence when the primary and better evidence could not be obtained. It may be generally regarded as a rule that they are never admitted but as secondary evidence. They have been admitted to show the condition and identity of premises. There are many illustrations in the cases of the admissibility of such evidence. But they are not admissible unless authenticated by other evidence that they are correct resemblances or truthful representations."

In the case in hand, after the defendant had offered the very meager preliminary proof referred to, and on objection of the counsel for the plaintiffs, the court excluded the photographs. The counsel for the defendant then said that he proposed to show that the conditions existing at the time the photographs were taken were the same as those existing at the time of the accident. He did not state what those conditions were. Seven photographs were offered, not separately but collectively. Four of them show an automobile standing in the road. One of them contains the picture of a man standing in the road, and being one of the most prominent objects in the photograph. Another contains the pictures of two men standing in the grass or weeds on the side of the road at or near the point where the plaintiffs' carriage was overturned. Why these men were placed in these conspicuous places within the field of the

camera was not explained. Each of the seven photographs, furthermore, shows many conditions not material to the issue. A mere inspection of the photographs shows conclusively that it was impossible to prove that all the conditions disclosed by them existed at the time of the accident. As no information was imparted to the court concerning the particular conditions which the defendant proposed to show, the court was fully warranted in saying, as he did, that he excluded the photographs on the ground that they were taken more than a year after the accident, and disclosed conditions which could not be proved to have been the same when the photographs were taken as they were at the time of the accident.

The sixth and seventh assignments were withdrawn by the defendant at the time of the oral argument.

The eighth assignment relates to the refusal of the trial court to charge the defendant's request that:

“If the jury believed from the evidence that at the time of the accident the defendant was not operating his automobile at a high rate of speed, and that it was not in consequence of any such high rate of speed of the automobile, together with the noise emanating therefrom, that the horse of the plaintiff, Samuel S. Buckley, became frightened and caused the injuries to the plaintiff, then there was no negligence on the part of the defendant, and the jury should render a verdict in his favor.”

This request was too narrow. If charged, it would have excluded the jury from the consideration of other elements than speed and noise. For example, in the fourth count of the declaration the plaintiffs aver that the defendant not only operated his automobile at great speed and with noise, but that “the said defendant did not then and there take reasonable care, after frightening said horse as aforesaid, to look out and see the peril of the said plaintiff, Emaline Buckley, by reason of the fright of said horse, and did not then and there do what he could, in the management of said motor vehicle, to diminish the fright of said horse,” etc. There is evidence in the case tending to support this count of the declaration. The refusal to charge as requested was therefore correct.

The ninth assignment relates to the refusal of the court to charge the defendant's request that:

“Upon all the evidence the jury should render a verdict for the defendant, upon the ground that there is no proof of negligence on the part of the defendant, and also upon the ground that the injuries sustained by the plaintiffs were occasioned on account of their contributory negligence.”

The evidence shows that Mrs. Buckley was thrown out of the carriage as it passed over an embankment about two feet high on the side of the road. The plaintiffs insisted that the horse became frightened and ungovernable, and that in spite of the efforts of Mr. Buckley, who held the reins, the horse sheered to the side of the road, carried the vehicle over the embankment, ran into a wire fence where he got one of his legs between the wires, and then, withdrawing his leg from that position, ran across the road to the opposite fence, Mr. Buckley meanwhile holding fast to the reins. And the defendant insisted that before the automobile had passed the plaintiffs, Mr. Buckley was whipping his horse,

and that the accident was wholly due to the negligent and unskillful management of the horse by Mr. Buckley. On both of these points there was conflicting evidence, and on both of them the charge of the court was singularly fair to the defendant. There would have been palpable error in charging upon either of these points as requested by the defendant.

The tenth assignment was withdrawn by the defendant on the oral argument.

The eleventh assignment is:

"That the court erred in using the following language in the charge to the jury: 'There is a statute in this state which prescribes that at a prominent crossroad automobiles shall not exceed a speed limit of 6 miles per hour. That statute has no reference to this case, gentlemen, unless you shall find that that crossing was a prominent crossing. Now "prominent" means something standing out from the ordinary. A prominent crossing is a chief crossing—a leading crossing. Is this such a crossing? You have heard the evidence in this case. You have heard as to how much that road is traveled and all the evidence concerning it, and it is for you to say as a fact from the evidence in this case whether that is a prominent crossing—more prominent than the ordinary crossing. If it was, then you may consider a violation of this statute as a circumstance in the case tending to show the negligence of the defendant. If it was not a prominent crossing, then the speed limit as fixed by the statute is 20 miles an hour. Now, gentlemen, that statute comes up for your consideration in the manner I have stated. If it is a prominent crossing, the speed limit is fixed at 6 miles per hour. If it is not a prominent crossing, the speed limit is fixed at 20 miles per hour. You should only consider a violation of the speed rate of that statute in connection with any evidence in the case tending to show negligence on the part of the defendant. It is only a circumstance to be considered by you.'"

By the statute of New Jersey referred to in this language (P. L. 1903, p. 81, § 5) it is declared that the speed of a motor vehicle on any public highway shall be limited to "one mile in six minutes upon the sharp curves of a street or highway and at the intersection of prominent crossroads where such street, road or highway passes through the open country, meaning thereby portions of a town, township, borough or village where houses are more than one hundred feet apart."

The Allamuchy Road, on which the defendant was driving his automobile, is macadamized. The evidence shows that it is much used, and we do not understand that even the defendant denies that it is a prominent road. The other—the Petersburg or Budd's Lake Road, which crosses the Allamuchy Road at the place where the accident occurred—is not so much used. The evidence satisfies us that it is a cross-country road and by no means a prominent one. It will be observed that the statute speaks of "the intersection of prominent crossroads" and not of a "prominent crossing." Assuming that the Allamuchy Road is a prominent one and that the Petersburg or Budd's Lake Road is not, the intersection of the two roads is not "the intersection of prominent crossroads." In the charge the court failed to observe the exact phraseology of the statute. But so did counsel for the defendant. After the charge was finished the counsel for the defendant said:

"I beg leave to note an exception to so much of the charge as relates to the applicability of the automobile act of 1903. Your honor said that the jury should say whether the crossing from the Budd's Lake Road was a prominent crossing."

The court then said:

"Do you want me to charge that it was a prominent crossing?"

To this inquiry the counsel answered:

"My objection is that there is nothing in the case to sustain or warrant the inference that it is a prominent crossing, where this accident occurred."

An exception to evidence cannot be sustained that fails to call the attention of the court to its particular infirmity. This is a salutary rule designed to promote the administration of justice. *Allaire v. Allaire*, 39 N. J. Law, 116; *Noonan v. Caledonia Mining Co.*, 121 U. S. 400, 7 Sup. Ct. 911, 30 L. Ed. 1061. The reason underlying it is equally applicable to an exception to a refusal of a trial judge to grant a nonsuit or to his charge to the jury. If the particular error above mentioned had been pointed out to the court at the close of the charge it would doubtless have been immediately corrected. It would be as competent for us to sustain this assignment on the ground that the trial court made the slip of telling the jury that the New Jersey statute prescribes a speed limit of 6 miles an hour instead of a mile in 6 minutes, or 10 miles an hour, notwithstanding no exception to that error was taken, as to sustain it on the exception that in fact was taken.

The twelfth assignment is that:

"The court erred in refusing to charge the jury to disregard the testimony of the following witnesses, namely, Emaline Buckley, Samuel S. Buckley, and Julia C. Thomas upon the subject of the rate of speed at which the automobile of the defendant was running at the time of the accident."

While some of the evidence of Emaline Buckley appears to have been objected to, no exception was taken. Samuel S. Buckley testified on the subject of speed both on his direct and cross-examinations, and not only was no exception taken to any part of his testimony on that subject, but no objection to it was made. The testimony of Julia C. Thomas was properly admitted as stated above in considering the first assignment. The request to charge contained in this assignment was equivalent to a motion to strike out all the testimony of these witnesses relating to the subject of speed. It was properly refused because a portion at least of the testimony was competent and relevant, and also because a portion of it was not objected to when offered. *American Express Co. v. Lankford*, 93 Fed. 380, 35 C. C. A. 353; *Farmers' & Traders' Nat. Bank v. Greene*, 74 Fed. 441, 20 C. C. A. 500; *Benson v. United States*, 146 U. S. 332, 13 Sup. Ct. 60, 36 L. Ed. 991.

The thirteenth assignment is that:

"The court erred in refusing the motion of defendant to direct a verdict in favor of the defendant," and the fourteenth and last assignment is that "the court erred in entering judgment in favor of the plaintiffs and against the defendant."

The objections presented by these assignments have already been sufficiently answered. The case was one of fact for the jury. The judgment of the circuit court is affirmed, with costs.

In re INTERNATIONAL MAHOGANY CO.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 278.

1. EVIDENCE—PROOF OF FOREIGN LAW.

The law of a foreign country on a given subject cannot be proved merely by the introduction in evidence of excerpts from its written laws, without showing their construction by its courts but should be proved by the testimony of lawyers of that country.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1661.]

2. BANKRUPTCY—DEFECTIVE MORTGAGE—CURING DEFECT AFTER BANKRUPTCY.

Where a bankrupt corporation, prior to its bankruptcy, to secure an issue of bonds had executed a mortgage on lands in Cuba which had there been filed for registry but not recorded owing to a technical defect, the court will not enjoin the directors from authorizing the execution and delivery of a curative mortgage after bankruptcy, it appearing that under the law of Cuba, the mortgage will be valid from the date of the entry in the recorder's books of the fact of its presentation, if the defect is corrected and the instrument is thereafter duly recorded; the trustee in bankruptcy having no greater right to object to the correction than the general creditors of the bankrupt would have had if the bankruptcy had not intervened.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York in Bankruptcy.

On petition to review order denying motion for order to enjoin directors of the bankrupt corporation from passing a resolution authorizing the Register of the Province of Puerto Principe, in the island of Cuba, to receive a certain mortgage made by the bankrupt corporation prior to its adjudication as a bankrupt.

L. Oppenheimer, for petitioner.

Herbert Barry and Gerrard Glenn, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The International Mahogany Company, prior to its bankruptcy, on September 30, 1904, executed a mortgage on real estate, situated in the Province of Puerto Principe, in the island of Cuba, to the Knickerbocker Trust Company, as trustee, for an issue of bonds amounting to the par value of \$1,000,000. A portion of this issue has passed into the hands of divers individuals as purchasers for value, and the remaining bonds have been deposited with said Knickerbocker Trust Company as part collateral for a loan of \$225,000, made to the Company by said Knickerbocker Trust Company. After execution, this mortgage was entrusted to the attorney of the bankrupt for record and it was duly lodged for record, but owing to certain technical objections

to the mortgage, in its omission to specify by a certain additional Cuban unit of measure the area of the land conveyed, and a failure to specify the value of the property according to the appraisal of the contracting parties, it was not recorded. Thereupon, a form of instrument intended to obviate these objections was forwarded to the bankrupt and was executed by it. Thereafter, the trustee filed a motion for an order enjoining the directors of the company from passing said resolution, and it was arranged that the instrument, after execution, should be left, pending the determination of said motion, in the custody of the trustee in bankruptcy. The court, after hearing the parties, denied the motion, and ordered the trustee to deliver said supplemental instrument to the Knickerbocker Trust Company. Thereupon, this petition to review said order was brought. The question presented upon this petition is whether the corporation should be permitted to execute and deliver said supplemental instrument to remedy said technical defects or whether, by reason thereof, the mortgage must be invalidated and set aside. The trustee admits that the objections now made by him would be available in a foreclosure of the mortgage in Cuba, but desires that they be disposed of in this court.

It is to be noted at the outset that no question is raised as to the corporate power of the bankrupt corporation to execute and deliver said instrument. The position of the trustee is stated by his counsel as follows:

"It is not contended by the trustee that the bankrupt ceased by the adjudication in bankruptcy to be a corporation, nor that it thereby forfeited its rights to be a corporation, but it is maintained that all the title to and control over the bankrupt's property as distinct from its franchise to be a corporation has passed to the trustee in bankruptcy as of the date of the filing of the petition."

The trustee further contends:

"That the attempted execution of the instrument in question is a usurpation of the powers of the trustee and a contempt of court, in that title to the property has passed to the trustee."

But the proposed supplemental declaration and resolution neither purports nor attempts to affect the title to the property of the bankrupt prior to the adjudication which has vested in the trustee. It merely operates to cure certain formal defects in a mortgage executed by the bankrupt prior to its bankruptcy, in accordance with a covenant for further assurance contained in the mortgage deed itself.

The argument of the trustee is predicated upon the claim that by the Cuban law an unrecorded mortgage is void as to creditors as well as to purchasers without notice, that the trustee stands in the position of such creditors or purchasers, and, therefore, even if the conveyance in question be construed to be an equitable mortgage, it will not avail as against the trustee because it has not been recorded.

There is no proper or sufficient evidence in support of the claim as to the provisions of the Cuban law relating to the recording of

mortgages. The affidavit of the trustee in the court below on this point is as follows:

"That your deponent has made energetic efforts, both at the office of the Cuban Consul and through attorneys, to obtain a copy of the law of Cuba as concerned the recording and registry of mortgages of real property, and that annexed hereto is a copy of the mortgage law for Cuba, Porto Rico, and the Philippines, published by the War Department of the United States government in the year 1899, and which your deponent believes is the law of Cuba governing mortgages at the present time, and your deponent is further informed by the Cuban Consul in this city that the said law is the law of Cuba as it stands to-day."

The volume referred to is not before us and no citations therefrom are printed in the record, although what appears to be a copy of certain provisions therein is printed in the brief for the trustee. But, irrespective of these defects of proof and of the fact that it nowhere appears that said provisions are embodied in the existing Cuban law, this method of attempting to prove a foreign law is unprecedented and insufficient, and has recently been specifically disapproved by this court in *The Asiatic Prince*, 108 Fed. 287, 47 C. C. A. 325, where Judge Lacombe, delivering the opinion of the court, said as follows:

"The law of a foreign country and its commercial usages are proved here by calling its lawyers and merchants and interrogating them. That has been done in this case, with a result which certainly warrants the conclusion that the proof is overwhelmingly the one way. It is true that as to the law of Brazil the only witness called by claimant was a young lawyer, but his statements are direct, positive, and reiterated. * * * There was abundant opportunity to take the testimony of some other lawyer in the District Court, if the statements of claimant's witness were inaccurate, and to make application here to take further proofs, but libellant has contented himself with printing copious excerpts from the statute law of Brazil, which he insists do not sustain the witness' statements. * * * Such a method of criticising the testimony of a foreign lawyer as to the law which prevails in his country is unpersuasive; there is much more than the text of a statutory enactment to be considered; departmental regulations, administrative construction, judicial exposition are often quite as important. The text of the act of Congress of February 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290] might well convey to a jurist in some foreign country a different meaning from that which it conveys to a lawyer here, who is familiar with *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226."

This decision is directly in point when applied to the present case.

The quotations from the Cuban mortgage law of 1899 consist of mere declarations that "instruments * * * which are not duly recorded or entered in the registry cannot prejudice third persons," etc.

On the other hand, counsel for the company has introduced the affidavit of a member of the Cuban bar, who deposes that he is familiar with the existing Cuban law and that thereby the right of priority of a mortgage creditor is protected from the date of the entry in the recorder's books of the fact of presentation of the mortgage, provided that curable defects, if any, are duly corrected and the mortgage is, thereafter, duly recorded, and that, in his opinion, upon the admitted facts as to the mortgage in question, in case it

should be duly corrected, as proposed, and duly recorded, the rights of the mortgagee would be so perfected as to enable it to institute foreclosure proceedings in accordance with the provisions of the mortgage. In view of this declaration it would seem that even under the Cuban law of 1899, as quoted by the trustee, the instrument had been "duly entered in the registry," and that after due record the rights of the mortgagees would be protected against third parties.

One of the citations by the trustee from the Cuban law of 1899 is as follows:

"Those who have not participated in recorded instruments or contracts shall be considered as third persons."

The trustee interprets this provision as meaning that unrecorded mortgages are invalid as to general creditors, judgment creditors, and purchasers without notice, and asserts that the trustee takes a title which is higher than that of the bankrupt. But this court, in *Re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, has held directly to the contrary. There, Judge Wallace, delivering the opinion of the court, says as follows:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankruptcy acts, contemplates that a lien good at that time as against a debtor, and as against all of his creditors, shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

This language is quoted with approval in *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 981.

In these circumstances, it is unnecessary to consider the argument of counsel for the company, supported by the opinion of the district judge, that an equitable lien was created by the mortgage, which a court of equity here, having the parties before it, would enforce, nor the construction of section 67a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], which is fully discussed in *New York Economical Printing Co.*, *supra*. It is there held that section 67a should be construed as one designed to conserve the rights of creditors and mortgagees respectively as they existed prior to the bankruptcy proceedings, not to create new rights in the creditors, nor to take away any rights of a mortgagee.

We are of the opinion that the claim under this mortgage is a valid lien against the trustee, and that the defects in the mortgage should be corrected.

The order of the District Court is affirmed, with costs.

NOTE.—The following is the opinion of Holt, District Judge, on overruling the motion for injunction:

HOLT, District Judge. The questions involved in this motion are novel and difficult. If the claim of the mortgagee was not, for want of record, a valid lien as against claims of the creditors of the bankrupt at the time of

the adjudication, I think it very doubtful, under section 67a, of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] whether anything could be done afterwards to render it valid. At the same time the argument that a court of equity would have power to direct the bankrupt to execute such an instrument as is proposed to be delivered in this case, in a direct suit brought for that purpose, is very weighty, and if such a judgment can be rendered in a plenary suit, I see no reason why this court should not permit the same result to be accomplished by a simpler process. I think, too, that the claims that the filing of the mortgage in the Cuban record office was, under the circumstances, equivalent, in its legal effect, to recording it, and that the mortgagee has at least an equitable mortgage which the courts would enforce, are very strong. At all events, I think that the alleged defects in the form of the mortgage which have led to the recording officer in Cuba refusing to record it should be cured, if possible. The mortgagor has received and the mortgagee has paid out \$275,000 on the faith of the validity of this mortgage, and there is no justice in permitting it to be invalidated if it can be prevented.

Motion denied.

JAMES RAMAGE PAPER CO. v. BULDUZZI.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 244.

1. MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—EVIDENCE OF RELATION BETWEEN PARTIES.

Where defendant corporation, desiring in the conduct of its business to use a bridge which had broken down, rebuilt such bridge at once under an agreement with the town by which they shared the cost, the question whether it did the work merely as agent for the town or as a principal, so as to render it responsible as master to an employé on the work, *held* properly submitted to the jury in an action by such employé to recover for a personal injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1004, 1276.]

2. SAME—ACT OF FELLOW SERVANT—NEGLIGENCE IN EMPLOYING INCOMPETENT SERVANT.

A master is liable for an injury to a servant through an act of a fellow servant which was due to his incompetency and unfitness to direct dangerous work of which he was put in charge, and where the master failed to exercise reasonable and proper care in his employment.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 334-351.]

3. SAME—ACTION FOR INJURY OF SERVANT—QUESTIONS FOR JURY.

The question of a plaintiff's contributory negligence *held* properly submitted to the jury under the evidence, in an action by a servant to recover for a personal injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

4. SAME—INSTRUCTIONS.

The refusal of requested instructions on the subject of assumed risk, in an action by a servant against the master to recover for a personal injury, *held* proper, in view of the charge given.

In Error to the Circuit Court of the United States for the District of Vermont.

See 140 Fed. 95.

This cause comes here upon writ of error to review a judgment of the Circuit Court, District of Vermont in favor of defendant in error who was plaintiff below. The judgment was entered upon the verdict of a jury, who found the plaintiff entitled to damages for injuries sustained by the explosion of a blasting charge in a stone quarry. A blast of five holes had been arranged to be fired, and the man in charge as foreman undertook to discharge them. The five caps exploded, but two of the dynamite cartridges missed fire; the result was that at three holes rocks were blown out, while at two holes only earth was thrown up. It would seem that to a man experienced in blasting this would indicate that two of the cartridges had failed to explode. The man in charge, one Arighene, the plaintiff, and a fellow workman believed that all had exploded. Thereupon Arighene directed the plaintiff and another man to drill out one of the holes, which had not broken out, but had simply thrown off the dirt, which plaintiff proceeded to do. In the process of so drilling out the hole unexploded dynamite was struck by the drill and exploded, severely injuring the plaintiff. It was the theory of the case that a competent and careful foreman, seeing that a "charge" had only thrown out earth, would have made a sufficient examination to determine whether or not there was any unexploded dynamite in the hole before setting a man to drill it.

E. N. Gibson and E. L. Waterman, for plaintiff in error.

Clarke C. Fitts, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. It will not be necessary to review the authorities cited on the respective briefs; the fundamental principles of law are well-settled, and, in all essentials, there is no real conflict as to the facts.

1. The defendant contends that a verdict in its favor should have been ordered by the court, because defendant was agent for the town of Rowe in all that was done relating to the construction of the abutment of the bridge for which this stone was being blasted. And also because defendant was organized to manufacture paper, and the business of quarrying stone was beyond the scope of its corporate powers. There was evidence, however, showing that a certain bridge had broken down, which it was the duty of the town of Rowe to restore. The time, however, was unfavorable; the ground was frozen and covered with ice and snow, and it was a much more expensive job to put in the abutment than it would be after the frost should be out of the ground and the days longer. Under these circumstances the selectmen of the town deferred undertaking the work. This was a great disadvantage to the defendant as the bridge connected its mill with the railroad, and it wished to have it replaced at once. Thereupon with the assent of the selectmen, the defendant procured and paid a man named Douglass at \$5 a day to take charge of the work, bought and turned over to him all the supplies, material, and outfit necessary, and paid the workmen employed both in the quarry and at the bridge. The selectmen agreed that when the bridge was finished if they could not agree on the price the town would pay for it, it should be left to any responsible parties to say what it should cost; and that whatever it cost more to do it at that time than in a more favorable time the town would not be responsible for the difference.

The total cost was \$3,202, of which the town eventually paid \$1,000; the balance being paid by defendant and charged off on its books to "extra construction account." In view of this testimony we think the court quite properly left it to the jury to determine whether in fact the defendant did this work for its own convenience, instructing them that if it did so, it might be held as a principal.

2. Defendant excepted to the court's refusal to direct a verdict in its favor because plaintiff was a fellow servant of Arighene, who instructed him to drill out the missed shot. The difficulty with this proposition is that it disregards the true ground of negligence which the evidence disclosed. Arighene, whether he were merely temporarily directing the operations of the other two men, or were a fully designated foreman in charge, was undoubtedly, under the federal authorities, a fellow servant with the plaintiff. *Martin v. A., T. & S. F. R. R.*, 166 U. S. 399, 17 Sup. Ct. 693, 41 L. Ed. 1051. But the question which the court left to the jury was whether he was a competent fellow servant; whether the master had discharged the duty, which he undoubtedly owed to the servant, and which he could not escape by leaving the selection to some one else, of exercising reasonable care in employing this man to work with the plaintiff on this dangerous job. The court expressly left it to the jury to say whether Arighene was a fit man, saying:

"It belongs to an employer to have fit men around to have charge, reasonably fit men for the place. * * * Was he a fit man to put in charge of handling this dangerous material such as dynamite is, to put it into holes and fire it off? Was he such a man as a prudent man would put there? Supposing you are prudent men and you were there, would you have put him in charge of that blasting and firing those holes to get out those rocks? Would a prudent man do that? If he was fit, that is enough, verdict for the defendant, because the complaint is that they didn't have a fit man. If he was fit, that is enough; if he wasn't you will look into the case further."

No exception was taken to this accurate statement of the obligation of the master to be reasonably prudent in selecting competent workmen; and no request asked for any further instructions on that branch of the case. There was testimony tending to show that Douglass put Arighene in charge of the work that day before the accident, telling him to be careful and not let any of them get hurt in blasting. Douglass himself testified that it was necessary to have a foreman in charge of such work, and that it requires skill and understanding in drilling and blasting with dynamite. And when asked if this man, whom he thus put in charge, had any experience in blasting he replied: "Not that I know of." Upon this proof the jury were warranted in finding that the defendant, and Douglass to whom it had confided the duty of selection, did not exercise reasonable prudence in choosing the fellow servant to the risk of harm from whose negligence it exposed the plaintiff.

3. Defendant further excepted to a refusal to direct a verdict on the ground of contributory negligence. But the jury had plaintiff's own statement that he heard five explosions, supposed all the charges had gone off, and did not know it was dangerous to use the drill on

a hole that had not thrown up rocks as well as dirt. There was conflicting evidence as to the extent of plaintiff's experience in this kind of work, and the question of his negligence was undoubtedly one for them to pass upon.

4. Exception was reserved to the court's refusal to charge the following requests:

"(7) In attempting to remove the tamping the plaintiff assumed the risk of known and obvious dangers incident to his employment, including the risk of dangers that could not be detected nor avoided by ordinary care.

"(8) If the plaintiff was ordered by Arighene to remove the tamping, he was not relieved from the risk and responsibility of the danger by this order, but assumed the obvious risk there was in doing the work."

The court had charged the jury, cautioning them to be careful as to this branch of the cause, that plaintiff could not recover if "in some way he brought it on himself." That, while at work under Arighene he was to do only what a prudent man would do that knew what he knew, or what he ought to have known from what he had observed and seen about this dangerous stuff. That they were to see whether it was imprudent for him to do as Arighene told him; that he wasn't obliged to risk himself in putting in dynamite unless he was of a mind to. That plaintiff could not recover if the jury could see that by his own imprudence in going on with that work, in that way, he brought the catastrophe upon himself. And that it was for the jury to say whether as a prudent man he ought to have stopped; that if it was imprudent for him to work there in that way, there should be a verdict for the defendant. To no part of the charge was any exception reserved. Although frequently confused there is a difference between "contributory negligence" and "assumption of risk," and in some cases the one principle may be controlling though the other is absent. But it will be noted that the above-quoted requests are confined to the transaction immediately preceding the catastrophe, viz., the drilling on top of the unexploded cartridge. In view of that fact we think the jury were sufficiently instructed and that it would have tended to confuse their minds had there been an effort to impress them with any distinction between contributory negligence and assumption of risk which at that stage of the transaction were closely interwoven. They were distinctly told that if a prudent man, with the knowledge he had, or ought to have had from what he had seen and observed about such dangerous stuff, would have stopped and declined to risk himself, verdict should be for the defendant. It would have given them no additional principle to apply in testing the facts, had they been instructed that plaintiff took the risk of known and obvious dangers. An "obvious" danger is one which would have been seen and observed by a reasonably prudent man. Had there been any instruction asked about an assumption of risk in going on with the work under Arighene's order, knowing the latter to be an incompetent man, a different question might be presented, but no such request was asked, and the record does not seem to indicate that plaintiff knew enough about such work or about Arighene to lead him to suspect that he was incompetent, or that he was as-

suming any risk in going on under his directions. The whole theory of the case—a theory which the jury sustained—is that had the acting foreman been competent the accident would not have happened, because a competent man could have told at a glance that the cartridges in two of the holes had not exploded and of course would not have set his men to drilling out dynamite.

The judgment is affirmed.

CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA v.
UNITED STATES, to Use of BRYANT et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 220.

1. UNITED STATES—BOND OF CONTRACTOR FOR PUBLIC WORK—CONSTRUCTION OF STATUTE.

Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], which requires a contractor for government work to give a bond conditioned that he will promptly make payment to all persons supplying "labor and materials in the prosecution of the work provided for in said contract," is broad enough to include within the protection of a bond so conditioned one who supplies coal to the contractor which is used to operate hoisting or pumping engines employed in the work.

2. WRIT OF ERROR—REVIEW OF QUESTIONS OF FACT—EFFECT OF MOTION FOR DIRECTION OF VERDICT.

Where a party asks the direction of a verdict, and one is directed against him, his position is the same as to all controverted facts and all inferable facts as though an adverse verdict had been rendered by the jury.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3748, 4024.]

3. UNITED STATES—BOND OF CONTRACTOR FOR PUBLIC WORK—LIABILITY OF SURETY.

The surety on a bond given by a partnership as government contractor for public work, conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], is not released from liability thereon for the claim of one who supplied labor or materials in the prosecution of the work because of the fact that other persons were associated with the firm as partners in carrying out the contract.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment, entered upon a verdict directed by the court, in favor of defendant in error who was plaintiff below. The action was brought upon a bond executed by John J. O'Brien and John C. Sheehan, copartners in business under the firm name of O'Brien & Sheehan, as principals, and the City Trust, etc., Company, as surety, under Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]. The bond was conditioned for the faithful performance of a contract of O'Brien & Sheehan with the United States for construction of a dry dock at Charlestown, Mass. The condition further provided that the contractors should promptly make payments to all persons supplying labor and materials in the prosecution of the work provided for in the aforesaid contract. In the prosecution of the work O'Brien & Sheehan associated with themselves two other persons, Perkins & McHale, for the purpose of carrying out the contract giving them such an interest in the enterprise as made them partners; the firm name remaining unchanged. Bryant, the plaintiff for whose benefit the action was brought, sold and delivered over

700 tons of coal at Charlestown to the firm, at an agreed price, all of which coal was used by the firm in the locomotives, hoisting engines, and pumping engines owned by said copartnership and employed by it in carrying on the work provided for in the contract for constructing said dry dock. No payments were made on account of this coal prior to the commencement of the action.

W. R. Conklin, for plaintiff in error.

H. A. Heyn, for defendants in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). 1. The defendant trust company contends that the complaint should have been dismissed on the ground that coal is not a material supplied and used in the performance of the work, within the meaning of the act of 1894. Very many authorities are cited, but it will not be necessary to refer particularly to any except such as deal with the federal statute. As was pointed out in *American Surety Company v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 717, the ordinary mechanic's lien statutes of the different states are not all expressed in the same language, and few, if any, of them in as broad terms as is the act of 1894. A common form of expression in these mechanic's lien statutes is:

"Whoever performs labor or furnishes materials in erecting, altering, or repairing a house, building, or appurtenances."

The federal statute provides security to "all persons supplying [the government contractor] labor and materials in the prosecution of the work provided for in such contract." We concur with Judge Putnam in the conclusion (expressed in 110 Fed. 719) that:

"The act of Congress and the bond given under it are susceptible of a more liberal construction than the lien statutes referred to and they should receive it."

See, to the same effect, *U. S. v. National Surety Co.*, 92 Fed. 549, 34 C. C. A. 526.

But no especially liberal construction is required to bring the materials supplied in this case within the protection of the act. The labor expended by men in wheeling barrows of material from the point of receipt to the place where it is to be used; in working hand pumps to clear an excavation of water; in turning the cranks of a hoisting derrick, so as to raise materials to a proper elevation—all such labor is so manifestly labor in the prosecution of the work that no one could have the hardihood to contend that it is not within the express terms of the statute. If the contractor, whether for purposes of economy or of expedition, elects to do this work by the power of steam, instead of the power of human muscles, it is difficult to understand how it can be logically contended that such power is not supplied in the prosecution of the work, or that the cost of the coal which produces it should not be equally within the protection of the same statute.

There is nothing in the decisions interpreting the act of 1894 which requires the disallowance of such a claim as this. In U. S., for the

Use of *Sica, v. Kimpland* (C. C.) 93 Fed. 403, *Sica* had furnished board and lodging to laborers employed on the work. It was held that this was not within the statute. "The contractor's duty," says the court, "as a contractor, and as regards the sureties, was to pay his laborers their wages, and allow them to buy their board and clothing where they would."

In *U. S. v. Hyatt*, 92 Fed. 442, 34 C. C. A. 445, the court disallowed the claim of a railroad for freight on materials which it transported to the contractor from a point distant 120 miles from the work, saying:

"The labor which Congress intended to protect is evidently labor used directly upon the public work, claims for which would be made by the laborers primarily against the work, thus impeding, possibly, the prosecution of the work and hampering the government officers. Congress could not have intended to include in the term 'labor,' as used in this act, the freight charges of a railroad on materials carried by it. The railroad is abundantly protected by its lien on freight, and Congress did not contemplate that a charge for transportation by a railroad would be made against the work, and certainly not when the carrier was fully secured otherwise."

In *American Surety Co. v. Laurenceville Cement Co.* (C. C.) 110 Fed. 717, the court approved of a general discrimination "between labor and materials consumed in the work or in connection therewith, and labor and materials made use of in furnishing the so-called contractor's plant, and available not only for this, but for other work"; and it allowed for trucking from the regular steamboat landing on the island where the work was done to the precise locality of the work, and also for sundry small repairs to the plant, but disallowed the cost of fitting out a steam launch, and the construction of dump cars, conveyors, etc., which became part of the plant and survived the work.

In *U. S. v. Fidelity & Deposit Co.*, 86 App. Div. 475, 83 N. Y. Supp. 752, the court disallowed the cost (\$1,800 per month) of a steam lighter, with crew, coal, and all supplies, chartered to transport lumber and materials from Newport, Fall River, and Providence to three different localities where the contractor was erecting buildings for the government.

In *Standard Oil Co. v. Trust Co.*, 21 App. D. C. 369, the court disallowed a claim for lubricating oils used in the operation of a dredge. The only ground stated for the conclusion is:

"If the dredge or tools or material of a contractor are not materials in the sense used in the statute, then, for as strong a reason at least, the oil used for their preservation cannot be so considered."

The facts are not quite fully stated. If the oil was really used for the preservation of the machinery, we would fully concur; but, if it was in fact wholly consumed in doing the work which had been contracted for, we do not find this authority persuasive. In that event it would be materials used solely in the actual prosecution of that particular work, and not merely intended to keep a plant, available elsewhere, in good repair.

In *U. S. v. City Trust*, 23 App. D. C. 153, the same court disallowed a claim for coal furnished for the operation of a dredging machine, upon the authority of the case in 21 App. D. C. 369, saying:

"Both [the oil and the coal] are equally necessary for the operation of the machine, and equally outside of the operation of the statute. Neither one is used or consumed in the performance of the work in the sense of the law."

As above explained we think that the coal is as much used and consumed in the prosecution of the work as would be the labor of men who might be hired to raise the dredge scoops by turning a hand crank, and do not find this opinion persuasive to a different conclusion.

Several cases have been cited by defendant in error, which are referred to generally as the "powder cases." It seems unnecessary to quote from them, since they are all under different statutes from the one presented here. They hold uniformly that dynamite or giant powder used in blasting rock and excavating earth, so as to complete the particular improvement, and which were wholly consumed in the performance of the work, are distinguishable from the engine, boiler, picks, and shovels, which are part of the permanent plant, and, while used in the performance of the work, survive its performance and remain the property of the owner. *Schaghticoke Powder Co. v. Greenwich*, 183 N. Y. 306, 76 N. E. 153; *Giant Powder Co. v. Oregon Pac. R. R. Co.* (C. C.) 42 Fed. 470, 8 L. R. A. 700; *Rapauno Co. v. Greenfield R. R.*, 59 Mo. App. 6; *Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Hercules Powder Co. v. Knoxville R. R.* (Tenn.) 83 S. W. 354, 67 L. R. A. 487.

Under a statute of New York, which gave a lien for "all materials used and services rendered in the execution of such contract," the Supreme Court of that state reached the same conclusion as we have as to coal used in driving the engines for excavating the rock and pumping water, saying:

"The coal used entered into the execution of the agreement and formed a part of the value of the work done as much as the labor of the masons or of the men who aided in hoisting the stones into position to make up the wall. The materials need not be a permanent constituent of the structure itself, but must be necessarily incident to the execution of the agreement, to come within the purview of the defendant's contract, and the coal consumed in carrying on the work is of that character." *Zipp v. Fidelity & Deposit Co.*, 73 App. Div. 20, 76 N. Y. Supp. 386.

2. The next assignment of error is that a verdict should have been directed for the defendant on the ground that the surety company was released by some extension of the time of payment without its consent or knowledge. At the close of the trial the court asked whether either side wished to go to the jury on any issue, and whether either contended that there was any question of fact. The plaintiff expressed the opinion that he would rather have the verdict of the jury as to whether there was an extension or whether the defendant company was injured by any extension. Counsel for the defendant, however, insisted that there was no question of fact—only a ques-

tion of law—and that he did not want to go to the jury. Inasmuch as the court thereupon directed a verdict against him, it must be assumed, as to “all controverted facts and all inferable facts,” that his position is the same as if an adverse verdict had been rendered by the jury. *Smith v. Weston*, 159 N. Y. 198, 54 N. E. 38. Counsel for plaintiff in error does not dispute the correctness of this proposition.

The evidence relied upon to make out an extension is most unsatisfactory. The complaint avers that the contract to supply the coal was made “in or about the month of February, 1902.” Issue was joined as to this proposition. When the cause came on for trial, in lieu of calling witnesses or offering documents, a written stipulation was read that in or about the month of February, 1902, plaintiff agreed to and did supply to the contractors, at their special instance and request, 761.14 tons of coal at the agreed price and reasonable value of \$4 per ton. Subsequently a letter was put in evidence from one C. P. Anderson (a miner’s agent and shipper) to the contractors, dated Boston, February 11, 1902, which states:

“This is to confirm a sale made you through Mr. Eggleston, of E. B. Townsend, of the balance of the cargo of the schooner *Iona Tuunel*, about 775 tons bituminous coal, at \$4.00 per gross ton, delivered alongside your lighter. * * * This coal will be billed you by William Bryant of Philadelphia, for whom I am acting as agent.”

There is no evidence in the record showing the date at which the coal was delivered, but it would seem from the briefs of both sides that it is assumed to be February 17th. On April 26th the contractors executed a note for part of the purchase price, payable May 20, 1902, and on April 25th, executed another note for the balance of the same, payable June 20, 1902. It may be noted that these dates, May 20th and June 20th, are respectively three and four months after the date of delivery of the coal, including days of grace. Nowhere in the record is there any direct evidence to show what were the terms of the contract as to time of payment, whether cash upon delivery or on some credit, and if so for how long a time. Either there was some express bargain as to this when Anderson and Eggleston closed the negotiation for their respective principals in February, or else there was some well-known mercantile custom or usage governing such kind of coal sales in Boston at that period; but there is no proof of any express bargain, and this court cannot take judicial notice of the customs of the coal trade in Boston in 1902.

Nor, in the absence of direct testimony, is there found in the record any indirect evidence which is helpful to a conclusion. On February 24th Bryant writes to the contractors offering a discount on the bill, “so that we may receive settlement within the next few days,” which would seem to indicate that the terms were not “cash on delivery.” On the other hand, Bryant, writing to the contractors under date of April 3d, refers to the account as “overdue.” The contractors, writing to Bryant on April 26th, state that their understanding was that part was to come due on May 20th and the balance one month later. In an interview between Bryant and McHale (April 25th) the latter says that he told Bryant “the coal had been originally sold on three

and four months' time." There is nothing to show any admission as to the time of payment which may take the place of direct testimony as to the terms of the original agreement in that regard. Since it cannot be determined when the coal was to be paid for under the contract of purchase, it cannot be held that the taking of the notes operated to extend the time of payment. It is not necessary, therefore, to discuss the question, whether in view of the decision of the Supreme Court in *U. S. Fidelity, etc., Co. v. Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242, an extension of time of payment will operate to relieve the obligors upon a bond given under this statute.

3. We find no merit in the contention that the surety company is not liable for coal sold to O'Brien, Sheehan, Perkins, and Hale, because the obligation of the bond covered payments by the firm of O'Brien & Sheehan to persons supplying labor and materials in the prosecution of the work provided for in the contract with the government. "The practical effect of the statute is to confer a special lien in favor of such persons, and to substitute this bond in the place of the public building upon which that lien is charged. The bond is not, therefore, to be considered as if a special private offer of guaranty by the sureties to particular persons from whom their principal may solicit credit in the procurement of labor and materials, but as the performance of a precedent statutory condition of his contract, intended for the benefit of all persons whomsoever that, relying upon the provisions of the statute, shall have supplied him labor and material in its performance." *Marble Co. v. Burgdorf*, 13 App. D. C. 506, 519.

The conclusion we have reached as to the contention that there was an extension of time of payment renders it unnecessary to discuss some exceptions as to testimony elicited touching the financial condition of the contractors subsequent to date of sale.

The judgment is affirmed.

In re NEASMITII.

(Circuit Court of Appeals, Sixth Circuit. July 10, 1906.)

No. 1,541.

1. BANKRUPTCY—ISSUE OF INSOLVENCY—JURY TRIAL—REVIEW.

A trial by jury of the issues of fact raised on an involuntary bankruptcy petition authorized by Bankr. Act July 1, 1898, c. 541, § 19a, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], is a trial according to the ordinary course of a common-law jury trial, and if error is committed it can only be reviewed on an application for a new trial or on a writ of error, and not by appeal.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 915.

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—ISSUES—PARTNERSHIP—MEMBERSHIP.

On an involuntary bankruptcy petition against the members of an insolvent partnership, the question whether one of the alleged partners

was in fact a member of the firm is not a question which should be submitted to a jury authorized to try issues of fact in such proceedings, by Bankr. Act July 1, 1898, c. 541, § 19a, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429].

3. SAME.—RIGHT TO JURY TRIAL—WAIVER.

Failure of an alleged involuntary bankrupt to formally apply for a jury in writing at or before the time when an answer was required, as provided by Bankr. Act July 1, 1898, c. 541, § 19a, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], operated as a waiver of her statutory right to a trial by jury.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 140.]

4. SAME—ISSUES—SUBMISSION TO JURY—ADVISORY VERDICT.

The submission of issues of fact to a jury in an involuntary bankruptcy proceeding, independent of Bankr. Act July 1, 1898, c. 541, § 19a, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], is within the discretion of the judge of the bankruptcy court, and the verdict returned is wholly advisory.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 140.]

5. SAME—APPEAL—EXCEPTIONS, BILLS OF.

Where issues in a bankruptcy proceeding were submitted to a jury independent of Bankr. Act July 1, 1898, c. 541, § 19a, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], the verdict being merely advisory, a bill of exceptions was of no value, except on motion for a new trial.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 918.]

6. SAME—APPEAL.

An appeal from a judgment adjudicating appellant an involuntary bankrupt is on "appeal as in equity cases," as provided by Bankr. Act July 1, 1898, c. 541, § 25, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].

7. SAME—APPEAL—SCOPE—FEIGNED ISSUES—ERRORS.

An appeal from an adjudication in involuntary bankruptcy, as in equity cases, brings up the whole case, and cannot be made to turn on errors in rulings made on the trial of a feigned issue.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 929.]

8. PARTNERSHIP—MEMBERSHIP IN FIRM—EVIDENCE.

Where a person had signed articles of copartnership, accepted the issue of shares transferable by consent of the company, and participated in profits, she was liable as a partner as to third persons.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 30, 35.]

Appeal from the District Court of the United States for the Western District of Michigan, in Bankruptcy.

Upon an involuntary petition filed against her and a number of others, alleged to be copartners under the firm name of "Vicksburg Exchange Bank, Neasmith, Bair, Page & Co.," Mrs. Eva A. Neasmith was adjudged a bankrupt. From this adjudication she has appealed and assigned error. Each of the defendants, other than appellant, filed answers denying the essential averments of the petition, including solvency of the alleged corporation and of the alleged copartners individually, as well as any act of bankruptcy by the said copartnership, or of the individual defendants. Each of the defendants, other than appellant, called for a jury to try such issues as were triable by a jury under section 19a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]). The appellant, Mrs. Eva A. Neasmith, filed a separate answer, in which she denied her insolvency, or

that she had committed any act of bankruptcy, and denied that she had been a member of the banking copartnership. She did not, however, demand a jury, as had the other defendants, though they, too, had denied membership in the said firm. All of the defendants entered into certain stipulations as to facts. Among the admissions so made was this: that the said copartnership, however composed, was in fact insolvent at date of filing of the petition, and that it had committed the acts of bankruptcy alleged. As none of the defendants have appealed except Mrs. Neasmith, the transcript has been limited to such parts of the proceedings below and to so much of the evidence as bears upon the judgment affecting her. The stipulation referred to left open no questions affecting the appellant, except that of her membership in the alleged banking copartnership and her solvency. The record shows that a jury was sworn; that they heard testimony; that so far as appellant is concerned the court told the jury to say specifically whether on June 23, 1905, Mrs. Eva A. Neasmith was a member of the alleged banking copartnership, and, if she was, to say whether she was insolvent when the petition was filed. To both questions the jury answered in the affirmative. The testimony so far as it affects appellant, the rulings upon questions of evidence made upon the jury trial, the charge of the court and exceptions reserved, the proceedings upon a motion for a new trial, including certain affidavits, have all been made a part of this transcript by stipulation of counsel.

A. J. Mills, for appellant.

Dallas Bondeman, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

After making the foregoing statement, LURTON, Circuit Judge, delivered the opinion of the court.

Under section 19a of the bankrupt act of 1898 appellant had a right to demand a jury for the trial of the question of her insolvency, as well as the question of any act of bankruptcy alleged. But she did not file a written application for a jury trial within the time for the filing of her answer, nor at any other time. That she filed one stipulation in respect to certain facts which recites that it was to be used before the jury is true; and it is also true that she does not appear to have objected to the calling of a jury, or to the submission of either of the issues made by her answer to the jury. That she endeavored to have the judge instruct the jury to find the question of her membership in the alleged banking copartnership in her favor is true. But this request for an instruction in her favor was not because the questions were not such as might go to a jury, under section 19a, nor because she had not applied for a jury, but, because she was of opinion that there was no conflict in the facts which bore upon the issues made by her answer. In every way that she could, except by a specific application, she seems to have es-sented to the submission, not only of the issues properly for a jury under section 19a, but of the question of her membership in the firm styled "Vicksburg Exchange Bank," etc.

A trial by a jury under section 19a is a trial according to the ordinary course of a common-law jury trial, and if error is committed it can only be remedied by a new trial, or reversed by this court upon a writ of error as from the judgment of a common-law court. In *Elliott v. Toepfner*, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200, it was expressly decided that facts determined by a jury under

section 19a could not be examined by an appeal, as in equity cases, but only upon a writ of error, and according to the rules of the common law. It follows, therefore, that so far as errors have been assigned upon instructions given or refused, we are without jurisdiction under an appeal such as this. *Bower v. Holzworth* (C. C. A.) 138 Fed. 28. But appellants say that the verdict of the jury must be regarded as purely advisory, inasmuch as the failure of the appellant to apply for a jury within the time when her answer might be filed was a waiver of the right to a jury at all, and that for this reason the jury should be regarded as one called by the judge for his own assistance.

Again, it is said that the question as to whether Mrs. Neasmith was a member of the copartnership in question was not a question which should go to the jury under section 19a. Considered apart, this is true. But the question of solvency or insolvency hinged only upon her membership in that firm. This was conceded below and is conceded by stipulation here. The question of solvency or insolvency involved the amount of appellant's liabilities, as well as the amount of her assets, and the question of liability turned upon the question of her being a copartner in the alleged banking firm. That her answer and the issues submitted to the jury by the court split the question of solvency into two parts, the first being her membership in the copartnership, does not make that issue one distinct from the larger question of solvency.

But did the failure of appellant to formally apply for a jury in writing at or before the time when an answer was required operate as a waiver of the statutory right to a jury conferred by section 19a? We are inclined to hold that such was the effect of her failure to apply for a jury in the manner and within the time prescribed by that provision of the bankrupt act. The case of *Oil Well Supply Co. v. Hall*, 128 Fed. 875, 63 C. C. A. 343, decided by the Court of Appeals for the Fourth Circuit, is very clearly in point. If the case was not one submitted to the jury under the provisions of section 19a, the verdict would be wholly advisory, as in the case of a jury called to the assistance of the chancellor in a court of equity. Such a practice is not prohibited by any provision of the bankrupt act, and is quite in harmony with the equitable character of the proceedings in a bankrupt court. The submission of issues of fact to a jury was deemed within the discretion of the bankrupt judge under the act of 1867. See the observations of Justice Woods in *Barton v. Barbour*, 104 U. S. 126, 137, 26 L. Ed. 672. So far as the question has been considered under the present law the practice has been approved. *Loveland on Bankruptcy* (2d Ed.) p. 231; *In re Rude* (D. C.) 101 Fed. 805; *Morss v. Franklin Coal Co.* (D. C.) 125 Fed. 998; *Oil Well Supply Co. v. Hall*, 128 Fed. 875, 63 C. C. A. 343. Treating the submission of the issues under Mrs. Neasmith's answer as a discretionary submission, the verdict was not obligatory, but advisory only. A bill of exceptions upon such a trial is out of place, and, if taken, is of no value, except upon a motion for a new trial made to the court below. *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271; *Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826; *Wilson v. Riddle*, 123

U. S. 608, 8 Sup. Ct. 255, 31 L. Ed. 280; *Oil Well Supply Co. v. Hall*, 128 Fed. 875, 63 C. C. A. 343.

The appeal here is on "an appeal as in equity cases," under section 25 of the bankrupt act (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), from a judgment adjudicating the appellant a bankrupt. Such an appeal brings up the whole case and cannot be made to turn upon errors in rulings made upon the trial of a feigned issue. The court might, in its discretion, have granted a new trial; but, as it did not, we must assume that it was satisfied to decide the case the same way upon the whole of the evidence, giving to the conclusions of the jury only such weight as under all the circumstances, and its own view of the testimony in the case, it should have. An appeal from a decree based in whole or in part upon such a verdict, must be decided in the same way; and in the case of *Johnson v. Harmon*, where the only errors assigned were upon the rulings and charge of the court on the trial of the feigned issue, the decree was affirmed without any further investigation of the merits of the case.

Upon the question of fact submitted to the jury as to whether or not Mrs. Neasmith was a member of the copartnership styled "Vicksburg Exchange Bank, Neasmith, Bair, Page & Co.," we see no sufficient reason for disagreeing with the conclusions of the jury and of the trial judge. The copartnership was a somewhat peculiar one, savoring much of a joint-stock company. Shares of stock of the par value of \$100 were issued to each of the copartners to the extent of their contribution to the capital. These shares were transferable by consent of the members, and the transferee thereby took the place of his assignee in the business. The original Neasmith of the copartnership was James M. When he died, four shares of his stock were assigned to a granddaughter, Maude Neasmith, as next of kin. Maude was a minor, and her mother, the appellant, Mrs. Eva A. Neasmith, was her guardian. The certificate was issued in the name of Maude, but was receipted for by the guardian. Mrs. Neasmith, as guardian, undertook to become a copartner as guardian, and, she, together with other heirs and representatives of the deceased member, James M. Neasmith, joined in a clause added to the original partnership articles, by which it was recited that they "subscribed the articles of association and thereby became copartners in the Vicksburg Exchange Bank, etc." Subsequently Maude died. Her mother became her administratrix. Upon settlement of the estate and the distribution of the assets, Mrs. Neasmith received this certificate of stock as next of kin of her daughter Maude, and receipted for same September 17, 1903. The certificate was never transferred to her upon the books of the company, nor did Mrs. Neasmith ever sign the partnership articles. There was evidence that after she took this certificate she received several dividends. The question of whether she became a partner was thus put to the jury by the court, which, after disposing of the case as it affected certain other of the defendants who were contesting the petition, said:

"This leaves the one question which has been argued by counsel before you, and that is whether Eva Neasmith, who was the mother of Maude Nea-

smith, a child of a son of James M. Neasmith, became a partner by the reception of those dividends and taking this stock. Now, she signed this agreement of April 2, 1897, which I have said made the others partners, they having signed it, and became partners and took the interest in this bank of their deceased father; and, they having taken it, they became partners in the enterprise, and she, at the time all the others signed the agreement, signed it also as the guardian of Maude Neasmith. Now, she was not able to make Maude Neasmith a partner in that enterprise, and afterwards the interest that Maude Neasmith had in that enterprise descended to her, and after that you are to determine whether she accepted this stock and accepted these dividends, knowing that they were dividends, from this partnership, and understanding that she was taking the place that she attempted to put Maude Neasmith in when she signed these articles, these supplemental articles of partnership. If she did, then she is a partner, and you will answer the question 'Yes.' If she did not, if she took these dividends without any intention or knowledge of receiving them from this partnership as profits and her share of the profits of that partnership, then your answer will be 'No.' "

It may, for the purpose of this case, be conceded that appellant could not involve her ward's estate in a copartnership. But quite another question is presented when we inquire whether she did not involve herself in the enterprise, having failed for want of power to involve a minor ward. See 11 A. & E. Encycl. of L. (2d Ed.) p. 974, and cases cited. Without putting the case upon this ground, the circumstance of receiving profits from the copartnership, knowing as she did the character of the company as a copartnership, knowing that she had signed as guardian the copartnership articles, with the express purpose of thereby, as guardian, becoming a copartner, is quite enough to fix the liability as a partner, in the absence of some contract by which she was to have a share of the profits upon some other consideration, such as services, property, etc. That participation in the profits of a copartnership is strong evidence of a partnership, and that it is sufficient, as to third persons, unless explained by circumstances showing a different relation, is well settled. *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462, 66 C. C. A. 336; *Meehan v. Valentine*, 145 U. S. 611, 619, 12 Sup. Ct. 972, 36 L. Ed. 835. It is difficult to conceive any ground upon which Mrs. Neasmith was paid a share of the profits of the business after the death of Maude, unless it was upon the ground that she was a partner.

The issuance of shares transferable by consent of the company might have misled a stranger into the idea that the business was incorporated, and furnish evidence upon the question of her intent. But appellant must be taken to have known the facts. She had signed articles of copartnership, and doubtless supposed she was a partner, as guardian, during Maude's life, and when she succeeded to Maude's interest that she had become a partner in her own right. This was the view the jury took and their conclusion is justly entitled to consideration. It was also the view adopted by the District Judge. Although the liability occurred by the assumption of the rights of a partner is out of proportion to the interest she had, it affords no reason for escaping the consequences of the relation.

The other objections seem to have no merit, and the judgment must be affirmed.

HOLBROOK, CABOT & ROLLINS CORP. v. PERKINS.

(Circuit Court of Appeals, First Circuit. July 27, 1906.)

No. 626.

1. NEGLIGENCE—DEFECTIVE PREMISES—PERSONS LIABLE—CORPORATIONS—ORGANIZATION.

Defendant contracted to construct a dam, canal, and power house for a traction company and then immediately organized a construction corporation without capital to which defendant sublet the contract, the construction company agreeing to furnish all the material, provide for the safety of employes and rent the machinery, apparatus, tools, and appliances from defendant at a nominal rental, and to receive as compensation the actual cost of the work and materials and one-half of 1 per cent. in addition. The officers of defendant and of the construction company were the same and one of defendant's officers testified that the construction company was organized for the sole purpose of avoiding attachments, etc. *Held*, in an action against defendant for injuries to a third person by the negligent placing of a derrick guy rope, that it was not error to charge that if the organization of the construction company and the subletting of the contract to the construction company were not in good faith, but fictitious to relieve defendant of the consequences of the careless prosecution of the work, defendant was responsible for plaintiff's injuries.

2. SAME—NOTICE OF DEFECTS.

Where defendant, after obtaining a construction contract, organized a corporation without capital to which the contract was sublet, the latter agreeing to furnish all the materials and perform the work, but such contract was not complied with, and defendants, in fact, purchased the materials, and caused them to be delivered on a siding under the control of its superintendent who was also the superintendent of the subcontracting corporation, defendant was liable for the latter's negligence in erecting a derrick guy rope over the siding, though the contract with the construction company was not fictitious.

In Error to the Circuit Court of the United States for the District of New Hampshire.

Oliver E. Branch (Oliver W. Branch, on the brief), for plaintiff in error.

Robert L. Manning (Burnham, Brown, Jones & Warren, on the brief), for defendant in error.

Before COLT and LOWELL, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. Arthur W. Perkins, a brakeman employed by the Boston & Maine Railroad Company, was swept from the top of a moving car by the guy rope of a derrick. The guy rope was stretched at a dangerous height across a private sidetrack used for the delivery of materials and machinery for the construction of a dam near Garvin's Falls, N. H. The Holbrook, Cabot & Rollins Corporation defended his action for negligence, on the ground that the plaintiff had sued the wrong party, and contended that the work and premises were controlled by the Atlantic Construction Company, a distinct corporation.

The defendant introduced in evidence what purported to be a construction contract between the copartnership of Holbrook, Cabot & Rollins on the one part, and the Atlantic Construction Company, incorporated under the laws of Maine, on the other part. The agreement recited that the firm had, by contract with the Manchester Traction, Light & Power Company, of Manchester, N. H., undertaken the construction of a dam, canal, power house, etc. It also recited that:

"The firm desires to engage the corporation to do the work and supply the materials called for by the said contract and the corporation desires to undertake the same upon terms hereof."

It was agreed that:

"The corporation shall, at its own proper cost and expense, well and truly furnish all labor and materials and do all things required to complete and perform the work called for in the contract. * * * And while engaged therein the corporation shall have the entire control, management and direction of the work and of the employes and persons engaged thereon and shall do whatever is necessary to guard properly the safety of such employes and all persons engaged in and about the premises and all others to whom the firm or corporation may owe such a duty, and the firm is hereby wholly discharged from all duties and liabilities in respect of the foregoing."

The firm was to furnish and lease to the corporation all machinery, apparatus, tools, and appliances necessary; the corporation to pay as a rental therefor the sum of \$100 each month, and, upon the termination of the agreement, a further sum equal to the difference between the present value of said machinery, apparatus, tools, and appliances, and the market value. The corporation was to employ all workmen, laborers, and employes. As compensation for the execution of the work and the furnishing of said materials, the firm was to pay the corporation a sum equal to the actual cost of said work and materials, and one-half of one per cent. of such cost in addition.

The learned judge, in submitting the case to the jury, used the following language:

"I am going to submit to you this question: Whether this subletting or subcontracting was a substantial bona fide transaction in a reasonable prosecution of the work, or whether it was fictitious, and done for the purpose of avoiding the ordinary administration of justice and in bad faith. If you should find that this was merely a thing on paper, without any business, any practical business substance behind it aside from the fact of avoiding the legal consequences which would result from the ordinary administration of the laws of New Hampshire, then it is not a transaction that would relieve them from liability.

"In other words, if they were substantially—if the Atlantic Company were substantially the same party in interest, if substantially the same men and the same capital was behind it, and this subcontract, second contract, was drawn up between practically the same men, representing the same interests, for the sole purpose of avoiding the consequences which might result, the serious consequences which might result in the prosecution of the work, and to relieve them from legal liability, then it is a matter which you are not bound to regard, and especially it would be so if the same men were left in practical control and management of the enterprise.

"In other words, was this transaction fictitious for the purpose of relieving the original corporation who was behind the enterprise from the legal

consequences of a careless prosecution of the work? If it was, you are entitled—you are at liberty to disregard it entirely and to proceed to inquire into the question as to whether there was carelessness which caused the injury to the plaintiff.

"If you find that this is a matter of fiction under the views which I have suggested, then whatever was done in the name of the—if it was in the mere name of the Atlantic Company—whatever was done in the name of the Atlantic Company was really done by the Holbrook, Cabot & Rollins Corporation.

"On the other hand, if you should find it was a bona fide transaction simply for prudential business purposes, and so in good faith, and that this thing went out of the control in a substantial way, went out of the control of the Holbrook, Cabot & Rollins Corporation, and went into the hands of the Atlantic Corporation, then the suit is against the wrong party."

The plaintiff in error concedes that if there had been any evidence which rendered doubtful the execution of the contract, or the fact that the actual performance of the work was turned over to the Atlantic Construction Company, this question would have been for the jury.

We are of the opinion that there was very strong evidence tending to show that the so-called contract with the construction company was a mere pretense; that the parties thereto did not comply with, but, on the contrary, violated its terms; that there was no actual and bona fide contract; and that the execution of the document was a mere piece of circumvention, devised to avoid legal liability for accidents and the attachment of property in tort actions. The testimony of Mr. Rollins was commendably frank, and most explicit, to the effect that the Atlantic Construction Company was organized for the sole purpose of avoiding attachments, and that it was without capital. It had the same superintendent as the plaintiff in error, and was composed substantially of the same individuals who composed the firm of Holbrook, Cabot & Rollins, which firm subsequently was incorporated under the name of Holbrook, Cabot & Rollins Corporation.

The plaintiff in error cites many decisions to the effect that corporations are distinct entities, even when composed of the same individuals; that they may contract with each other, etc., and argues as follows:

"To allow an inquiry into the personnel of the two corporations in this case denies absolutely to Messrs. Holbrook, Cabot, Rollins, Patten and Story the right conferred upon them by the laws of Maine of making contracts, of suing and being sued, under the artificial form and name of the Atlantic Construction Company. It is hard to imagine a clearer case of contradicting a fiction so as to defeat the end for which it was invented. The sovereign acts of the Legislature of Maine in creating this corporation are to be nullified by a finding of the jury that the same men have formed two corporations, as they had a perfect right to do. There will be an end at once of all the rights, powers, privileges and limited liability of corporations, if it is open to an entire stranger to the corporation to contradict the fiction of law by virtue of which it exists, nullify the authority under and by which it is created, and assert that its acts are the acts of the individuals composing it, or, worse still, the acts of another corporation composed of the same men. * * * We submit that there is nothing illegal in attempting to carry on a business in such a way as to be free from legal liability for accidents happening in the course of that business. That is very often the sole object in view in forming a corporation rather than a partnership; yet who would contend for a minute that one injured by the serv-

ants of such corporation could come into court and hold the stockholders personally liable for the tort, because their sole object in forming the corporation was to escape personal liability for such accidents? * * *

"The uncontradicted testimony of Mr. Rollins was that the objects in forming the Atlantic Construction Company were (1) to avoid individual liability as partners; (2) to prevent the tying up of the firm's assets by attachments. The contract was, of course, the necessary means for attaining these objects, and they must have been the objects of the contract. Both these objects were perfectly legitimate," etc.

We are of the opinion that this argument is clearly unsound. Assuming the valid creation of the Atlantic Construction Company as a distinct corporation, assuming the regularity in point of form of the execution of a document which purported to be a contract between two corporations, there was still open the question whether there was in fact, as distinguished from mere form, a contract—whether there were in fact, as distinguished from form, two distinct parties making an agreement upon mutual considerations. When circumvention is resorted to by the use of legal documents, it is usual to comply strictly with legal forms, and to prepare documents that are technically unexceptionable; but the courts are not bound by mere forms, and look through forms to the substance.

In *United States v. Milwaukee Refrigerator Transit Co.* (C. C.) 142 Fed. 247, 255, it was said:

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction, or a mere mental creation, or that the idea of invisibility or intangibility is a sophism. A corporation, as expressive of legal rights and powers, is no more fictitious or intangible than a man's right to his own home or his own liberty.

"Applying the rule here laid down to the circumstances shown to surround the brewing company and transit company, can it be doubted that there really is, in substance and effect, an identity of interest, or that the brewing company, considered as an association of individuals, really owns and fully controls the transit company? * * * Moreover, it clearly appears that the shipper practically controls the transit company, and I think this shows a sufficient identity of interest among the shareholders of both in these repayments to make them rebates, if paid and received with unlawful intent."

It is quite true that individuals are permitted to form corporations for the purpose of conducting business with a limited individual responsibility. It is not true that individuals are permitted to form corporations solely for the purpose of avoiding ordinary legal liabilities. Incorporation is permitted in furtherance of business enterprises; but a franchise is not granted for the sole purpose of destroying legal accountability. If the Holbrook, Cabot & Rollins Corporation had put out of its hands all of its property merely in order to avoid legal liability for torts which it might commit in the course of its operations, we think there can be no question that such a conveyance would be void. We see no substantial difference in the arrangement made in this case. Instead of putting its property out of

the hands of the Holbrook, Cabot & Rollins Corporation, the persons associated in that corporation attempted to put out of its hands the work authorized by its franchise, and for which the corporation was created, and thus, by an artificial division of its work and property, secure for the joint operations of the two corporations an immunity which could not be secured for the principal corporation. The immunity from attachment accruing to the Atlantic Construction Company is to be due to the fact that it will have no attachable assets. The immunity of the Holbrook, Cabot & Rollins Corporation is to be due to the fact that it will put all of its contracts into other hands. This arrangement between the Atlantic Construction Company and the Holbrook, Cabot & Rollins Corporation was merely a piece of circumvention which may be regarded either as a nullity, or as making the Atlantic Construction Company the agent, or alter ego, for whose acts the defendant, as true principal, is liable. *James McNeil & Bro. Co. v. Crucible Steel Co. of America* (Pa.) 56 Atl. 1067; *West Chicago St. R. Co. v. Morrison, Adams & Allen Co.* (Ill.) 43 N. E. 393, 396; *Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66.

Were it necessary to go beyond the evidence that the Atlantic Construction Company was created solely for the purpose of avoiding legal liability, and if there were any evidence tending to show bona fide reasons for the creation of the Atlantic Construction Company, even then we think the jury might well have found that there was no existing contract between the two corporations which was in fact treated or regarded as actually in force. By the terms of the contract the Atlantic Construction Company was to supply the materials. It clearly appears upon this record that it never did supply the materials, or go through the form of doing so; but, on the contrary, that all the materials were shipped in the name of the Holbrook, Cabot & Rollins Corporation, and were received by that company on the premises.

We find nothing in the instructions of the learned judge, above quoted, which was erroneous. The only doubt that arises is whether the instructions were not too favorable to the plaintiff in error, and whether the undisputed facts would not have justified an instruction that the Holbrook, Cabot & Rollins Corporation, and not the Atlantic Construction Company, was conducting the work.

A second question arises under alternative instructions of the learned judge. The jury were instructed that, even if the construction contract were a bona fide contract, the side track did not pass to the control of the Atlantic Construction Company under the language, the firm "hereby leases to the Corporation all machinery, apparatus, tools, and appliances necessary to be used in or about the said work." The evidence is clear that the Holbrook, Cabot & Rollins Corporation was receiving the materials over this track; that its superintendent was also the superintendent of the Atlantic Construction Company; and, therefore, that the defendant had the same knowledge of the negligent condition of the wire rope that the Atlantic Construction Company had. As it appeared in evidence that the materials were consigned to the Holbrook, Cabot & Rollins Corporation, that they were to be delivered over this track, that the superintendent of the

Holbrook, Cabot & Rollins Corporation knew of the dangerous obstruction, the Holbrook, Cabot & Rollins Corporation owed the duty to the railroad company and its servants to see that they were not exposed to this known and unnecessary risk.

We do not find it necessary to determine if the siding was comprehended within the term "appliances," used in the contract; for, as we have already said, there was a departure from the contract. The Holbrook, Cabot & Rollins Corporation assumed the delivery of materials, and used the siding and its adjuncts for this purpose. Even if, by the terms of the agreement, the Atlantic Construction Company was to have control of the siding, this is immaterial, in view of the fact that the parties did not observe the requirements of the contract. The Holbrook, Cabot & Rollins Corporation used the track for its own purposes, and its superintendent had knowledge of the dangerous obstruction to the free passage of cars. Under these circumstances we are of the opinion that the jury might well have found the defendant liable even if they found that the contract with the Atlantic Construction Company was real and not fictitious.

Other assignments of error do not, in our opinion, require specific notice. We are of the opinion that the merits of the case were with the defendant in error, and that, if there was any error or oversight it was harmless error, which did not affect the result.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

CITY OF CLEVELAND v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1906.)

No. 1,451.

1. REMOVAL OF CAUSES—GROUNDS FOR REMOVAL—PREJUDICE AND LOCAL INFLUENCE.

The existence of prejudice and local influence does not furnish a separate and independent ground for the removal of a cause, but only operates to extend the time within which a case may be removed when the requisite diversity of citizenship exists.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 116-125.

Prejudice or local influence as ground for removal of cause to federal court, see note to *Schwenk & Co. v. Strang*, 8 C. C. A. 95.]

2. SAME—SEPARABLE CONTROVERSY—HOW DETERMINED.

The question whether a suit involves a separable controversy which renders it removable by one of two or more defendants must be determined from the pleadings as they stood when the petition for removal was filed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 115.]

3. SAME—EJECTMENT—JOINDER OF LESSOR AND LESSEE AS DEFENDANTS.

A plaintiff in ejectment has the right to join a lessee in possession having a leasehold estate and an equity for improvements made and the lessor, so as to conclude both by one judgment; and, having such right,

one of the defendants so joined cannot make the controversy separable, nor remove the cause, where the other defendant and plaintiff are citizens of the same state.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

On motion for rehearing upon jurisdiction of the Circuit Court. For opinion below, see 93 Fed. 113.

Newton D. Baker, for plaintiff in error.

J. T. Dye and A. Squire, for defendants in error.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

LURTON, Circuit Judge. This was an action of ejectment started in the Ohio court of common pleas for the county of Cuyahoga. The plaintiff was a municipal corporation of the state of Ohio. The defendants were four distinct railroad corporations. Three of them were corporations of the state of Ohio, and the fourth, the Pennsylvania Company, a corporation of the state of Pennsylvania. After the cause was fully at issue, but before a trial upon the merits, the Pennsylvania Company removed the suit into the court below upon a petition which alleged that diversity of citizenship existed between it as a corporation of the state of Pennsylvania, and the sole plaintiff, a municipal corporation of the state of Ohio, and that from prejudice or local influence it would not be able to obtain justice in the court in which the suit was pending, or in any other state court to which it might under the laws of the state, have the right, on account of local prejudice or local influence, to remove said suit. The other three defendants did not join in this petition for removal and could not so do, being corporations of the state of Ohio and of like citizenship with plaintiff. After the removal, issue was taken upon the existence of the alleged prejudice or local influence, and a motion made to remand the case to the state court. Much evidence was heard upon this issue, and the motion to remand denied. Thereupon the cause came on regularly to be heard before the court and a jury, and there was a verdict and judgment for the defendants. From this judgment this writ of error was sued out, and error assigned.

In due course the cause was heard by this court, and an opinion handed down affirming the judgment of the court below upon grounds particularly set forth. No error was assigned upon the jurisdiction of the court, and our opinion did not deal with that question. Subsequently and at the same session, and before the time prescribed by rule for a petition for rehearing, this court, of its own motion, directed a rehearing upon the single question of the jurisdiction of the court below. The rehearing so ordered has been had with the result that we are constrained to recall our opinion and reverse the judgment with directions to remand the case to the state court from which it was removed. Diversity of citizenship did exist between the plaintiff and the removing defendant. But diversity of citizenship did not exist between the sole plaintiff and the other three defendants, and they

did not and could not join in the petition for removal. That the existence of prejudice and local influence does not furnish a separate and independent ground of removal, and only operates to extend the time within which a case may be removed when the requisite diversity of citizenship exists, is fully settled by *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182.

The existence of a separable controversy within the meaning of section 2 of the act of August 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 509]), between the plaintiff and the Pennsylvania Company which could be fully determined as between them without the presence of either of the local defendants was not alleged as a ground of removal in the petition, nor was the removal sought to be sustained in the court below upon that ground. Under section 5 of the act of 1888 (25 Stat. 436 [U. S. Comp. St. 1901, p. 511]) it is made the duty of the Circuit Court, as well as of this court, at any time that it shall appear that a suit removed from a state court does "not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court," to remand it to the court from whence it was removed. But it is urged with much earnestness that the court should not exercise this power, at this stage of the case, if the record discloses a removable case upon the ground of a separable controversy between the city of Cleveland and the Pennsylvania Company which would have afforded a sufficient ground for the removal if it had been relied upon and stated as a ground in the petition for removal. To restate the contention, it is that at this stage of the case, and in the absence of any objection to the jurisdiction by either party, a case is none the less one really and substantially involving a dispute or controversy properly within the jurisdiction of the Circuit Court, if, at the time of removal, there in fact existed a separable controversy between the sole plaintiff and the removing defendant, whether that reason was assigned in the petition for removal or not. For this counsel cite *Ruckman v. Ruckman* (C. C.) 1 Fed. 587, 591, *Merchants, etc., Bank v. Thompson* (C. C.) 4 Fed. 876, 878, and *Connell v. Smiley*, 156 U. S. 334, 15 Sup. Ct. 353, 39 L. Ed. 443.

We are not disposed either to admit or controvert this position, for we are unable to agree with learned counsel that there was a separable controversy, within the meaning of the removal act, disclosed by the pleadings in this case. The contention that there was a separable controversy is based upon the claim that the pleadings show that the premises in suit were not in the joint possession of the four railway corporations made defendants, but that the Pennsylvania Company was in possession of a distinct and separable part of the property sued for, as lessee of its codefendant, the Cleveland & Pittsburgh Company and that each of the other defendants claim and occupy a distinct and separate part of the premises. The pleadings do not bear out this contention. The premises sued for are described in the plaintiff's declaration as a single parcel of land, being a part of one of the public streets of said city, known in the original plat of the village as "Bath Street," and that "the defendants unlawfully keep said plain-

tiffs out of the possession thereof, whereby it is unable to perform the duty imposed upon it by law, to keep the same open and in repair and free from nuisance." Each of the defendant corporations answer separately. Thus, the Cleveland & Pittsburgh Railroad Company, a corporation of Ohio, after pleading the general issue, by way of second defense, says that it "and those under whom it holds have been in the continuous, uninterrupted and adverse possession of the premises described in the plaintiff's petition, under the claim of right and ownership, for more than 21 years last past before the commencement of this action." The original answer of each of the other three defendants was in identical terms.

Each of the defendants subsequently amended their separate answers by setting out the source of title under which they claim the premises. Among these sources of title was an ordinance of the city of Cleveland of September 15, 1849, by which in consideration of \$15,000 the said city granted the said premises to the defendant the Cleveland, Columbus & Cincinnati Railroad. That ordinance is not set out in *hæc verba* in this amendment, but it is said in the amendment to the answer of the Cleveland & Pittsburgh Railroad Company in respect of it that the city thereby conveyed "all such right, title, or interest it had or claimed to have in the premises sought to be recovered in this action, subject to the rights which the defendant company and its grantors had therein." The granting clause of the ordinance was as follows:

"Hath granted and by these presents doth grant to said railroad company, as fully and absolutely as said city or the constituted authorities thereof have the power or legal authority so to do, the right to the full and perpetual occupancy for their railroad tracks, turnout, engine and car and passenger house, turntable, water tanks or stations, avenues to and from the same, leaving open spaces between when deemed expedient and other purposes connected with and necessary for the convenient use and working of said road."

The qualification of the grant to the Cleveland, Columbus & Cincinnati Railroad Company referred to in the answer of the Cleveland & Pittsburgh Railroad Company as contained in the ordinance of 1848, was in these words:

"Said company to take and hold said land subject to all the legal rights and claims of the Cleveland & Pittsburgh Railroad Company upon the same, and to have all the benefits to accrue from such claimants as is before provided, and as a further provision for the same, shall upon reasonable and equitable terms, extend to said Cleveland & Pittsburgh Railroad Company and the Cleveland, Painesville & Ashtabula Railroad Company, room for warehouse and passenger depots, and such facilities for coming onto said premises with their cars, engines and tenders for the reception and delivery of passengers, baggage and freight, subject to the same restrictions as to warehousing, forwarding and commission business as are herein imposed on the Cleveland, Columbus & Cincinnati Railroad Company, and for transferring them to or receiving them from other railroads, or from steamboats, either by independent tracks, or by the use of the tracks laid by the Cleveland, Columbus & Cincinnati Railroad Company, as shall be found most convenient to all concerned, and in case the parties cannot agree as to the terms or manner of occupying such part of the premises as may be so required, the same shall be determined by three competent, disinterested men, one to be chosen by each party and the third by the two so chosen. It being, however, under-

stood that the Cleveland, Columbus & Cincinnati Railroad Company shall not be bound to permit either of said railroad companies to use for car, engine or warehouses, or grounds on which to place or dispose of cars, engines, tenders or other furniture of their roads, any part of said premises which said arbitrators shall decide is necessary for those purposes to be used exclusively by said Cleveland, Columbus & Cincinnati Railroad Company. It being further understood and agreed that no part of said premises shall after two years from this date be used by said Cleveland, Columbus & Cincinnati Railroad Company, for forges, furnaces, workshops or anything of a similar character for the manufacture of cars, engines or other machinery, so as to deprive either of said railroad companies of the full benefit of the use of part of said premises intended by this agreement to be extended to them."

The amended answer of the Pennsylvania Company set out that "it is in possession of and holds title to the premises in the petition described as lessee of the defendant, the Cleveland & Pittsburgh Railroad Company, and that it is so in possession by virtue of the title of the Cleveland & Pittsburgh Company, transferred to it under said lease." It thereupon sets out the same defense and same line of title set out in the answer of the Cleveland & Pittsburgh Company. Still later each of the defendants by an amendment to their answers disclaimed title to or possession of a strip 132 feet wide specifically described and being a part of the premises described in the plaintiff's declaration, but there was no disclaimer to any other part of the premises. The pleadings do not show the division of the premises between the several railway corporations now occupying same. Being independent railways operating independent lines of railroad it is probable, as suggested by counsel, that each may exclusively occupy certain of the numerous tracks constituting the terminals of the defendant companies. But it is also quite probable that some of the facilities incident to such terminal property, such as stations, docks, sheds, and particularly the spaces left open for access from the streets of the city to the various tracks, are subject to joint use and have been in the joint occupation of the several defendants.

It would be a matter of pure conjecture to say how this is, for the question as to whether this was a separable controversy when the removal occurred must be made out from the controversy as then presented by the pleadings. If each had then claimed and occupied only a distinct part of the premises, it should so appear from the pleadings, and a disclaimer should have been made as to the part not claimed or occupied by each defendant. This does not appear. As we have already shown, the only disclaimer was one made by each defendant of a strip constituting an open street included within the outside lines describing the premises sued for. As to all the rest each defendant separately pleaded a continuous adverse possession for more than 21 years, and if there was any qualification of this in the amended answers it is not in such terms as to enable us to say that the suit is one for the recovery of several distinct parcels of land each owned or claimed or occupied by only one of the several defendants. The case does not, therefore, fall within the principle of *U. P. Ry. v. Kansas*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, and *Connell v. Smiley*, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443. The case is rather

controlled by the general principles deducible from such cases as *Bellaire v. B. & O. R. Co.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910, and *Corbin v. Van Brunt*, 105 U. S. 576, 26 L. Ed. 1176.

But there is another insurmountable objection to a removal upon the ground of a separable controversy between the plaintiff and the Pennsylvania Company, even if the suit against that company involves only a distinct and separate part of the premises claimed by the city. The supposed separable parcel so occupied by the Pennsylvania Company is the property of the Cleveland & Pittsburgh Company, a corporation of Ohio. The Pennsylvania Company pleads that it is in possession as lessee under the Cleveland & Pittsburgh Company. It further pleads that as lessee, and in reliance upon the city ordinance of 1848, before referred to, and the long acquiescence of the city, it had in good faith expended a great sum of money in the improvement of its leasehold. It thus has a substantial interest in defending against the city growing out of the value of its lease and its equity in the matter of improvement. That the city might have sued the Pennsylvania Company as lessee in possession without joining the Cleveland & Pittsburgh Company, as lessor, may be conceded. In that event the right of removal would be clear for the requisite diversity of citizenship would have existed. After the removal the Cleveland & Pittsburgh Company, as the lessor, might have come in and been made a defendant in its own interest, for the purpose of defending its interest and estate as a lessor. But if this had been done after a removal by the lessee it would not have ousted a jurisdiction already acquired. This would be due to the ancillary character of the suit as against the owner or lessor. It would be an intervention *pro interesse suo*, and on well settled principles would not defeat the original jurisdiction. This is well settled in respect to just such a supposed case in *Phelps v. Oak*, 117 U. S. 236, 241, 6 Sup. Ct. 714, 29 L. Ed. 888. But *Phelps v. Oak* is not an authority justifying a removal by a lessee when the lessor is also a party and does not join in the application for a removal.

The plaintiff had a right to join a lessee in possession having a leasehold estate and an equity for bona fide improvements, with the lessor holding the major estate, and thus conclude both in one suit and by one judgment. Having the right to join both in one action, it is not for a defendant to say that the single matter of controversy shall be the subject of two suits. Having elected to join both the owner and the lessee in one suit, the defendants cannot make severable that which the plaintiff had a right to make joint. *L. & N. R. Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269.

We are constrained to hold that the Circuit Court was without jurisdiction. The judgment, for this reason only, must be reversed, with directions to remand to the state court from which the suit was wrongfully removed. The costs of this court and of the Circuit Court will be paid by the Pennsylvania Company.

ERIE R. CO. v. BURNS.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1906.)

No. 1,478.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Cushing & Clarke, for plaintiff in error.

W. S. Anderson & Son and A. W. Jones, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. Reversed, with directions to remand to the state court from which it was wrongfully removed. Plaintiff in error will pay costs of this court and of the Circuit Court since removal. This action is upon the authority of *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, and *City of Cleveland v. C., C. & St. L. R. et al.* (opinion by this court at this session) 147 Fed. 171.

In re J. M. MERTENS & CO.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 196.

1. BANKRUPTCY—CLAIMS—PROOF—ALLOWANCE.

Bankr. Act July 1, 1898, c. 541, § 63, subd. "a," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], provides that debts founded on an implied contract may be proved and allowed, and subdivision "b" declares that unliquidated claims may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate. Section 57, subd. "a" (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), declares that proof of claims shall consist of a statement under oath, in writing signed by a creditor setting forth the claim, the consideration, and that the sum is justly owing from the bankrupt to the creditor. Subdivision "c" declares that claims after being proved, may, for the purpose of allowance, be filed by the claimants, and subdivision "d," that proved claims shall be allowed on presentation to the court, unless objection is made. Subdivision "f," makes the determination of objections dependent on the convenience of the court and the best interests of the estate and the claimants, and subdivision "n" (30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), declares that claims shall not be proved subsequent to one year after the adjudication, or if they are liquidated by litigation, and the final judgment therein is rendered within 30 days before or after the expiration of such time, then within 60 days after the rendition of such judgment. *Held*, that the "proof" and the "allowance" of claims are separate and distinct steps, and that where a written statement of claim, duly verified, is filed with the referee within the year, such filing is sufficient to take the claim out of the statutory limitation, and it may be allowed, or liquidated and allowed thereafter.

2. SAME—PROOF OF CLAIM—LIQUIDATION.

A claimant's proof in bankruptcy proceedings stated the amount claimed. The trustee did not dispute the facts, nor make any counter allegations, but objected that, if it was for a tort, it was not provable under the act, and, if it was for damages on an implied contract, it could not be filed until the damages had been liquidated, which could

not be done after the expiration of a year from the adjudication, etc. The trustee, however, expressly admitted that the amount was accurate, and offered to allow the proof if the claimant would abandon his claim of fraud. *Held* that, the bankrupts, claimant, and trustee all having agreed as to the amount due on the claim, it was entitled to be allowed as a liquidated claim.

Appeal from the District Court of the United States for the Northern District of New York.

See 144 Fed. 818; 142 Fed. 445.

On appeal by the American Woolen Company from an order of the District Court for the Northern District of New York affirming an order of the referee disallowing a claim, filed by the Woolen Company for \$28,614.15.

Lee M. Friedman and Benjamin Stolz, for appellant American Woolen Company.

Frank Hiscock, Ceylon H. Lewis, and Will B. Crowley, for respondent trustee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. On September 13, 1904, two days before the expiration of one year from the date of adjudication, the American Woolen Company filed a claim for \$28,614.15, stating fully the facts out of which the claim arose.

Briefly stated the transaction was as follows:

On and prior to August, 1903, the woolen company, at the special instance of the bankrupts, delivered to them woollens and cloths, an itemized statement of which is annexed to the proof, reasonably worth the sum of \$28,614.15. The proof proceeds as follows:

"That the goods so mentioned in 'Exhibit B' were delivered in pursuance of pretended contracts of sale, which the said American Woolen Company of New York was induced to enter into by the false representations of the said bankrupt, touching the financial responsibility of said firm and its members; that the said firm procured said goods by falsely and fraudulently stating to the said corporation that it was solvent, had a large surplus in its business, and was worth a large sum of money over and above its debts and liabilities; that the representations made by said firm to the said corporation were false and known to be false by said bankrupts and were made with the false and fraudulent purpose of inducing said corporation to sell said goods to said bankrupts upon credit and said company relied upon such representations so made to it in making the deliveries above mentioned; that thereafter the said American Woolen Company duly disaffirmed said sales and rescinded said contracts of sale and demanded of the said bankrupts that they surrender to said corporation possession of said goods, which the bankrupts refused to do; that on account of the indebtedness arising from said deliveries specified under 'Exhibit B' nothing has been paid by the said bankrupts."

The proof concludes by alleging that because of the foregoing facts the bankrupts are indebted to the woolen company in the sum above stated "for deliveries made in pursuance of pretended contracts of sale which have been rescinded."

At a meeting of creditors, held after the filing of this proof of claim, the counsel for the trustee demanded that the claimant state

whether the claim was filed for the contract price of goods sold and delivered or for damages upon an implied contract or whether it was in tort. Afterwards the counsel for the claimant stated, in substance, that the claim shows upon its face what it is for, but that it was not filed on the theory of goods sold and delivered. Thereupon the trustee filed objections to the claim upon the ground that it must be construed either as a claim based on fraud or for damages arising out of an implied contract. If the former, it is not provable under the act, and if the latter, being a claim for damages, it cannot be filed until the damages are liquidated and, as more than a year had elapsed since the adjudication, it was then too late to liquidate them.

The referee sustained the trustee's contention, holding that the claim might be considered as one for damages resting upon an implied contract but that as the damages were unliquidated and as no application for liquidation was made within a year after the adjudication, the claim must be disallowed.

The petition for review of the referee's decision states that the goods in question were obtained from the woolen company by the false and fraudulent representations of the bankrupts and that as soon as the woolen company learned of the fraud it demanded of the trustee that he return the said goods, which had come into his possession, and, on his refusal to do so, it commenced a suit for conversion against him. It also appears that the District Court issued an injunction restraining the prosecution of this suit.

The bankrupts' schedules, filed in the bankruptcy proceedings, state that the woolen company is a creditor in substantially the same amount stated in the proof of claim—the difference being only \$2.18. It is also alleged, and found as a fact by the referee, that after the objections to the claim were filed by the trustee he offered to withdraw the same and allow the claim for the full amount stated, if the woolen company would waive the fraud and modify the claim so as to make it one for goods sold and delivered. This would, of course, have been tantamount to a withdrawal of its suit against the trustee for conversion and the woolen company declined to consent to what it deemed an entirely unjustifiable condition. But the offer of the trustee raises a well-nigh conclusive presumption that there never was any doubt in his mind as to the amount which the bankrupts owed the woolen company.

The practical situation, then, is this: The woolen company has a claim against the bankrupts for \$28,614.15, the amount being admitted alike by the bankrupts and the trustee; it also has a claim for the same amount against the trustee for conversion, growing out of the fraudulent representations of the bankrupts when the goods were ordered.

Manifestly the woolen company is entitled to its goods or the value thereof or, failing to establish fraud, to its share in the bankrupts' estate. If, however, the present status continues the woolen company will be deprived of both remedies—its claim has been disallowed and its lawsuit enjoined. Such a condition of affairs does not appeal strongly to a court sitting to do equity, and should not be permitted

to continue unless considerations, conceded to be technical, imperatively demand it.

The provisions of the statute must, of course, be followed, but in construing them the court should keep in mind the fact that one of the chief objects of the law is to secure a fair division of the bankrupt's estate among his creditors.

Section 63 of Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447] provides (subdivision "a") that debts "may be proved and allowed" founded upon an implied contract and subdivision "b" provides that unliquidated claims may, "pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 57 provides (subdivision "a") that:

"Proof of claims shall consist of a statement under oath, in writing signed by a creditor setting forth the claim, the consideration therefor * * * and that the sum is justly owing from the bankrupt to the creditor." 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

The section further provides (subdivision "c") that "claims after being proved may, for the purpose of allowance, be filed by the claimants," and (subdivision "d") that "claims which have been duly proved shall be allowed, upon receipt by or presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Subdivision "f" makes the determination of objections dependent upon the convenience of the court and the best interests of the estate and claimants.

Subdivision "n" provides that:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment." 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444].

From these various sections we deduce the following propositions: That proof and allowance of claims are two separate and distinct steps; that a clear statement of a claim in writing duly verified and filed with the referee, if made within a year, is sufficient to take the claim out of the statutory limitation, even though it may be allowed, or liquidated and allowed, afterwards.

We think that section 63b must be interpreted in the light of the other sections of the law and that to construe it as meaning that no proof of unliquidated claims can be filed until the precise amount due thereon is established will, in practical operation, make the allowance of such claims impossible, for the reason that a hostile trustee or creditor can easily delay the liquidation until after the expiration of the year. A more reasonable and sensible construction is that the filing of the proof, like the filing of a declaration at common law, if made within the time, takes the claim out of the statute of limitations, and that after such proof is made the claim is before the court to be dealt with as the interests of the bankrupt and the

creditors may require. No hard and fast rule can be made for the guidance of the referee in such matters; much is left to his discretion; and if the best interests of the estate require he may withhold action on the claim or postpone the dividend thereon until the status of the claim is fully determined.

These views are sustained by *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584; *Dunbar v. Dunbar*, 190 U. S. 340, 350, 23 Sup. Ct. 757, 47 L. Ed. 1084; *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; *Hutchinson v. Otis*, 190 U. S. 555, 23 Sup. Ct. 778, 47 L. Ed. 1179; *Buckingham v. Estes*, 128 Fed. 584, 63 C. C. A. 20.

In *Whitney v. Dresser* the court decided that a proof of claim is prima facie evidence of its allegations in case it is objected to.

In *Dunbar v. Dunbar* the court, speaking of section 63b, says:

"Its purpose is to permit an unliquidated claim, coming within the provisions of 63a, to be liquidated as the court should direct."

It may be pertinent to inquire how a claim can be liquidated as the court shall direct unless a statement of the claim is filed with or brought to the attention of the court.

In *Crawford v. Burke* the court held that a debt originating in or founded upon an open account or upon a contract express or implied is provable though the creditor may have elected to bring his action in trover as for a fraudulent conversion instead of in assumpsit upon an open account.

In *Hutchinson v. Otis* a defective proof was amended more than a year after the adjudication. The court said:

"It is argued that the allowance of the amendment is within section 57n forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad. *Sanger v. Newton*, 134 Mass. 308. See *In re Parkes*, 10 N. B. R. 82, Fed. Cas. No. 10,754; *In re Baxter* (D. C.) 12 Fed. 72; *In re Glass* (D. C.) 119 Fed. 509.

"The proceedings remained in the District Court, notwithstanding the appeal, and the amendment properly was allowed there."

In *Buckingham v. Estes* the court held that a claim proven within the year is amendable after the lapse of the year.

The claim of the woolen company was founded upon an implied contract and it was proved within the year. In this connection it should be remembered that the injunction restraining the prosecution of the action against the trustee was not issued until August, 1904, leaving only about a month in which a claim could be filed against the bankrupts' estate. It is quite apparent, therefore, that if the claim of the woolen company was one which required liquidation there was insufficient time, if the trustee objected, to secure a liquidation prior to September 15, when the year expired.

We are, however, inclined to think under the facts shown that the claim was not unliquidated within the meaning of the act.

The strict rules of pleading applicable to the criminal or even to the common law is not required in proofs of claim. The proof in question alleged all the facts and stated the amount claimed with clearness and precision. The objection of the trustee did not dispute these facts or make any counter allegations. His pleading was in the nature of a demurrer. If he had denied that any damages had been sustained or if he had alleged that the amount as stated was inaccurate or excessive a different proposition would have been presented, but he did neither. On the contrary, as before stated, he expressly admitted that the amount was accurate and offered to allow the proof therefor if the claimant would abandon its claim of fraud. With the bankrupts, the claimant and the trustee all agreeing as to the amount it is not easy to perceive what was left for liquidation. In *re Filer* (D. C.) 125 Fed. 261.

So far as the question of amount is concerned it was as if the parties had stipulated the amount of the damages in open court.

The order appealed from is reversed with costs.

In re J. M. MERTENS & CO.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 12.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of New York.

See 144 Fed. 818; 142 Fed. 445.

L. M. Friedman, for petitioner.

C. H. Lewis, for respondent.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The order under review enjoins the American Woolen Company from prosecuting an action in the Supreme Court of the state of New York which it had brought against the trustee in bankruptcy to recover the value of certain personal property alleged to belong to the woolen company, and which the trustee took into his possession as the property of the bankrupts and sold as a part of the bankrupts' estate. The order restrains the plaintiff in an action of trover from recovering the value of property which, if its contention is correct, never became part of the bankrupts' estate, and was converted by the trustee. In effect the order overrules several decisions of this court. In *re Russell & Burkett*, 101 Fed. 248, 41 C. C. A. 323; In *re Kanter & Cohen*, 121 Fed. 984, 58 C. C. A. 260; In *re Spitzer*, 130 Fed. 879, 66 C. C. A. 35; In *re Grissler*, 136 Fed. 754, 69 C. C. A. 406. We find nothing in *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, which conflicts with the views expressed in these decisions.

The order is reversed, with costs.

McINERNEY v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. June 22, 1906.)

No. 584.

1. GRAND JURY—OBJECTIONS—WAIVER.

The objection that the grand jury which returned an indictment was not selected as required by statute, can be availed of only by a motion to quash, or by a plea, and is waived by going to trial on the merits. In any event, if matter of record and ground of error, the right to make the objection is lost by the failure to assign it on the prosecution of a writ of error.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Grand Jury, §§ 53–55.]

2. CRIMINAL LAW—MOTION IN ARREST—TIME FOR APPLICATION.

A motion in arrest of judgment cannot be entertained after sentence, and after the term at which it was entered has expired.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2471.]

In Error to the District Court of the United States for the District of Massachusetts.

Harvey H. Pratt and Isaac F. Paul, for plaintiff in error.

Asa P. French, U. S. Atty., and Guy A. Ham, Asst. U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a petition filed by the plaintiff in error on May 8, 1906, and subsequent, therefore, to a judgment which we entered on February 26, 1906 (143 Fed. 729), affirming the proceedings of the District Court on an indictment against the plaintiff in error, in the course of which the plaintiff in error was found guilty by a jury and sentenced to imprisonment. The petition is in substance that certain persons who had been summoned to sit on the grand jury which returned the indictment against the plaintiff in error were excused from service, and were replaced by talesmen brought in by the marshal from the bystanders, contrary, as claimed, to section 808 of the Revised Statutes [U. S. Comp. St. 1901, p. 626], which, it is maintained, provides that, under such circumstances, the court should have ordered the marshal to have summoned from the body of the district, and not from the bystanders, whatever number of persons might have been required for any purpose of that character; and thereupon the plaintiff in error petitions us to reserve leave to apply to the District Court for a motion in arrest of judgment in that behalf.

It is not necessary for us to go over the general practice with regard to petitions of this character, because it has been fully explained by us in *Re Gamewell Company* (April 23, 1896) 73 Fed. 908, 20 C. C. A. 111, in *Post v. Beacon Vacuum Company* (June 14, 1898) 89 Fed. 1, 32 C. C. A. 151, and in *Boston & Revere Company v. Bemis Company* (November 10, 1899) 98 Fed. 121, 38 C. C. A. 661.

This indictment was returned on September 9, 1904, and the facts

about the grand jury referred to were patent to everybody. Therefore the petitioner has been guilty of such laches that he is not entitled to any relief, except what the law absolutely requires.

The United States claims that the irregularity about the grand jury does not appear of record; but it does appear in the journal entry of September 13, 1904, requiring the marshal to bring in three talesmen. This clearly did not mean that venires should issue, but it plainly directed that talesmen should be brought in from the bystanders. If the facts did not appear of record, it would be clear by the rules of criminal practice that the only remedy which the plaintiff in error would have had would have been by a motion to quash the indictment, or by a plea in abatement, or, possibly, by a plea in bar, each of which was waived by pleading and going to trial on the merits.

Assuming, however, that the irregularity appears of record, as the plaintiff in error maintains, and as is the fact, the only possible basis of any claim that it was not waived by going to trial on the merits is the dictum of Mr. Justice Harlan in *Rodriguez v. United States*, 198 U. S. 156, 164, 165, 25 Sup. Ct. 617, 49 L. Ed. 994. This related to a fundamental objection of a character which constituted the whole panel void, as is plain from what appears on pages 164 and 165 of 198 U. S., page 617 of 25 Sup. Ct. (49 L. Ed. 994). In any view, it cannot be accepted as sufficiently authoritative to set aside the clearly established rule as stated in *Bishop's New Criminal Procedure*, vol. 1, §§ 887, 888; *Agnew v. United States*, 165 U. S. 36, 44, 17 Sup. Ct. 235, 41 L. Ed. 624, and *Carter v. Texas*, 177 U. S. 442, 447, 20 Sup. Ct. 687, 44 L. Ed. 839. Mr. Justice Harlan does not notice the cases in 165 U. S., 17 Sup. Ct., 41 L. Ed., and 177 U. S., 20 Sup. Ct., 44 L. Ed., and therefore he must not be held to have intended to disregard or qualify them. Even if he did, his dictum would not be effectual for that purpose.

However, if the facts about the grand jury as claimed by the plaintiff in error do not appear of record, they could, as we have said, be availed of only by a motion to quash or a plea, each of which, on all the authorities, has been waived. If they appear of record, they were ground of error, and, as only one writ of error lies, unless dismissed for want of jurisdiction or some other reason, they should have been brought up on the writ of error now before us. To hold otherwise would be to evade the law limiting to six months the period within which a writ of error can be sued out. At any rate, there is no possible pretense which can be sustained that they should not have been brought before us on this writ. There was no assignment of error on the point; and, by reason of the laches of the plaintiff in error of which we have spoken, we certainly would not allow him to amend his assignment of errors, nor waive the usual rules in reference thereto. Therefore in no possible view can plaintiff in error obtain any relief.

Especially he cannot obtain relief on this proceeding in which he proposes to file a motion in arrest of judgment after sentence, which, of course, is an anomaly. Such a motion cannot be entertained after sentence, although, of course, during the term in which sentence was

pronounced, the trial court may in its discretion strike out a sentence and allow such a motion to be filed. Bishop's New Criminal Procedure, vol. 1, § 1282 (3); Chitty's Criminal Law, vol. 1, *661.

Ordered that the petition filed by the plaintiff in error on May 8, 1906, for leave to proceed further in the District Court, is denied, and the mandate may issue forthwith.

UNITED STATES v. KAUBOE.

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,286.

BILLS AND NOTES—CONSIDERATION—EXECUTION.

Defendants, who were liable on a postmaster's bond in the penal sum of \$1,000, were called on by a post office inspector to pay an embezzlement of the postmaster amounting to \$1,891. Defendants requested an extension of time, and the inspector consented to an extension of 90 days provided defendants would execute their note to the United States for the amount of the default which they did. *Held* that, as the inspector had no authority to extend the time of payment, the note was unauthorized, without consideration, and void.

In Error to the District Court of the United States for the Territory of Hawaii.

This action was brought in the name of the United States against the defendants in error to recover upon a promissory note. The amended complaint alleged in substance that on June 15, 1904, and for a long time prior thereto, one Levi P. Kauboe, was the postmaster at Kapaa on the island of Kauai in the territory of Hawaii, and that the defendants in error were the sureties on his official bond, the penal sum of which was \$1,000; that while they were such sureties on the said bond the said postmaster feloniously converted to his own use and embezzled \$1,891 of the money of the United States which came into his possession as such postmaster; "that on said 15th day of June, 1904, due demand was made upon said Levi P. Kauboe and upon the aforesaid sureties upon his aforesaid official bond for the full amount of the aforesaid embezzlement;" that said demand was made by Frank J. Hare, post office inspector of the United States, acting on behalf of the United States; that the defendants in error requested from said post office inspector an extension of time for the period of 90 days within which to pay the \$1,891 so demanded; that the inspector consented thereto and thereupon upon June 15, 1904, the said sureties, in consideration of such extension of time for the period of 90 days and the promise of said inspector that the United States would refrain from proceeding against them during said period, and in consideration of their obligation to reimburse the United States "for any losses sustained by the said United States through the acts of the said Levi P. Kauboe as such postmaster," made and executed their promissory note, whereby they promised to pay to the order of said inspector 90 days after the date the sum of \$1,891 "on account of shortage in money order funds at Kapaa post office." The complaint further alleged a demand for payment at the maturity of said note and the refusal of the defendants in error to pay the same. The defendants in error demurred on the ground, among others, that the facts alleged in the amended complaint were not sufficient to constitute a cause of action against them. The court sustained the demurrer and rendered judgment dismissing the complaint.

J. J. Dunne, R. W. Breckons, and Edward E. Cushman, for plaintiff in error.

Wm. R. Daingerfield and Clarence W. Ashford, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question here presented is whether the complaint states a cause of action against the defendants in error. They were sureties on a postmaster's official bond. Their liability on the bond was limited to \$1,000. The postmaster embezzled \$1,891 and became liable to the United States in that amount. The post office inspector demanded of the sureties the payment of the full amount so embezzled. They asked for time in which to pay it. He consented to an extension of time for 90 days, and in consideration of such extension of time they executed their promissory note for the full amount so embezzled. Does it follow from these facts that the sureties are liable upon the note? There is nothing in the complaint to indicate that indulgence to the postmaster entered into the transaction or formed any part of the consideration for the note. There is nothing in the complaint to indicate that the sureties voluntarily assumed to pay the full amount of their principal's liability over and above their own liability to the United States. The transaction as set forth in the complaint is purely one between the United States, represented by the inspector, and the sureties. The demand, and the only demand, made upon the latter was for the payment of \$1,891, and it was based solely on their liability on the bond. Their liability was limited to \$1,000, as the inspector must be presumed to have known. The contract of a surety is to be strictly construed and his responsibility is limited by the terms of his bond. *National Surety Co. v. United States*, 129 Fed. 70, 63 C. C. A. 512; *United States v. Boyd* (C. C.) 118 Fed. 89; *Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189; *United States v. Singer*, 82 U. S. 111, 21 L. Ed. 49.

The plaintiff in error attempts to find a consideration for the assumption by the sureties of a liability vastly in excess of that to which they could be lawfully held in the fact that their time to pay was extended 90 days. But that contention is not sustained by the averments of the complaint. The original demand made upon the sureties was not for the payment of the \$1,000 in accordance with their contract, but it was for the full amount of the postmaster's indebtedness. According to the complaint it was for the payment of \$1,891 that they obtained an extension of time. If the demand had been made for the \$1,000, it is not improbable that they could have paid it then and there. But in any view of the transaction as alleged in the complaint it is clear that the post office inspector had no authority to alter the contract of the sureties with the United States. Their contract was to pay \$1,000. That sum was due from them, if the averments of the complaint are true, on June 15, 1904. The post office inspector was clothed with no authority to extend the time of

payment or to bind the United States to refrain from immediately enforcing the liability of the sureties. In short, the note was obtained upon an unwarranted assumption of authority by the inspector and upon a wrongful demand. We find neither in the statutes, the regulations of the post office department, nor in the records in this case that authority is conferred upon a post office inspector to bind the government by an agreement to extend the time of payment such as is pleaded in the complaint herein. The government is not bound by the act or declaration of its agent unless it manifestly appears that he acted within the scope of his authority or is employed in his capacity as a public agent to do the act or make the declaration for it. No unauthorized act of his can estop the government from asserting its rights. *Whiteside et al. v. United States*, 93 U. S. 247, 23 L. Ed. 882; *United States v. Pine River Logging & Improvement Co.*, 89 Fed. 907, 32 C. C. A. 406-412; *Lee v. Munroe*, 7 Cranch, 366, 3 L. Ed. 373; *The Floyd Acceptances*, 7 Wall. 666-679, 19 L. Ed. 169; *Pine River Logging Co. v. United States*, 186 U. S. 279-291, 22 Sup. Ct. 920, 46 L. Ed. 1164.

The execution of the note did not change the relation of the sureties to their obligation on the bond. They remained, as they were before, liable only on the bond and according to the letter of its provisions. The note was unauthorized, without consideration, and void.

The judgment is affirmed.

REARDON v. TOLEDO, ST. L. & W. R. CO.

(Circuit Court of Appeals, Sixth Circuit. July 23, 1906.)

No. 1,505.

MASTER AND SERVANT—ACTION FOR INJURY TO BRAKEMAN—QUESTIONS FOR JURY.

Conflicting evidence considered, in an action by a brakeman against a railroad company to recover for a personal injury resulting from plaintiff falling under the cars in the night after dropping from an engine to open a switch, and *held* to require the submission to the jury of the question of defendant's negligence in failing to keep its right of way in the vicinity of the switch in a reasonably safe condition, and also the question of plaintiff's contributory negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1021, 1022, 1089-1132.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Charles A. Thatcher, for plaintiff in error.

Charles A. Schmettan, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges, and THOMPSON, District Judge.

LURTON, Circuit Judge. This was an action to recover damages for personal injuries sustained by the plaintiff while in the service of the defendant company as a brakeman. At the conclusion of all of the evidence the court instructed a verdict for the defendant. The negligence averred was in respect of the condition of the right of way

adjacent to a switch; the place being one used by brakemen in getting on and off moving engines and cars, for the purpose of handling a switch leading from a main track in defendant's Toledo yards to a private mill adjacent to same. There was evidence tending to show that one of defendant's yard tracks is laid in or upon ground parallel to one of the public alleys of the city of Toledo. This track is some two feet below the level of the existing alleyway on the east. Upon the alley side, and only some 4 feet from the easterly rail, is a wooden retaining wall against the bank of the alleyway. There was also evidence tending to show that the earth of this alleyway adjacent to the retaining wall is at places sunken below the top of this wooden wall, as well as below the general level of the alley. This depression is said to vary from 6 to 18 inches, and that grass and weeds conceal it in part from observation.

The evidence is not clear as to whether this wall is upon the right of way or maintained by the defendant company. Neither is the evidence clear as to whether the defendant's right of way covers any part of the alleyway behind the wooden wall. But there was some substantial evidence tending to show that both the retaining wall and some two or three feet of the ground behind it was upon the railway right of way, and as such had been maintained by the defendant. This evidence is found in the testimony of the witnesses James G. Kaney and Emma Stiegman, and amounts to something more than a scintilla, and enough to carry to the jury the question as to whether the company had been negligent in the maintenance of its roadway at this point. There was also evidence that the plaintiff in the early night time was engaged in switching at this point, and that it was his duty to handle a switch leading from the yard track at this point to certain adjacent mills. For this purpose he says he got upon an engine which was backing up this track with certain cars intended for this mill switch; that when the engine reached a point near the switch he stepped from the engine to this retaining wall, the wall being but a few inches below the floor of the engine cab, for the purpose of signaling the engineer when his train had passed the switch, and to then turn the switch so that the engine could enter. Plaintiff testified in substance that the top of this retaining wall was decayed or broken, and that his foot slipped and he fell backward upon the track, and that a passing car ran over his hand and cut it off. He also testified that he did not and could not see the condition of this retaining wall in the darkness, and did not know its bad condition. The switch which plaintiff was to handle was upon the ground level with the track, or substantially so, and upon the opposite side of the track to the retaining wall upon which plaintiff stepped. There was a conflict in the evidence as to whether plaintiff got off upon the proper side for the discharge of his duty.

The contention of plaintiff was that it was his duty to get off upon and give his signals from the engineer's side of the engine, and not upon the opposite, or fireman's, side. If the plaintiff for his own convenience got off upon one side, when the proper thing for him to do was to get off upon the other, he cannot throw the responsibility upon

the defendant for an injury due to his own action in getting off at a place where it was not expected he would get off. There was some evidence, however, that it was the usual and customary thing for brakemen to get off upon this retaining wall, if that was the engineer's side and the purpose was to give him a signal for this switch. There was, upon the other hand, evidence tending to show that plaintiff should have gotten off upon the switch side and given the signal to the fireman, whose business it would be to communicate the same to the engineer. Plaintiff also introduced evidence to excuse his not getting off on the switch side by evidence that the ground adjacent to the switch was low and that he would have to get off in a pool of water if he had stepped off on that side. On the other hand, the records of the Weather Bureau showed that since noon of the day of the injury the mercury had not been above 20, a fact which, if true, would tend to show that the ground must have been frozen. It cannot be said, however, that there was not a conflict as to the condition of the ground around this switch where plaintiff was hurt. Undoubtedly the court should have given some instruction concerning the high grade of record evidence of temperature upon a certain day as compared to the memory of witnesses, whether interested or not. Still it was not impossible for error to occur in the records of the Weather Bureau, and the fact may be that the presence of a pool of water around the switch stand presented some reason for getting off upon the retaining wall upon opposite side of track.

Upon a consideration of the whole case we have reached the conclusion that the question of contributory negligence in getting off upon the side opposite to the switch, as well as the question of plaintiff's implied knowledge of the condition of this retaining wall and of the ground behind it, were questions for the jury, under proper directions by the court. The other errors assigned are without merit.

Reversed, and remanded for a new trial.

SAXLEHNER v. EISNER et al.

(Circuit Court of Appeals, Second Circuit. June 7, 1906.)

No. 280.

1. TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—PERSONS LIABLE—OFFICERS OF A CORPORATION.

Where the executive officers of a corporation held a full power of attorney authorizing them to act in all matters pertaining to the company, and the directors were practically nonentities, the corporation's entire activities being within the control of such officers, they could be personally charged with infringement of trade-marks and unfair competition in the transaction of the corporation's business.

2. SAME—INJUNCTION—EQUITABLE JURISDICTION.

Where defendants, as executive officers of a corporation, had personally directed the infringement of complainant's trade-marks, and in March, 1901, filed an answer averring that complainant had, long prior to the commencement of the suit, lost all exclusive right to its label as well as to the name and shape of its bottle, complainant was justified in

alleging in a bill to restrain defendants personally from continuing such infringement, that defendants intended to continue the same.

3. INJUNCTION—CORPORATIONS—OFFICERS INDIVIDUALLY—EFFECT.

That a corporation, and through it, its officers, agents and servants, had been enjoined from further infringing complainant's trade-marks, and from conducting a business campaign of unfair competition, did not preclude complainant from obtaining an injunction restraining certain of the officers in their individual capacity from performing such unwarranted acts.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 7.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon an appeal from a judgment of the Circuit Court, Southern District of New York, directing that an injunction issue and adjudging that complainant recover the sum of \$31,030.36 as damages for infringement of trade-marks and unfair competition. The cause is reported below in 140 Fed. 938.

A. F. Cook, for appellants.

Antonio Knauth, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. In *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, it was held that defendant had fraudulently appropriated the complainant's bottle and label without justification or excuse, and the court sustained a decree of the Circuit Court, Southern District of New York for an injunction and accounting against that defendant. The *Eisner & Mendelson Co.*, originally a Pennsylvania corporation, was succeeded by a corporation of the same name incorporated under the laws of West Virginia. Of both companies the defendant *Eisner* was president and *Joseph Mendelson* treasurer. The decree in the suit which went to the Supreme Court was against the West Virginia corporation, and, upon the accounting, the master found nearly \$30,000 profits for which final decree was entered. The decision of the Supreme Court was rendered October 15, 1900, and the accounting was commenced February 15, 1901. This suit was begun November 23, 1900, against defendants, on the theory that they were contributory or joint infringers with the company, having committed infringements not only as officers of the company but also individually, jointly, and severally. The complainant averred that she first learned of the individual acts of defendants in the course of the proceedings against the West Virginia corporation. The Circuit Court sustained the bill, and held defendants liable for the same amount as that already found against the corporation as profits. The case is so fully discussed in the opinion of Judge *Hazel* who heard it at circuit that a brief reference to the propositions advanced on this appeal will be sufficient.

It is contended:

1. That executive officers of a corporation cannot be held personally liable for infringements by the corporation. In *Hutter v. The De Q.*

Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652, this court held that they could be so held where they have infringed the patent as individuals or have personally directed infringement.

2. That these defendants merely acted as executive officers of the company without any such personal initiative as would make them participants in the infringement. In our opinion the evidence shows the contrary. They were not only executive officers but also held, each of them, a full power of attorney authorizing them to act in all matters pertaining to the company. The directors were practically nonentities. Whatever business was to be done and whatever transaction was to be had rested entirely and solely with these two individuals who acted on their own initiative and do not seem to have reported to the directors what they did in carrying on the business. No one can read the testimony of the defendants including that taken in the suit against the corporation (which was put in evidence here) without being convinced that they were practically the corporation, managing it, and controlling its affairs as if it were a partnership, with themselves sole partners; that the scheme of pirating complainant's label originated with them, was worked out and carried into effect by their personal exertions; and that in reality the corporation was but the cover for their individual enterprises. Under such circumstances there might be a failure of justice if the plaintiff who has seen his trade-marks boldly appropriated for many years should be denied any relief against the individuals through whose pernicious activity alone he has been made to suffer the consequent loss.

3. That it appears by the record that all use of infringing bottles and labels by the Eisner & Mendelson Company ceased November 1, 1900, three weeks before this suit was begun. That, therefore, there was no threatened infringement to be guarded against, since all prior infringing acts of defendants had been the acts of the company. That therefore since the bill could not be sustained for an injunction there was no jurisdiction in equity. The bill, however, does aver an intention on the part of defendants to make further sales. In view of the past conduct of defendants, complainant might fairly aver an apprehension that they would in some way continue the old infringement or concoct some new one, even though the company were itself enjoined. The circumstance that since that time they have not in fact infringed is not controlling. That they had already infringed is shown, and that complainant's apprehensions were not altogether unfounded is demonstrated by the answer which was interposed in March, 1901. Instead of conceding complainant's rights, adjudicated months before by the Supreme Court, and averring that it is their intention to respect those rights and to refrain from infringement, the answer avers that complainant had long prior to the commencement of the suit lost all exclusive right to its red and blue label as well as to the name and the shape of the bottle. The interposition of such an answer indicates that complainant was quite justified in anticipating that at any time in the future some infringement of such label might be put on the market by defendants.

4. That the defendants were already enjoined, and that, therefore,

the court should have declined jurisdiction of this bill for an additional injunction.

The theory is that an injunction against the company bound its officers, agents, and servants. That is true enough, but it was within the power of the defendants to dissolve that injunction, so far as they were concerned, by resigning, and thus ceasing to be officers, agents or servants of the enjoined company. Against their personal acts there could be no absolute protection except a personal injunction.

The conclusions above expressed render it unnecessary to examine a point raised as to the admission of certain testimony.

The decree is affirmed, with costs.

THE BANES.

(Circuit Court of Appeals, Second Circuit. May 24, 1906.)

No. 264.

1. SALVAGE—AMOUNT OF COMPENSATION—UNNECESSARY ATTACHMENT.

Where libellant, who had rendered a salvage service to a steamer, seized her cargo on attachment and caused a considerable loss to the owners, although the shipowner offered to give security for the full amount of any claim against it, a reduction of the salvage award on that account by the trial court will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, § 64.

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

Appeal from the District Court of the United States for the Southern District of New York.

The following is the opinion of HOLT, District Judge, in the court below:

I was very favorably impressed with the evidence of Mr. Bacon. I think it is natural that he should think that the Merritt & Chapman Company intruded itself in this matter after it knew that it ought not to do so. No salvage should be allowed to a vessel that goes, against the deliberate wishes of the owner or master, and insists on rendering service against the will of those in command of the vessel. On the other hand, it is important that genuine salvage services should be liberally recognized. The practice should be encouraged of any vessels in the neighborhood starting immediately to rescue another vessel without awaiting detailed instructions. I think the existence of this system of the Merritt & Chapman Wrecking Company having vessels at various points, and having arrangements for quick communication of any disaster, is itself a thing which should be encouraged.

The evidence shows in this case, in my opinion, that the Merritt & Chapman Company had sent orders for their vessel to go, before they knew what the stranded steamer was, and that the Coley had gone. Then, after learning what vessel it was that had stranded, they applied to Mr. Bacon. The evidence is somewhat conflicting as to whether they offered to send their vessel or said they had sent it. As to that I do not think it is very important. Mr. Bacon wanted to know if they would make a fixed charge, instead of leaving it a matter of salvage computation. They declined to do that, and he then said he did not want the tug. But the tug had started, and it is claimed that word should have been sent or some effort made to stop it. In the first place, it is rather doubtful if they could have stopped it, and I think their explanation is quite plausible that they felt it wouldn't be of any use

to try. But I am not sure that, under the circumstances, they were bound to do that. As the afternoon wore on the situation down there was a good deal worse. The tug had started out. I do not see any objection to its going up and offering assistance, and if the captain of the Banes thought he needed it, particularly if the circumstances had changed. It seems to me he ought to have power to retain their services, notwithstanding the original declaration of the owner, unless he could get into communication promptly with the owner, without any danger in the meantime to the vessel. At all events the tug went there, and the captain of the Banes supposed that that was the one that had been sent by the owner to get them off. The Coley got out its anchors and got ready to work at high tide, but had not done any more than to get ready. Mr. Bacon got down there about 8 o'clock. I do not understand that the Merritt tug had done anything up to that time except to get ready to work. Mr. Bacon got there at 8 o'clock, and I think the evidence is pretty striking that in the course of that afternoon and up to that time the condition of things had changed. It was pretty serious. The entries in the log show that the vessel was pounding and was listing to starboard, and the evidence is that the wind was fresh and rising. It was blowing pretty stiff, and there was a heavy roll of the sea in there. Under these circumstances, from the fact that when Mr. Bacon got there, having supposed up to that time, as I understand it, that no Merritt boat had gone there, he made no demand that they leave the steamer and allow him to do the salvaging, it seems to me that the natural inference to be drawn is that he found things out there worse than he thought they would be when he was in New York, and he concluded, upon the whole, in view of all the circumstances of the case, that he had better let the Merritt boat undertake to do the work, rather than to dismiss it and undertake to do it himself. Undoubtedly, he says, and the captain says, that they thought it would not be of any use to order them away. But I think he should have said, "I gave notice to your owners that I didn't want you, and I demand that you leave and I will save my ship." He was right there, and no such notice was given. He, through the captain of the tug, talked with the captain of the Merritt tug a while about various things, and finally left and went back to New York. I think he decided then that he would leave the salvaging of that ship to the Merritt Company. I think, under those circumstances, that he in legal effect ratified the consent of his captain to accept the aid of the Merritt tug.

The question is, how much should be allowed. I do not think a very large allowance should be made. There was no danger here to the men or the vessel that was engaged in the work of rescue. They had practically no distance to go. The ship itself, as it turned out, was not in much danger and the men on it were in no danger. But as the afternoon wore on, down to 8 or 9 o'clock, and even down to the time she was got off, it was pretty squally and looked as though it might get worse. The steamer was lying on that part of the keel which was right under the engines. If she pounded much there was danger of a leak there, and of a displacement of some part of her boilers or machinery. But after all, as it turned out, she was not in much danger, and I think that not more than about 5 per cent. should be allowed in this case, or say \$2,000. I think the valuation of the steamer should be \$36,000 and of the cargo \$6,000. As to the point Mr. Kneeland has raised of the action brought by Mr. Benedict, I think that Mr. Benedict is quite free from any criticism. I think, however, that the Merritt & Chapman people ought to have taken into consideration before seizing the property that it was a peculiar cargo of a perishable kind, and to have sent around to make some inquiry to see if the insurance companies would not give a guarantee to avoid the necessity of a seizure and a stoppage of this auction sale. I do not wish to be understood as censuring them very severely. I think they were a little piqued undoubtedly. If this had been a general cargo consigned to a great lot of consignees that would have been quite a different thing, but I think, if they had made a little inquiry or investigation, they would have found out that this cargo was represented by the insurance companies and that they would have obtained a guaranty without an attachment, and saved the owners of the cargo considerable loss.

I think, in view of that fact, there should be some diminution of the amount allowed. I think it should be reduced to say \$1,600, to be divided in the proportion of \$36,000 to \$6,000 between the steamship company and the owners of the cargo.

E. G. Benedict, for appellant.

C. S. Haight, for The Baner.

Lawrence Kneeland, for the cargo.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Although not prepared to hold that the libellant should be mulcted, because it attached a disappearing cargo, nevertheless, in view of the circumstance that the shipowner disclosed the situation of the cargo and promptly offered to give security for the full amount of any claim against it, we concur fully in the conclusion of the district judge, and affirm the decree without interest, pending appeal, and with a single bill of costs in this court to the appellees.

See *N. Y. & Cuba Mail S. S. Co. v. The Express*, 59 Fed. 476, 8 C. C. A. 182.

THE ASBURY PARK.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

Nos. 201, 202.

SHIPPING—STEAMBOAT CAUSING DANGEROUS SWELL—LIABILITY FOR INJURY TO BARGE IN TOW.

A large steamboat navigating New York Bay at a high rate of speed held in fault for creating a dangerous swell, and liable for an injury caused thereby to a barge in tow, which was knocked against other boats and her planking broken, but not liable for the loss of the barge and her cargo through sinking some hours afterward, which could have been prevented by proper care on the part of her master, and was proximately due to his failure to keep her pumped out or to notify the master of the towing tug of her condition.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 344, 345.]

Appeals from the District Court of the United States for the Southern District of New York.

Appeal by the steamship *Asbury Park* and the owners of barge *Tornado* from decrees of the District Court (136 Fed. 269) for the Southern District of New York holding the steamship in fault for damages alleged to have been caused by displacement waves, and the owners of the boat *Tornado* liable for the negligence of her master, and awarding full damages against the steamship in favor of the assurance company for loss of cargo and one-half damages against said steamship for the loss of the *Tornado*.

R. D. Benedict, for appellant the *Asbury Park*.

M. A. Ryan, for appellant *Tracy*.

J. K. Symmers, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The court below has found that the swells from the steamship caused such damage to the boat *Tornado* that

she subsequently became in a sinking condition, and that the master of the boat was negligent in failing to notify the tug of her damaged condition, and that by reason thereof the boat contributed to the loss.

The record establishes the correctness of the finding that the swells from the steamship caused damage to the boat, and that her master was negligent. But the evidence as to such negligence does not justify the decree as to the award of damages. The proofs show that the damage caused by the swells was not such as to cause the boat to sink, provided she had been properly pumped out. Her master, Cassidy, testified that she was stove in above the water line, and that as soon as he saw that she was leaking he commenced to pump and reduced the amount of water in her from about 12 inches to 8 or 9 inches while she was being towed from off Liberty Light up to Fourteenth street, where she lay for nearly an hour. After the tug started to tow the boat from Fourteenth street up East river he did not pump any longer, but went below to dinner, although he testified that her condition was such at Fourteenth street that he said to the captain of the tug, "If you get this boat in the trough of the sea you are going to sink her." The captain of the tug denies that he received any such notice. When Cassidy came up from dinner he found Hamilton, a man from the *Eleanora*, one of the other barges, who had been sent aboard by the captain of the tug, and they took measurements and found two feet of water in her hold. They then put the siphon in, but after it had been used for two or three minutes the boat filled rapidly and sank. Furthermore, although Hamilton, at the request of the master of the *Tornado*, had assisted him in pumping her out while she was coming up the bay, yet when he went down to dinner he did not ask Hamilton or any one else to pump while he was below.

In these circumstances it is clear that the swells from the Asbury Park were not the proximate cause of the sinking of the *Tornado* and of the loss of her cargo, but that these damages resulted directly from the negligence of the captain of the boat in failing to use reasonable diligence to minimize the effects of the original damage. The case presented, therefore, is not one of mutual fault, the two causes contributing to produce a loss, but of two successive causes distinct and separate from each other. The rule of damages in such cases, as stated by the Supreme Court in *The Baltimore*, 8 Wall. (U. S.) 387, 19 L. Ed. 463, is as follows:

"Persons injured by collision are entitled to indemnity, but the respondents are not liable for such damages as might have been avoided by the exercise of reasonable skill and diligence after the collision on the part of those in charge of the injured ship."

The master of the boat, knowing the peril to which she was exposed in going up the river and the imminent danger by reason of her leaky condition, failed either to continue the pumping himself, although he knew that thereby he might avoid all further damage, or to ask any one to assist him while he went below to dinner leaving the boat to her fate, or to call the attention of the captain of the tug to her condition, as found by the district judge. The captain of

the tug testified that if he had been told that the boat was leaking, he could have siphoned her out and kept her free until she arrived at her destination.

We have had occasion to consider a similar question at this term of the court in *Commercial Lighterage Company v. Steamship Kaiser Wilhelm der Grosse*,¹ and the reasoning and conclusions in that case are relevant upon the facts proved herein. The court below, therefore, should have entered a decree against the Asbury Park and in favor of the owners of the boat for the damages directly caused by the displacement waves, and a decree dismissing, with costs, the libel of the assurance company against the Asbury Park, because said waves were not the proximate cause of the loss of the cargo.

The decrees are reversed, with costs of this court, and with instructions to the court below to enter decrees in accordance with this opinion.

FITCH v. RICHARDSON.

In re FITCH.

No. 607.

(Circuit Court of Appeals, First Circuit. February 23, 1906.)

APPEAL AND ERROR—FAILURE TO FILE BRIEF.

Where an appellant fails to file a brief, as required by the rules of the Circuit Court of Appeals, the appellee is entitled to have the appeal dismissed or the judgment affirmed, unless the court of its own motion determines to consider the case on the merits, which it will not do unless the assignment of errors clearly presents the questions in issue without the necessity of going through the record, as to ascertain the issues would, in this case, require the court to go through the record, it was *ordered* that the appellant must file a brief under penalty of the appeal being dismissed, with costs.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3104-3108.]

D. D. Corcoran and George R. Swasey, for appellant.

Henry A. Richardson, for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PER CURIAM. This appeal was submitted by the appellee on brief, but the appellant has neither filed a brief nor applied to be heard orally. Under the rules and practice of the court, the appellee is entitled to have the appeal dismissed, or, perhaps, to have the judgment affirmed. *Portland Company v. United States*, 15 Wall. 1, 21 L. Ed. 113; *Ryan v. Koch*, 17 Wall. 19, 21 L. Ed. 611. Or, the court at its option might open the record and dispose of the case on its merits. In view of the fact that the appellee has filed a brief, the court might possibly do the latter of its own motion if the assignment of errors was of such a character that the court could see that it clearly and fairly presented the issues on the appeal. Such, however, is not the fact, and this to such an extent that it is impossible for the court to ascertain what the issues between the parties are without its going through the record. This,

¹ 145 Fed. 623, 76 C. C. A. 374.

of course, the court is not inclined to do. The appellee has not specially asked that the judgment be affirmed.

The following order will be entered:

Ordered: Unless the appellant files a brief, framed in accordance with the rules, on or before March 17, 1906, the appeal will be dismissed, with costs for the appellee.

FITCH v. RICHARDSON.

In re FITCH.

(Circuit Court of Appeals, First Circuit. May 23, 1906.)

No. 607.

1. SECURED DEBT—RENEWAL OF LEASE BY CREDITOR.

A creditor holding as security a lease running to his debtor, who on its expiration obtained its renewal to himself without the debtor's knowledge, holds the renewal merely as security, the same as the original lease.

2. SAME—JURISDICTION OF COURT—JUDGMENT AGAINST CREDITOR FOR EXCESS OF SECURITY.

A court of bankruptcy, on rejection of proof of a claim on the ground that the creditor held security therefor, is without jurisdiction to value the security and enter a decree against the creditor over his objection for its excess value over the debt, although he claimed the security as his own property.

D. D. Corcoran, for appellant.

Henry A. Richardson, pro se.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This appeal relates to the allowance of a proof of claim by a creditor against the estate of Nathan A. Fitch, bankrupt. As usual, there was a prima facie proof of the claim, followed by a petition by the trustee for a reconsideration thereof. The trustee's petition alleged that the creditor had held collateral for the debt, by which the debt had been paid in full. The proceedings show that the alleged collateral was a stall in the new Faneuil Hall Market, held under a lease from the city of Boston. The District Court found that the debt was fully covered by the lease referred to, from which finding the creditor appealed; and this forms the first proposition which we have to consider.

There is no question that the creditor at one time held as security a lease of the stall referred to. This lease expired at some time not stated, but before there was any avowed insolvency on the part of the bankrupt. The creditor testified that, at the time of its expiration—a time at which there was no default on the part of Nathan A. Fitch—he, that is, the creditor, "went round and got the lease" in his own name, "without consulting him," that is, the bankrupt. The creditor claims that this deprived the bankrupt of any interest that he might have had in the lease, but that, nevertheless, the bankrupt still owed him the whole of the original debt. He also testified, in substance, that, having made a renewal of the lease, he told the bankrupt he might

stay in the stall so long as he paid the rent, and that when the bankrupt no longer paid the rent he would eject him. It appeared that the bankrupt paid the rent. It also appeared that the stall had been occupied by the bankrupt for some 15 years prior to the time of the assignment of the lease to the creditor as security, under successive leases granted to him in accordance with a custom by which a tenant who had paid his rent, and who is otherwise satisfactory to the city, receives renewals. The creditor asserts acquiescence by the bankrupt in the creditor's obtaining the new lease from the city in his own name, and a further acquiescence in his retaining it as his own property, thus relieving it entirely from any apparent relation to his debt as security therefor. Aside from this claim of acquiescence, the case is clearly governed by the ordinary principles with reference to renewals of leases, and to other direct or indirect extensions of other rights, held in mortgage or as collateral security; a well-known illustration of which is *Aberdeen Town Council v. Aberdeen University*, 2 App. Cas. (1877) 544.

On fundamental principles of equity, there can be no question that the renewal by the creditor of the lease of the stall inured to the benefit of the debtor, subject to a liquidation of his debt, and that the new lease was held by the creditor merely as security for the claim offered in proof. Also, according to the settled rules of courts of equity, the fact that his debtor apparently acquiesced in a claim that the creditor had renewed the lease for his own sole benefit is of no effect. Especially is that true in the present case, where the creditor admits that he obtained the renewal behind the back of the debtor, and without consulting him. Even if he had consulted him, equity looks at the relative positions of creditor and debtor, and it holds that, in view of the fact that the debtor is, at least theoretically, more or less under compulsion, all dealings by a creditor with securities which he has received are regarded as involuntary on the part of the debtor, and as subject to the original relation in which they stood, unless a new and adequate consideration passes between the parties. In this case there was no such consideration, and therefore it is clear that the creditor must be regarded as holding the lease of the stall in question as security for his debt; and the debt, therefore, could be offered in proof only as one secured in whole or in part.

The other question on this record arises from the fact that the District Court not only found that the claim offered in proof was secured, but valued the security at \$1,339 in excess of the claim, and entered judgment against the creditor for that amount, resting the judgment on the proposition that the creditor had appropriated the security to his own use, and also holding that, according to the rules of equity practice, the question with reference to the proof of the claim involved a determination of all other questions incidental thereto. But the judgment by which the District Court ordered the creditor to pay over the amount named was against an adverse claimant, and therefore was within the decision in *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and other decisions of that class, holding that a court sitting in bankruptcy has no jurisdiction over an

adverse claim without the consent of the parties; and it was not within *Pirie v. Chicago Company*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, where the order to return dividends received was purely an incident to the proof of a claim which had been rejected.

It is true that in bankruptcy proceedings questions of right are governed by the rules of chancery; but the practice of courts in bankruptcy with reference to topics like that before us is statutory. The nature of their powers with regard to matters to which this appeal relates is expressed by paragraph 6 of General Orders xxi (89 Fed. x, 32 C. C. A. xxiii), limiting proceedings with reference to a reconsideration of claims to the mere matter of expunging or diminishing them. This, of course, is subject to the right of the courts in bankruptcy, on a proper proceeding, to liquidate property found in the possession of the bankrupt, as provided by section 38, Act July 1, 1898, c. 541, 30 Stat. p. 555 [U. S. Comp. St. 1901, p. 3435], or as otherwise provided by law; but nothing anywhere gives them jurisdiction to enter a decree against a creditor for the excess value of property held as security in the manner and under the circumstances which this record brings before us.

The decree of the District Court is reversed, and the case is remanded to that court for proceedings in accordance with the opinion passed down this day, and the costs of appeal are awarded to the appellant.

UNITED STATES v. PIERCE.

(Circuit Court of Appeals, Second Circuit. June 7, 1906.)

No. 268 (1,595).

1. CUSTOMS DUTIES—CLASSIFICATION—ROSSED PULP WOOD—"UNMANUFACTURED TIMBER"—"INCLUDING."

In construing the provision in paragraph 699, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689] for "round unmanufactured timber including pulp-woods," *held* that pulp wood subjected to the rossing process whereby the bark, skin, and rough places are removed, is not manufactured in any true sense; also that it is not necessary that the "pulp woods" should be "round unmanufactured timber," "including" being used as equivalent to "also."

2. SAME—ROSSED PULP WOOD.

The term "pulp woods" in paragraph 699, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], has no commercial signification differing from its ordinary meaning, and is employed as a short, comprehensive expression intended to cover pulp wood in all its forms, including such as has been subjected to the rossing process.

Appeal from the Circuit Court of the United States for the District of Vermont.

For decision below, see 140 Fed. 962, affirming a decision of the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of Newport, Vt., on importations by C. W. Pierce.

William G. Thompson, for United States.

Stetson, Jennings & Russell (Frederic B. Jennings, of counsel), for importer.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The importations in controversy were invoiced as "rossed pulp wood," and consisted of spruce wood in the form of sticks or logs of about 10 inches diameter, cut in lengths of about two feet, and "rossed." They belong to the class of woods, chiefly poplar and spruce, used for making pulp in the manufacture of paper. Before the date of the present tariff act they were imported in various forms, cut into suitable lengths; sometimes with the bark on; generally with the bark peeled off; and occasionally, though seldom, "rossed," that is, with the bark, skin, and rough places of the log removed by hand shaving or by a rossing machine. The primary object of peeling and rossing is to cheapen transportation by reducing the bulk and weight of the wood. But rossing is necessary when the wood is to be used in making high-grade pulp, and is done to a limited extent to logs which have been already peeled by pulpmakers in order to remove imperfections and impurities that remain about the surface.

The Board of General Appraisers decided, and the court below affirmed that decision, that the importations should have been classified for duty under paragraph 699, of the present tariff act (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]), which reads as follows:

"699. Wood: Logs and round unmanufactured timber, including pulp-woods, firewood, handle-bolts, shingle-bolts, gum blocks for gum-stocks, rough-hewn or sawed or planed on one side, hop-poles, ship-timber and ship-planking; all the foregoing not specially provided for in this act."

It is contended for the appellant that they should have been classified under paragraph 200, § 1, Schedule D, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646], which reads as follows:

"200. Hubs for wheels, posts, heading bolts, stave bolts, last-blocks, wagon-blocks, car-blocks, heading-blocks, and all like blocks or sticks, rough-hewn, sawed or bored, twenty per centum ad valorem; fence posts, ten per centum ad valorem."

There was, at the date of the present tariff act, no commercial signification of the terms "logs," "round unmanufactured timber," or "pulp woods" differing from the ordinary meaning of these terms.

It is conceded by the appellant that if the importations answer the description in paragraph 699, the decisions below were correct; but appellant insists (1) that they are not "logs" because that term includes only logs in their natural state, or hewn only; (2) that they are not "round unmanufactured timber" because they have been advanced from that category by the process of rossing; and (3) that it is not enough, that they may be pulp woods, as only such pulp woods are included as are also round unmanufactured timber.

For many years pulp woods have been exempt from duty. Going back only to the tariff act of 1883, they were enumerated in the free list as "Woods, poplar or other woods for the manufacture of paper." In the tariff act of 1890 they were transferred to a general provision exempting "paper-stock, crude, of every description, including * * *

poplar and other woods fit only to be converted into paper." In the tariff act of 1894, the exemption was made in the same phraseology as in that of 1890. In the present act they were omitted from the general paper-stock provision, and transferred to paragraph 699. During all these years duties were never levied upon pulp woods in any form in which they were imported. It is to be assumed that Congress was aware of the different forms in which they had been usually imported; and it would seem that when, for the first time, they were enumerated as "pulp woods" in 1897, a short but comprehensive descriptive term was employed which was intended to cover them in all their forms. The evidence shows that while pulp wood has been designated in trade to some extent as rough pulp wood (being wood with the bark on) peeled pulp wood (being wood with the bark peeled by the spudder), and rossed pulp wood (being wood with the bark removed by a barker or rossing machine), all kinds have been equally known as pulp wood and have not been considered as anything else until they are converted in the grinder or the chipper into pulp.

The argument that by the use of the word "including," preceding the words "pulp woods, firewood," etc., in paragraph 699, Congress intended to put only such pulp woods on the free list as should also be round unmanufactured timber, is not persuasive. We think the word "including" was used as the equivalent of "also," a sense in which it is frequently employed in tariff acts. It is sufficient to refer to the decision of this court in *Hiller v. United States*, 106 Fed. 73, 45 C. C. A. 229. But rossed pulp wood is not a manufactured timber in any true sense. It would be absurd to call hand-peeled logs manufactured timber. The only real difference between peeled pulp wood and rossed pulp wood is one of degree; and if the pulp wood from which the bark is removed by a spudder is as thoroughly treated as that from which it is removed by a rosser, the result is practically the same.

We agree generally with the decision of the Board of General Appraisers and of the Circuit Court, and do not deem it necessary to add anything further to the opinions of Judge Wheeler and Mr. Appraiser Somerville.

The decision is affirmed.

UNITED STATES v. R. HOE & CO.

(Circuit Court of Appeals, Second Circuit. February 26, 1906.)

No. 130 (3,773).

CUSTOMS DUTIES—CLASSIFICATION—PATTERNS FOR MACHINERY—MOLDERS' PATTERNS.

The provision in Tariff Act July 24, 1897, c. 11, § 2. Free List, nar. 616, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], for "Models of inventions and of other improvements in the arts, including patterns for machinery," is not limited to the class of patterns known as "model patterns," intended to show the working of the thing illustrated, but includes also molders' patterns, which are used as models about which to form sand molds, in which castings may be made, and which are fitted for successive use in that way.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 141 Fed. 488, which reversed a decision of the Board of United States General Appraisers, G. A. 5,889, T. D. 25,942, which had affirmed the assessment of duty by the collector of customs at the port of New York.

Following is an extract from the majority opinion of the board, together with the dissenting opinion:

WAITE, General Appraiser. This case arises over the importation of certain wooden forms called molders' patterns, imported by R. Hoe & Company for use in manufacturing machinery or parts thereof. * * * It is claimed by the importers that the commodity should be admitted free under Tariff Act July 24, 1897, c. 11, paragraph 616, § 2, Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], which reads as follows:

"616. Models of inventions and of other improvements in the arts, including patterns for machinery, but no article shall be deemed a model or pattern which can be fitted for use otherwise."

Considerable testimony has been taken from men of skill and long experience, both for the importers and for the government, as to what are known in the trade as "patterns." The testimony reveals the fact that there are and were, at the time of the passage of this act, model patterns and molders' patterns, the two kinds differing in their appearance and use. * * * It would appear by a preponderance of evidence that a model pattern is a pattern of the exact size and dimensions of the thing desired to be made, a pattern to convey the idea to the machinist or to the manufacturer or maker of molders' patterns, the only use of which would be to stand before the artisan as the embodiment of an idea, shape, form, and use; while a molder's pattern is a more or less accurate representation of the thing desired to be made, which is placed in the hands of the molder or foundryman, and is made use of by him to form the matrix or mold in the sand into which the molten metal is poured, thus producing a casting for a part or whole of the machine. The unskilled could not by an observation of the molders' pattern reproduce a part of the machine, because it differs in the following respects: It is larger to allow for shrinkage; it has projections where there should be holes in the machinery for the purpose of producing indentations in the mold into which may be placed the sand cores, and is also made tapering so that it can be drawn from the sand.

We think it may be conceded that the importations in question are not models of inventions or of other improvements in the arts, but come under the last part of the paragraph, if they are included within this paragraph at all, where they are described as patterns for machinery. The patterns which are admitted free, are not only limited to patterns for machinery, but are further limited by this language, "no article shall be deemed a model or pattern which can be fitted for use otherwise." Previous to the law of 1890, the word "otherwise" did not appear, but the language read, "which can be fitted for use," which, in our view, means for use as the thing which they represent. The word "otherwise" may well be thought to have been intended to prohibit free entry of "patterns for machinery" used by molders in making castings in the way the importation in this case is used. The manufacture of molders' patterns is a large industry; and, in our judgment the molders' patterns are used as a tool of trade, the same as the molders' pick or trowel. * * * We think the pattern for machinery covered by said paragraph 616 is such a pattern as can be used for conveying an idea from which to form the object and for nothing else; one which can be preserved indefinitely for that purpose. * * * The thing intended to be admitted free must correspond to the requirements of the general term "pattern," rather than with the specific term "molders' pattern," which is in the same class as the matrix formed by it, and is an instrument made use of in the practical operation of manufacturing the machine. Following the distinction here made,

we conclude, under the evidence in this case, that a molders' pattern does not come within the definition of "patterns for machinery," taking the ordinarily accepted meaning of the word "pattern," because machinery could not be produced by following the form and lines represented by the molders' pattern, and the imported articles are fitted for use and made use of otherwise than as such patterns for machinery as are intended to be covered by the statute. * * *

SOMERVILLE, General Appraiser (dissenting). I dissent from the conclusions reached by my colleagues in this case, being clearly of opinion that the article under consideration, which is an iron molder's pattern for machinery, is entitled to free entry, as claimed by the importers, under paragraph 616 of the present tariff act of 1897, which reads as follows:

"616. Models of inventions and of other improvements in the arts, including patterns for machinery, but no article shall be deemed a model or pattern which may be fitted for use otherwise."

No clearer or more specific language, in my judgment, could have been used by Congress to describe the article under consideration than that used in the above paragraph. The limitation that "no article shall be deemed a model or pattern which can be fitted for use otherwise," has no application to the wooden pattern represented by the accompanying sample under consideration. If the article were a model or pattern of iron or other metal, it might be susceptible of some other use; but, being of wood, it would clearly seem to be fit only for use as a molder's pattern.

The Standard Dictionary, while giving the general definition of the word "patterns" to be "an original or model proposed for imitations; something used or worthy to be used, as a copy," specially describes the word so as to expressly include what are known as "iron molders' patterns," namely, as "a model, usually of wood or iron, and often in several parts to facilitate removal, about which to form a sand mold, in which a casting may be made." This definition precisely covers the pattern under consideration. The evidence shows, without conflict that it is a pattern for machinery; that is, a wooden pattern used in molding the cast iron parts of certain machinery. It is well settled that words in a tariff act are presumptively used in their ordinary or dictionary signification. *Swan v. Arthur*, 103 U. S. 597, 26 L. Ed. 525. In order to establish a commercial designation, such as will control the meaning of a tariff law, the evidence must be "definite, uniform, and general, and not partial, local, and personal." *Maddock v. Magone*, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482. The testimony in this case falls far short, in my opinion, of establishing any peculiar or trade meaning for either of the phrases, "models of invention" or "patterns for machinery," as different from the dictionary definition above quoted.

The protest in my opinion should be sustained.

W. Wickham Smith, for United States.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. Decision affirmed on opinion of Circuit Court and dissenting opinion of Judge Somerville, General Appraiser, which concisely and clearly expresses our conclusion upon the record.

F. W. MYERS & CO. v. UNITED STATES.
(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 144 (1,670).

CUSTOMS DUTIES—CLASSIFICATION—FIREPROOFED LUMBER.

Lumber which has been subjected to a fireproofing process that largely increases its value, but which can still be applied to the ordinary uses of sawed lumber, is not dutiable as manufactures of wood, not specially provided for, under paragraph 208, Tariff Act July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], but as "sawed lumber," under paragraph 195, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646].

Wallace, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of New York.

For decision below, see 139 Fed. 344, which reversed decisions of the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of Plattsburg. Note G. A. 5,827 (T. D. 25,715).

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

George B. Curtiss, U. S. Atty.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. This cause involves customs duties on "fire proofed lumber." It is reported below in 139 Fed. 344. In the opinion of a majority of the court the decision of the United States Supreme Court in *U. S. v. Dudley*, 174 U. S. 670, 19 Sup. Ct. 801, 43 L. Ed. 1129, is controlling.

The decision of the circuit court is therefore reversed, and that of the Board of General Appraisers is affirmed.

WALLACE, Circuit Judge (dissenting). The importations in question are fireproofed lumber, and consist of oak and white pine sawed lumber which has been treated for the purpose of making it fireproof by a process by which it is chemicalized. The process involves softening the lumber and opening its pores, withdrawing the sap, injecting the chemicals into the fiber of the wood, and then treating the wood with heat until it is perfectly dry, thereby crystallizing the solution of the chemicals in the fiber of the wood. The treatment is an expensive one, and the cost of combining the chemicals with the lumber is about \$19 per 1,000 feet, and doubles the market value of the cheaper varieties.

The question raised by this appeal is whether such fireproofed lumber is subject to duty under paragraph 195 or paragraph 208 of the tariff act of July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 167, 168 [U. S. Comp. St. 1901, pp. 1646, 1647]. Paragraph 195 prescribes the duty on "sawed boards, planks, deals, and other lumber of white wood; sawed lumber not specially provided for in this act." Para-

graph 208 prescribes the duty on "house or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood, or of which wood is the component material of chief value, not specially provided for."

It is not disputed that wood was the component material of chief value in the importations in controversy.

The Board of General Appraisers were of opinion that the importations should be classified as sawed lumber. That opinion was mainly influenced by the decision of the Supreme Court in the case of the *United States v. Dudley*, 174 U. S. 670, 19 Sup. Ct. 801, 43 L. Ed. 1129. The majority of this court, in affirming the decision of the Board of General Appraisers, do so because they consider the *Dudley* Case controlling.

It was decided in the *Dudley* Case that sawed boards and planks, planed on one side and grooved, or tongued and grooved, were "dressed lumber," and dutiable as such under paragraph 676 of the tariff act of August 28, 1894, c. 349, § 2, Free List, 28 Stat. 546, rather than as a "manufacture of wood," under paragraph 181 of the act, § 1, Schedule D, 28 Stat. 521. Everything that was said in the opinion in discussing paragraph 181 was unnecessary to the decision. In the present act paragraph 208 is a substitute for that paragraph, and it is hardly conceivable that as the paragraph has been changed in the present act any court would hold that it enumerates only such manufactures of lumber as are *eiusdem generis* with "house or cabinet furniture." The gist of the decision in the *Dudley* Case was that, so long as dressed lumber is in a condition for use for all the ordinary uses of lumber, it is still dressed lumber; but if its manufacture has been so far advanced that it can only be used for a definite purpose, it becomes a manufacture of wood.

It is true that fireproofed lumber, sawed, can be used for any of the purposes for which ordinary sawed lumber is used; and if anybody chooses to use it for making a water tank, or a sidewalk, or any kind of wooden structure or article, even for making kindling wood, it will answer the purpose. In my judgment, this consideration is not controlling. Fireproofed lumber is capable of a use for which ordinary lumber is not adequate and is not adapted; and by the process which has been applied to it the original lumber has been advanced into a new material adapted to a particular use, that of making fire-proof structures. It seems to me almost absurd to hold that wood which has been combined with other materials at such expense and labor as to nearly double its commercial value is not to be considered as a manufacture, and as such covered by paragraph 208, merely because, notwithstanding what has been done to it, it can still be applied to all the uses of ordinary sawed lumber, if no regard is had to the extravagant and foolish nature of the use.

The test generally applied to determine whether an article which has been advanced from its crude or original state of labor, either by hand or by mechanism, is a manufacture within the meaning of the tariff laws, is whether what has been done has produced a new and different article, having a distinctive name, character, or use from that of the original material. *Hartranft v. Wiegmann*, 121 U. S. 615, 7

Sup. Ct. 1240, 30 L. Ed. 1012. The importations in question have a distinctive name, a distinctive character, and a distinctive use. In practical application, however, the test is very elastic and elusive, and the question in the particular case can often be better determined by common sense than by the use of definitions and fine-drawn distinctions.

I think the decision of the Circuit Court reversing that of the Board of General Appraisers was correct, and should be affirmed.

COCHRAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 30, 1906.)

No. 2,082.

1. COURTS—TERRITORIAL COURTS—PRACTICE AND MODES OF PROCEEDING IN CRIMINAL PROSECUTIONS BY UNITED STATES.

In criminal prosecutions by the United States in the territorial district courts of Oklahoma those courts are required to conform to the practice and modes of proceeding prescribed by the territorial laws, and not those prescribed for the courts of the United States, unless it be otherwise specially provided by some law of Congress.

2. CRIMINAL LAW—SEPARATE TRIALS—PEREMPTORY CHALLENGES.

On the trial in a territorial district court of Oklahoma of an indictment charging an offense against the laws of the United States questions relating to the right of the defendants to be tried separately and to challenge jurors peremptorily are to be determined by the laws of the territory. (Syllabus by the Court.)

In Error to the Supreme Court of the Territory of Oklahoma.
For opinion below, see 76 Pac. 672.

E. M. Clark, C. R. Buckner, and G. W. Buckner, for plaintiffs in error.

Horace Speed, U. S. Atty.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. H. D. Cochran and Emmett Blevins, who are not shown to be Indians, were convicted in a district court of the territory of Oklahoma, while it was exercising the jurisdiction of the circuit and district courts of the United States, of the larceny of personal goods within an Indian reservation in that territory, and the judgment has been affirmed by the territorial Supreme Court, 14 Okl. 108, 76 Pac. 672.

The case is now before us upon a writ of error to the latter court.

The first question presented, whether the offense was one against the United States, under Rev. St. § 2145, and section 5356 [U. S. Comp. St. 1901, p. 3638], and cognizable on the federal side of the district court, is ruled by our decision in *Brown v. United States* (announced concurrently herewith) 146 Fed. 975, in which the same question, upon full consideration, is answered in the affirmative.

The remaining questions relate to matters of procedure, rather than jurisdiction, and arise out of the denial of the request of the defendants for a severance and separate trials and the refusal to accord to them more than three peremptory challenges to be exercised jointly. In the Circuit and District Courts of the United States, whether defendants jointly indicted shall be tried together or separately rests in the sound discretion of the court (*United States v. Marchant*, 12 Wheat. 480, 6 L. Ed. 700; *United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300), while under the statutes of Oklahoma separate trials may be had as matter of right if the offense be a felony, and in other cases may be allowed in the discretion of the court. Rev. St. Okl. 1903, § 5491. And in the Circuit and District Courts of the United States a defendant, or the defendants jointly, if there be more than one, are entitled, on the trial of any felony, other than treason or a capital offense, to 10 peremptory challenges, and on the trial of lesser offenses to 3 such challenges (Rev. St. U. S. § 819 [U. S. Comp. St. 1901, p. 627]), while under the statutes of Oklahoma a defendant, or the defendants jointly, if there be more than one, are entitled on the trial of any offense not capital but punishable by imprisonment in the territorial prison to 5 peremptory challenges, and on the trial of other offenses to 3 such challenges. Rev. St. Okl. 1903, § 5468. It is important, therefore, to inquire whether the territorial district court, when exercising the jurisdiction of the Circuit and District Courts of the United States in the trial of an offense against the laws of the United States, should conform to the practice and modes of proceeding in the Circuit and District Courts of the United States or to those prescribed by the territorial statutes. The question is not new, and the answer to it is found in repeated decisions of the Supreme Court of the United States. *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244; *Miles v. United States*, 103 U. S. 304, 310, 26 L. Ed. 481; *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966; *Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341. These decisions hold that the territorial courts, although expressly clothed with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, are not courts of the United States, but legislative courts of the territories; that the practice and modes of proceeding, including that of impaneling juries, prescribed for the courts of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specially provided by some law of the United States.

By the territorial statute, as has been stated, the defendants were entitled as of right to separate trials if the offense was a felony, otherwise action upon their request rested in the discretion of the court. Was the offense a felony within the meaning of the territorial statute? We say the territorial statute, because there was no right to separate trials unless given by that statute, and whether

or not it gave the right depends upon what it means by a felony. The word is variously used in the legislation of the country (*Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709), but in the statutes of Oklahoma it means "a crime which is, or may be, punishable with death, or by imprisonment in the territorial prison." Rev. St. Okl. 1903, § 1926. The situation therefore is as if the statute, instead of using the word "felony," read: "When two or more defendants are jointly indicted for an offense punishable with death, or by imprisonment in the territorial prison, any defendant requiring it must be tried separately." This offense is not one which may be so punished. It is defined by section 5356 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3638], which declares that it shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment, but does not designate the place of imprisonment or direct that it be at hard labor. By sections 5541 and 5542 [U. S. Comp. St. 1901, p. 3721], imprisonment in a state jail or penitentiary, as punishment for an offense against the laws of the United States, is prohibited unless it be for a period longer than one year or at hard labor. In *re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. The territorial prison of Oklahoma is a penitentiary as distinguished from a local or common jail (Rev. St. Okl. 1903, §§ 4007, 4008, 5713, 5740; Sess. Laws 1903, p. 218, c. 24), and is a state jail or penitentiary within the meaning of sections 5541 and 5542, *supra*. See Rev. St. U. S. §§ 5539, 5546 [U. S. Comp. St. 1901, pp. 3720, 3723]; Act March 3, 1875, c. 145, 18 Stat. 479 [U. S. Comp. St. 1901, p. 3722]. As the offense is not punishable with death or by imprisonment in the territorial prison, it follows that it is not a felony within the meaning of the territorial statute, and therefore that there was no error in denying the defendants' request for a severance and separate trials.

Nor was there error in the ruling in respect of the peremptory challenges. The offense not being capital or punishable by imprisonment in the territorial prison, the defendants were entitled under the territorial statute to but three such challenges, to be exercised jointly. These were accorded to them.

The judgment is affirmed.

In re BERRY et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 259.

1. TRUSTS—CONSTRUCTIVE TRUST—PAYMENT OF MONEY—MISTAKE OF FACT—RECOVERY.

Petitioners under a mistaken belief that they were indebted to B. & Co., on November 25th paid them \$1,500, which they did not owe, in response to a demand from B. & Co. for money on certain stock transactions. On the 26th, B. & Co. made a general assignment for the benefit of their creditors, and on the 28th a petition in bankruptcy was filed against them. The money so paid was deposited to the credit of B. & Co.'s bank

account which from that time contained a balance largely in excess of such amount which was finally paid to B. & Co.'s trustee in bankruptcy. *Held* that, the money having been paid under mistake of fact, was recoverable on petition against the trustee.

2. TRUSTS—CONSTRUCTIVE TRUSTS—PAYMENT OF MONEY.

Where bankrupts deposited money which they had received from petitioners under a mistake of fact to the credit of their general bank account, and though subsequent to such deposit and prior to the intervention of bankruptcy, withdrawals were made from the account, the balance was never below the amount which they received through mistake, it would be presumed that the amounts withdrawn were not those impressed with the trust, and that so long as the bankrupt's account equalled or exceeded the amount erroneously received that such amount constituted the trust fund.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

On petition, filed by the trustees in bankruptcy of Jacob Berry & Co., bankrupts, to review an order of the District Court for the Southern District of New York, dated October 18, 1905, directing said trustees to pay to Raborg & Manice \$1,500 and costs from the funds in their hands as trustees.

James N. Rosenberg and Robert P. Levis, for trustees.
Benjamin N. Cardozo, for Raborg & Manice.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. Raborg & Manice, during all the time in question, were brokers on the New York Stock Exchange and Berry & Co., the bankrupts, were also brokers on the Consolidated Stock Exchange, in the same city, and had an active speculative account with Raborg & Manice.

On November 11, 1904, by virtue of a sale of stock made by Raborg & Manice for Berry & Co., the latter received a credit of \$2,675 on the books of the former and on the same day the money was paid over to Berry & Co. On November 14, 1904, through a mistake of the bookkeeper of Raborg & Manice, the said amount of \$2,675, was again credited to Berry & Co., but the mistake was not discovered until after their failure, on November 26, 1904, when they made a general assignment for the benefit of their creditors. On the day previous, November 25th, between 2 and 3 o'clock in the afternoon, in response to a demand for "some money" by Berry & Co., Raborg & Manice, after consulting the books and learning from the bookkeeper that there was a balance of about \$2,500 due, drew two checks for \$1,000 and \$500, respectively, and sent them by messenger to Berry & Co., who deposited them about 3 o'clock to their credit in the Hanover National Bank. On November 28, 1904, a petition in bankruptcy was filed against Berry & Co. by their creditors.

There is no dispute as to the fact that through a mistake in bookkeeping, growing out of the failure of Berry & Co. to deliver certificates on their stock sale which were a good delivery on the Stock Exchange, a credit of \$2,675 was given them to which they

were not entitled. Relying on this credit the payment of \$1,500 was made. The fact was that at the time the balance was the other way, Berry & Co. owing Raborg & Manice the sum of \$139. Had the true situation been known the additional payment would not have been made. Stripped of all complications and entanglements we have this naked fact that Raborg & Manice by mistake paid Berry & Co. \$1,500, which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man.

It is conceded on all hands that had not insolvency and bankruptcy intervened Raborg & Manice could have recovered the money on an implied assumpsit in the event that Berry & Co. declined to return it after knowledge of the facts—a highly improbable contingency. Of course such an action would lie. On no possible theory could the retention of the money by Berry & Co. be justified; it was paid to them and received by them under mistake, both parties believing that Raborg & Manice owed the amount.

If \$1,500 had been placed in a package by Raborg & Manice and delivered to a messenger with instructions to deposit it in their bank, and the messenger, by mistake, had delivered it to Berry & Co., it will hardly be pretended that the latter would acquire any title to the money, and yet the actual transaction in legal effect gave them no better right.

It is urged that to compel restitution now will work injustice to the general creditors of the bankrupts, but this contention loses sight of the fact that the money in dispute never belonged to the bankrupts, and their creditors, upon broad principles of equity, have no more right to it than if the transaction of November 25th had never taken place. If the trustees succeed on this appeal the creditors will receive \$1,500, the equitable title to which was never in the bankrupts. There can be no doubt of the fact that the payment to Berry & Co. was a mistake and that by reason of this mistake the trustees have in their possession \$1,500 which, otherwise, they would not have. The proposition that Raborg & Manice, who have done no wrong, shall be deprived of their property and that it shall be divided among creditors to whom it does not fairly belong, is not one that appeals to the conscience of a court of equity.

The rule invoked by the District Court is well stated by Judge Story:

"The receiving of money, which consistently with conscience cannot be retained is in equity, sufficient to raise a trust in favor of the party for whom, or on whose account, it was received. This is the governing principle in all such cases. And, therefore, whenever any interest arises, the true question is not whether money has been received by a party, of which he could not have compelled the payment, but, whether he can now, with a safe conscience, *ex æquo et bono*, retain it. Illustrations of this doctrine are familiar in cases of money paid by accident or mistake or fraud. * * * Still, however, there are many cases of this sort, where it is indispensable to resort to courts of equity for adequate relief, and especially where the transactions are complicated, and a discovery from the defendant is requisite." Story *Eq. Jurisdiction*, vol. 2, §§ 1255-1256.

See, also, *Nat. Bank v. Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Am. Sugar Ref. Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757.

When the money was paid under a plain mistake of fact equity impressed upon it a constructive trust which followed it through the bank and into the hands of the trustees.

The account of Berry & Co. was never overdrawn during the day of November 25th; there was as much as \$5,000 to their credit during that day and at no time did the withdrawals reduce the balance below \$1,500. It is true that large sums were checked out after the deposit of the \$1,500, but the law presumes that the amounts withdrawn were not those impressed with the trust. In other words, so long as \$1,500 remained in the bank the presumption is that it was the trust fund.

It is unnecessary to enter further into details of the bank's transactions subsequent to the failure; it is enough to say that as the final result of the bank's liquidation of the account \$6,310.41 was delivered to the trustees in bankruptcy. But for the mistake of Raborg & Manice this sum would have been \$4,810.31, which is all the bankrupts' creditors are entitled to. The \$1,500 should be paid by the trustees to Raborg & Manice, its lawful owners.

The language of Judge Jenkins in *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739 is applicable to the present situation. At page 402 of 74 Fed., page 475 of 20 C. C. A. (33 L. R. A. 739) he says:

"Here the receiver is an officer of the law, having the assets in custodia legis. He has no interest in the fund, save to see that it shall be distributed among those entitled to it according to the highest principles of honesty and of equity. The assets of the bank received by him are, with respect to the question in hand, to be treated as an entirety. Those assets have been swelled by the property of the appellant wrongfully obtained by the bank, and which went into the possession of the receiver. That in the payment of dividends he has disbursed the actual money so received can make no difference, so long as assets remain out of which restitution can be made. The creditors have received that to which they were not entitled, and that which belonged to the appellant. If restitution be made out of the assets still remaining, the creditors will receive no less than that to which they were originally entitled, and the appellant will only receive that which was its due. To compass such a result is the highest equity, since otherwise the appellant will be deprived of its own, and the general creditors will receive that to which they have no right."

The order of the District Court is affirmed with costs.

VICTOR SAFE & LOCK CO. v. DERIGHT.

(Circuit Court of Appeals, Eighth Circuit. August 1, 1906.)

No. 2,061.

1. LIBEL—ACTIONABLE WORDS—SPECIAL DAMAGE.

By the law of libel defamatory language is actionable without special damage when it contains an imputation upon one as an individual, or in respect of his office, profession, or trade, but is not actionable when it

is merely in disparagement of one's property, or of the quality of the articles which he manufactures or sells, unless it occasions special damage.

2. SAME.

The plaintiff is engaged in the manufacture and sale of what are commonly designated as "Victor Safes." The defendant, who is engaged in selling other safes, wrote to a third person a letter containing the following language: "We have heard that you had placed order for a Victor Screw Door. We are somewhat surprised at this and feel that you have been misled. The Victor plate safe is very cheaply constructed and can be easily burglarized. The Victor, so-called, "manganese steel safe" is weaker still, and can be opened inside of a vault or anywhere else in a few moments time." *Held*, that this language must be regarded as merely in disparagement of the plaintiff's safes and therefore as not actionable in the absence of special damage, and that, there being no allegation of such damage in the petition, it is demurrable.

(Syllabus by Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

Charles W. Baker (Walter S. Stillman, and J. E. Price, on the brief), for plaintiff in error.

Isaac E. Congdon (John W. Parish, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action for libel. The plaintiff, an Ohio corporation, is engaged in the manufacture and sale of safes of various styles made of steel and iron plates and commonly designated as "Victor Safes." Among these is one known as a "plate safe" and another known as a "manganese steel safe." The defendant, a citizen of Nebraska, is engaged in the sale of safes other than those made by the plaintiff. The libel charged rests upon the following letter written by the defendant to one Holland:

"Dear Sir: We have heard that you had placed order for a Victor Screw Door. We are somewhat surprised at this and feel that you have been misled. The Victor plate safe is very cheaply constructed and can be easily burglarized. The Victor, so-called, manganese steel safe is weaker still, and can be opened inside of a vault or anywhere else in a few moments time. The large second-hand fire and burglar proof safe on which we made you a low price will stand much more explosive and is a much more difficult safe to open than any Victor you could buy. We are ready to demonstrate this at any time. We trust you have not concluded the contract, and will still consider a proposition on our safe."

Because the petition contained no allegation of special damage a demurrer thereto was sustained, and, the plaintiff declining to amend, judgment was given for the defendant.

The sole question presented for our consideration is: Is the language of the letter libelous per se; that is, actionable without special damage? As by the law of libel defamatory language is actionable without special damage when it contains an imputation upon one as an individual, or in respect of his office, profession or trade, but is not actionable when it is merely in disparagement of one's property or

of the quality of the articles which he manufactures or sells, unless it occasions special damage, it is essential to consider whether the language of the letter contains an imputation upon the plaintiff or is merely in disparagement of the quality of its safes. *Townsend on Slander and Libel* (4th Ed.) §§ 146-151, 205, 206; *Swan v. Tappan*, 5 Cush. (Mass.) 104; *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; *Dooling v. Budget Publishing Co.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83; *Boynton v. Shaw Stocking Co.*, 146 Mass. 219, 15 N. E. 507; *Tobias v. Harland*, 4 Wend. (N. Y.) 537; *Malachy v. Soper*, 3 Bing. (N. C.) 371; *Young v. Macrae*, 3 B. & S. 264; *Evans v. Harlow*, 5 Q. B. 624. The letter does not mention the plaintiff. It does not say that Holland's order for a Victor Screw Door was given to the plaintiff or that he was misled by the plaintiff. Nor is it implied that the plaintiff had any connection with that order, because consistently with all that is said Holland may have placed the order with some dealer other than the plaintiff wholly uninfluenced by any act or representation on its part. These considerations persuade us that the language of the letter must be regarded as merely in disparagement of the quality of the plaintiff's safes, and therefore as not actionable in the absence of special damage, of which there is no allegation in the petition. Cases before cited, and *Stone v. Cooper*, 2 Denio (N. Y.) 293; *McLoughlin v. American Circular Loom Co.*, 60 C. C. A. 87, 125 Fed. 203; *Pollard v. Lyon*, 91 U. S. 225, 237, 23 L. Ed. 308; *Walker v. Tribune Co.* (C. C.) 29 Fed. 827; *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

There is nothing necessarily immoral or reprehensible in the manufacture and sale of safes which are cheaply constructed, and not designed to be burglar proof or difficult of opening. They may be useful and salable in the market for the purpose of placing what is put into them beyond the reach of fire, and possibly for other purposes. The case is thus distinguishable from those where language is held actionable without special damage when it imputes to a master mariner and shipowner a purpose to sail to a distant port with passengers and freight when his ship is so unseaworthy as to immediately endanger all on board, or when it imputes to a brewer the use of such unwholesome materials in brewing as to make sick those who drink his beer. *Ingram v. Lawson*, 6 Bing. N. C. 212; *Ohio & M. Ry. Co. v. Press Publishing Co.* (C. C.) 48 Fed. 206; *White v. Delevan*, 17 Wend. (N. Y.) 49. Such language although relating to property or an article produced, is a libel on the owner or producer because it implies that he is guilty of deceit, or what is more reprehensible, in the conduct of his business.

We think the ruling upon the demurrer was right, and the judgment is accordingly affirmed.

In re NEW YORK & NEW JERSEY ICE LINES.

In re HEWITT et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 214.

1. BANKRUPTCY—CORPORATIONS SUBJECT TO ACT—CONSTRUCTION OF STATUTE.

The provisions of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], enumerating the classes of corporations subject to the act, is to be strictly construed, and includes only such corporations as are clearly within the enumeration.

[Ed. Note.—What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

2. SAME—ICE COMPANY.

A corporation organized to buy, gather, store, and preserve ice, to ship and vend the same, and which carried on its business by renting small bodies of water from which it cut the ice which it stored, shipped, and sold, only two or three times in a number of years buying small quantities of ice when its own supply ran short, is not engaged principally in manufacturing, trading, or commercial pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and is not subject to involuntary proceedings in bankruptcy.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 17.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree holding that the corporation could not be adjudicated a bankrupt and dismissing the petition for such adjudication.

H. B. Clossan, for appellants.

Selden Bacon, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The New York & New Jersey Ice Lines is a corporation organized under the statutes of New Jersey for the following objects:

"To buy, gather, store and preserve ice; to prepare it for sale, to transport it to the cities of Jersey City, New York and elsewhere and to vend the same, to contract with others and hire the necessary material for the performance or accomplishment of the said objects," etc.

The work that the company has actually done under this charter has been the gathering, storing, and preservation of ice, the transportation of it to the places of demand, and the selling of it there. Once in a great while, about two or three times in 13 years, it bought a little ice in Maine for its customers when its own supply ran short. What it did was to rent small bodies of water, or secure easements therein, and to harvest the ice which formed thereon during the winter. The only question in the case is whether such a corporation may be adjudicated an involuntary bankrupt, under the act of 1898. The relevant section is:

"Sec. 4b. * * * any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits * * * may be adjudged an involuntary bankrupt," etc. Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423].

This section was amended in 1903 by inserting the word "mining" after the word "publishing."

The Bankrupt Act of 1867 covered "all moneyed business or commercial corporations and joint-stock companies." This was a very comprehensive clause, and when Congress in a later act undertakes, in place of it, to give a specific enumeration of the particular kinds of business in which corporations must be "principally engaged" in order to bring them within the terms of the act, it is to be assumed that the words of such enumeration were used *ex industria* to restrict the provisions of the statute to such corporations only as are clearly within the enumeration. This interpretation is apparently confirmed by the amendment above referred to. Before amendment efforts were made in several districts to secure an adjudication in bankruptcy of different mining companies on the ground that they were engaged in manufacturing or trading or mercantile pursuits. Such applications were unsuccessful. In *re Woodside Coal Co.* (D. C.) 105 Fed. 56 (and cases there cited); In *re Keystone Coal Co.* (D. C.) 109 Fed. 872. Thereupon Congress extended the provisions of the act to such companies: but it did so, not by the use of broad general language, but by the addition of another specific designation. In *re H. J. Quimby Freight Co.* (D. C.) 121 Fed. 141. If "mining" could not be fairly included within the words "manufacturing, trading or mercantile pursuits," it is difficult to see upon what principle that phrase could be extended to include the harvesting, storage, and preservation of ice, even though it had to be cut in order to harvest it and was eventually sold.

The appellant relies upon the decision of Judge Archbald in *First National Bank v. Wyoming Valley Ice Co.* (D. C.) 136 Fed. 466; but it is manifest from an analysis of his opinion that he found the ice company to be a trader only, because a "material part" of its business was the buying of ice from third persons and the reselling of that ice to its customers. The court in that case seems somewhat to have enlarged the statute, which enumerates corporations "engaged principally in trading," words which would seem to mean more than a "material part of whose business is trading." But the citation in no respect fits the case at bar. The amount of ice purchased from third persons at rare intervals was so small as to be negligible.

Other authorities referred to by the respective parties will be found cited in the opinion of the referee. The district judge did not write. Little light is thrown upon the question by decisions not concerned with this act, which for the reason above set forth should, in this particular, be strictly construed. The principles laid down in the mining cases seem conclusive of the case at bar.

The decree is affirmed.

THE ETRURIA.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 253.

COLLISION—STEAMSHIP AND DRIFTING LIGHTER—MUTUAL FAULT.

A towing tug which cast adrift two lighters, having neither motive power nor means of signaling, near the middle of the Hudson river opposite New York City, on a somewhat foggy day, while delivering a third boat, *held*, in fault for a collision between one of such lighters and a steamship passing out to sea which did not make out the lighters until within less than 1000 feet of them, and the steamship also *held* chargeable with contributory fault, either in failing to sooner see the lighters or, in case excusable in that because of the thickness of the fog, in going at such rate of speed that she was unable to avoid them after they were seen.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 79, 152, 170, 175.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 139 Fed. 925.

Albert A. Wray, for appellant.

W. Mynderse, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This action was brought by the owner of the barge Oval Brand to recover damages for the collision between the barge and the steamship Etruria. The court below dismissed the libel.

We accept, as substantially correct, the findings of fact stated in the opinion of the District Judge, differing with him in some of the details only; and we agree with his conclusions of law that the owner of the Oval Brand was in fault, for the reasons stated in his opinion. We think, however, that the Etruria was also in fault.

The Oval Brand, a lighter without motive power of her own, was lying alongside another lighter near the middle of the Hudson river, opposite, but somewhat below, pier No. 25, on the morning of a somewhat foggy day, when she was struck by the Etruria. Both lighters were practically motionless, drifting upon a slack ebb tide, and heading somewhat toward the New York shore. They had been left drifting temporarily by their owner's tug, and were not provided with a horn or other means for making any fog-signals.

The Etruria, with her master, pilot, and second and third officers on her bridge, and two lookouts forward, had left her pier, which is about a mile and a half above the place of the collision, and, having straightened on her course down the river, was proceeding about mid-channel when she observed about 1,500 feet away a car-float, loaded with railroad cars and attached to a tug, proceeding slowly from the New York side on a course across the river towards the New Jersey side, apparently intending to cross the path of the steamship. Thereafter the Etruria maintained her course and

speed for some little distance, and then altered her course to starboard, her wheel being put hard to port, thereby throwing her bow toward the Jersey shore, and she passed in front of the car float some 70 or 80 feet away. The Etruria then began to alter her course to port, to regain her original course in mid-channel—her wheel being put hard starboard, according to the testimony of her quartermaster who was at the wheel—when her pilot and some of her officers discovered the lighters bearing about a point upon the Etruria's port bow. The lighters were then about 750 to 1,000 feet away. Immediately upon discovering the lighters the Etruria attempted to regain her course again to starboard, her wheel being put hard to port; but, finding she could not do so sufficiently to avoid the lighters, she reversed her engines, and, although her headway was retarded, the bluff of her bow struck the lighters near the stern of the outlying lighter with considerable violence, and she ran some little distance after the blow.

It is apparent from these facts that the Etruria must have maintained her original course until she was quite near to the car float, otherwise her wheel would not have been put hard apart to pass in front of the car float. It is apparent also that for some interval of time before she passed the car float, the latter, loaded with cars, intercepted to some extent her view of the lighters.

One of the controlling questions of fact is whether the Etruria should have discovered the lighters, either before she first changed her course to starboard, or, if not earlier, before she again altered her course to port. After the last maneuver it would seem that it was impracticable for her to regain her course to starboard in time to avoid collision with the lighters, and it was imperative for her to reverse full speed astern. Another question of fact is whether she was maintaining too high a rate of speed in view of the state of the fog. Her own theory is that the fog was heavy, and that her speed was at a rate of not more than about four miles an hour. According to her answer the weather was "thick and foggy." After the original entry of the collision was made her log was interlined to show that it was foggy at that time. The absence of such an entry originally is a suspicious circumstance.

A careful consideration of the evidence satisfies us that the Etruria has sought to exaggerate the density of the fog, and has convinced us that although at times during the morning it was thicker than at others, at the time of the collision it was not so thick that the Etruria could not have discovered the lighters when more than 1,500 feet away. Indeed, it is stated in the pleadings by the Etruria, and by some of the witnesses, that she did discover them when 1,500 feet away. As has been said, she did not discover them until she was within less than 1,000 feet of them. The pilot of the Etruria testifies that he had no report from the lookouts; and neither the lookouts, nor the master, the second officer or the third officer, all of whom were on the bridge with the pilot, were examined as witnesses. We think that the lookouts and those who were upon the bridge had their attention somewhat diverted by watching the operations of

the tug attached to the car float before she crossed the path of the Etruria, and watching the car float afterwards and when to some extent she intercepted the view of the lighters. If a vigilant outlook had been maintained, it seems impossible to doubt that the presence of the lighters could have been discovered, certainly before the Etruria altered her course to port while passing the car float; and if the lighters had been observed, that change towards port would not have been made, and the Etruria would have safely passed the lighters port to port.

If, owing to the state of the fog, the lighters could not have been discovered by vigilant observation until the Etruria was within 750 or 1,000 feet of them, it is plain that the Etruria was maintaining too great speed. The fact that in making the changes of course her wheel was put hard over, suggests that she was going at a higher speed than she asserts. However that fact may have been, her speed was excessive if it was true that she could not reverse her engines and come to a standstill before she should collide with a vessel which she ought to have seen. *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687.

The fact that the lighters were lying stationary and without motive power to help themselves in the crowded channel, did not under the circumstances embarrass the Etruria, and is of no importance in absolving her from the consequences of her contributory fault. If they had been under motion the Etruria would have had to ascertain the direction in which they were moving, and to some extent their speed, in order to avoid them; and it is not improbable that she would have had a more difficult task than she actually did have. If they had been under motion they might perhaps have been better able to keep out of the way of the Etruria; and if they had been provided with means for signaling their presence, they might have attracted her notice before she saw them. These considerations do not excuse the Etruria for colliding with the lighters, if it was practicable for her, using due diligence, to avoid doing so.

The decree is reversed, with costs of this appeal, and with instructions to the court below to render a decree dividing the damages.

McMILLIN et al. v. BEVES.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 114.

BROKERS—SALE OF BONDS—RIGHT TO COMMISSION.

It is sufficient to entitle a broker to his commission on a sale of bonds that the sale was effected through his agency as its procuring cause, and when his communications with the purchaser were the means of bringing the purchaser and his principal together, and a sale results as a consequence thereof, his right to his commission is not defeated because the principal assumes exclusive charge of the subsequent negotiations, dispensing with his services, nor because the sale is finally made on substituted terms resulting from such final negotiations.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 74.]

In Error to the Circuit Court of the United States for the Southern District of New York.

A. J. Rose, for plaintiffs in error.

Dallas Flannagan, for defendant.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The action was brought to recover commissions alleged to have been earned by the plaintiff as a broker in procuring the sale of certain corporate bonds. The principal assignments of error are based upon the refusal of the trial judge to direct a verdict for the defendants.

The jury were authorized to find the following facts: Early in January, 1901, the defendants requested plaintiff to find a purchaser for \$275,000 mortgage bonds of a traction company operating certain street railroads in Oshkosh, Wis., and to offer them at a specified price with a certain amount of the stock of the company as a bonus, and promised the plaintiff a commission upon the sale of $2\frac{1}{2}$ per cent. Pursuant to that proposition the plaintiff entered into communications with one Donnell, of Boston, and at the suggestion of Donnell had several interviews with the defendants to obtain information relative to the value of the securities, and reported the results to Donnell. February 19th plaintiff brought Donnell to the office of the defendants in New York City, introduced him, and told them he had offered the bonds to Donnell on the terms which they had suggested, and the defendants promised him that his commission should be taken care of. At that interview, after having a private conference with Donnell, the defendants told the plaintiff in substance that they had offered the bonds to Donnell at a somewhat reduced price, naming the terms; and an understanding was reached between all the parties that Donnell would within a few weeks investigate the value of the securities and negotiate directly with the defendants, and that the plaintiff's further intervention would be unnecessary unless he should be called in by the defendants. Thereafter Donnell visited Oshkosh, had the railroad properties examined by an expert, investigated the earnings and expenses and general financial condition of the company, had numerous interviews at Boston and at Chicago with Farley, an employé of the defendants in charge of their Boston office, and finally agreed definitely with Farley to purchase the bonds. Subsequently Donnell closed the transaction with the defendants, entering into a written agreement with them which modified somewhat his agreement with Farley, and which contained independent provisions contingent upon a reorganization of the traction company by Donnell. The terms of this agreement, so far as it related to the purchase of the bonds, were practically those originally proposed to him by the defendants. By the original proposition he was to have the bonds and the bonus stock for a sum which, with interest, would have amounted at the time of the final agreement to \$265,833. By the final agreement he undertook to pay \$211,750 for the bonds and \$54,083 for the stock, and was to pay the latter sum in cash and the balance in six months, with interest.

Upon these facts it would have been error if the trial judge had taken the case from the jury and directed a verdict for the defendants.

It is sufficient to entitle a broker to compensation that the sale was effected through his agency as its procuring cause; and when his communications with the purchaser have been the cause or means of bringing the purchaser and his principal together, and the sale has resulted in consequence thereof, his right to compensation is perfect; and when the principal assumes exclusive charge of the negotiations, dispensing with the further efforts of the broker, and sees fit to vary the terms originally proposed, the circumstance that the sale is made upon the substituted terms will not defeat the broker's right to compensation. On the other hand, the broker is not entitled to compensation for unsuccessful efforts to make a sale, unless the failure has been caused by the fault of his principal; and when he has been allowed a reasonable time to effect the sale, and has failed, and the principal has in good faith terminated the agency, and effected the sale through his own efforts, the latter is not liable for commissions. *Lloyd v. Matthews*, 51 N. Y. 124, 132; *Sussdorf v. Schmidt*, 55 N. Y. 319; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; and *Walton v. Chesebrough*, 167 N. Y. 606, 60 N. E. 1121 affirming (Sup.) 57 N. Y. Supp. 687.

The law as thus stated was formulated in substance in the instructions given to the jury by the trial judge; and he properly advised them that inasmuch as it was not disputed that Donnell and the defendants had been brought together through the plaintiff's efforts, that after the interview of February 19th the plaintiff had made no further efforts to negotiate the sale, and that the sale was finally closed by the negotiations of the defendants conducted mainly by their own employé, the controlling question for their consideration was whether the plaintiff's version of that interview was the true one.

In view of these instructions it would have been mere repetition to have given the instruction asked for by the defendants in their sixth request.

The judgment is affirmed.

ERIE R. CO. v. FARRELL et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 197.

1. TRIAL.—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.

Where there is a direct conflict of evidence on an issue the court is not justified in taking such issue from the jury, who are the judges of the credibility of the witnesses, because the testimony on one side largely preponderates.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 342, 334, 338.]

2. RAILROADS—INJURY TO PERSON AT CROSSING—VIOLATION OF SPEED ORDINANCE.

The violation by a railroad company of an ordinance regulating the speed of trains is not conclusive evidence of negligence, but in an action for an injury at a crossing is to be submitted to the jury as a circumstance from which negligence may be inferred.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1009, 1164½.]

In Error to the Circuit Court of the United States for the Southern District of New York.

F. B. Jennings, for plaintiff in error.

J. B. Ker, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The assignments of error challenge the refusal of the trial judge to direct a verdict for the defendant upon the ground that the evidence established the contributory negligence of the plaintiff, and his instructions to the jury upon the question of the negligence of the defendant.

The testimony of the plaintiff that he was struck by the locomotive of the defendant's train as he was attempting to cross the tracks of the defendant at Monmouth street, and when the approaching train was intercepted from his view by another train which had passed him while he was waiting to cross, and the rest of his testimony bearing upon the question of contributory negligence made, as this court observed upon a former occasion (138 Fed. 28), "an improbable, but not an impossible, case," and was overwhelmingly contradicted by the evidence introduced by the defendant. Nevertheless the question of his credibility was one for the jury, and if his testimony was true it would have been error for the trial judge to take the case from their consideration.

The trial judge in his charge to the jury upon the question of the negligence of the defendant in effect instructed them to find upon this issue in favor of the plaintiff, because the evidence was uncontradicted that the train of the defendant was moving at a speed in excess of that permitted by the city ordinance. He refused to instruct them, as requested by the defendant, that the defendant's failure to comply with the ordinance did not in itself constitute conclusive proof of negligence, and that it was for the jury to say, in view of the situation and surroundings in that part of the city and all the circumstances, whether the failure to comply was negligence.

The rule established by the weight of authority is, that the violation of the ordinance is not conclusive evidence of negligence, but is to be submitted to the jury as a circumstance from which negligence may be inferred. *Grand Trunk Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Hanlon v. South Boston Railroad*, 129 Mass. 310; *Knuipple v. Ice Co.*, 84 N. Y. 490.

The crossing was at the outskirts of the city, was rarely used, and the approaches to it afforded an unobstructed view for a long distance of a train approaching from any direction; and it could only

be owing to an extraordinary and almost impossible combination of circumstances that a person using it would be endangered or embarrassed in the least degree by the omission of the defendant to conform strictly to the ordinance.

The instructions given and refused, deprived the defendant of the benefit of a meritorious defense, and the assignments of error based upon the exceptions to the rulings are well taken.

The judgment is reversed.

SULLIVAN et al. v. CARTIER et al.

(Circuit Court of Appeals, Ninth Circuit. June 20, 1906.)

No. 1,268.

1. INJUNCTION—WRONGFUL ISSUANCE—BOND—DAMAGES—PLEADING.

Where, in an action on an injunction bond, the damages were specifically alleged and itemized, the recovery was limited to the items alleged.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 586-597; vol. 15, Cent. Dig. Damages, § 449.]

2. SAME—INSTRUCTIONS.

In an action on an injunction bond, the court charged that the amount of damages, if any, recoverable, should not exceed in the aggregate the amount prayed for in the complaint, but that if plaintiff was entitled to recovery, the jury, in measuring the damages, should consider "all damages," if any, that had their origin and direct and immediate cause in the restraining order during the period from the date the restraining order was served until it was dissolved. *Held*, that the words "all damages" as used in such instruction did not render it erroneous, as misleading the jury to allow damages not claimed in the complaint.

3. SAME—ATTORNEY'S FEES.

In an action on an injunction bond, attorney's fees paid in procuring the dissolution of a temporary restraining order was not a proper element of damages.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 597.]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

J. C. Campbell, W. H. Metson, F. C. Drew, Albert Fink, and Ira D. Orton, for plaintiffs in error.

W. Lair Hill, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action brought by defendants in error to recover damages on a bond given to obtain a temporary restraining order. The original action was in ejectment to recover possession of a fractional mining claim described as the "Little Chance Fraction." At the time the original action was commenced an order to show cause was made, directing the said defendants in error to appear before the court on August 29, 1903, to show cause why an injunction should not issue pendente lite, enjoining said defendants in error from mining upon or extracting

any gold from said claim, and in the meantime restraining the said defendants in error from so doing. The bond upon which this suit was brought was given to obtain this temporary restraining order. On the hearing the injunction pendente lite was granted. Afterwards, on April 9, 1904, the action in ejectment was tried, resulting in a judgment for the defendants in error.

The amended complaint set out several specific different causes of action, and damages in certain amounts were claimed in each count "by reason of the wrongful issuance of said injunction order." Some of the causes of action were eliminated during the trial. The different causes of action included: (1) The reasonable value of attorney's fees in "attempting to secure the dissolution of said injunction and restraining order," the damages alleged being in the sum of \$1,000; (2) damages for 223 days lost time during the period of injunction in the sum of \$3,045; (3) in making certain trips and in securing certain witnesses for the purpose of resisting said restraining order, and in attempting to have the same dissolved and set aside, in the sum of \$1,000.

The court instructed the jury, among other things, as follows:

"If you believe from all the evidence that the plaintiffs are entitled to recover damages against the defendants, then I instruct you that in measuring the damages of the plaintiffs you are to consider all the evidence submitted to you and allow the plaintiffs for the loss of their time, if any, as herein-after limited, their expenses, if any, in seeking to dissolve or set aside said restraining order, including a reasonable sum as attorney's fees, if you find they employed an attorney in an effort to dissolve the injunction and in answering the order to show cause, but the amount of the damages, if any, recoverable, shall not exceed, in the aggregate, the amount prayed for in the plaintiffs' complaint, to wit, the sum of \$2,500. * * * You are instructed that if you find from all the evidence that the plaintiffs are entitled to recover damages from the defendants, then in measuring the damages from the defendants to plaintiffs you are to consider all damages, if any, that had their origin and direct and immediate cause in said restraining order during the period which dates from the time the restraining order was served on the present plaintiffs up until the time of the dissolution of the same, to wit, November 9, 1903."

We do not think the court erred in giving the last instruction as to the measure of damages. We agree with plaintiffs in error that when damages are specifically alleged and itemized, the recovery should be limited to the items alleged. It would be erroneous, in such a case, to allow a recovery for damages not claimed in the pleadings. The specific objection is to the use of the words "all damages." We are of opinion that the jury, in the light of all the facts shown by the record, could not have been misled into the belief that it had the right to consider any damages not alleged in the complaint nor proven at the trial, or that the jurors could have drawn therefrom the idea that they were not required to limit the amount of recovery on each count to the amount of damages claimed therein. But, for the reasons stated in *Lindeberg v. Howard* (recently decided) 146 Fed. 467, the judgment must be reversed on the ground that the court erred in submitting "attorney's fees" as an element of damage to be considered by the jury.

Judgment reversed, and cause remanded for new trial.

NEW YORK EVENING JOURNAL PUB. CO. v. SIMON.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 230.

1. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

The admission in evidence in an action for libel of a general statement by a witness that plaintiff "was very much distressed" by the article published was not prejudicial error, where the charge made against the plaintiff in the article was of such character that the jury would have been warranted in finding such fact, even without proof.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4169.]

2. LIBEL—EVIDENCE—PROOF OF REPUTATION.

In an action for libel, the general high reputation of the plaintiff may properly be put in proof in general terms.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 256, 302.]

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment in favor of defendant in error, who was plaintiff below. The action was for libel in publishing of plaintiff, the captain of L'Aquitaine, one of the steamers of the French Line, that he passed by a water-logged bark in mid-ocean, leaving her crew of 14 men to their fate, although she signaled: "Send us help. We are sinking." The jury gave plaintiff a verdict of \$5,000.

C. J. Shearn, for plaintiff in error.

Charles Haldane, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Only two points were presented upon this appeal, and the argument in support of neither is persuasive.

1. It is challenged as error that the trial judge allowed a witness to testify that "the captain was very much distressed about this article." The witness was not allowed to expatiate on this subject, and other statements that he made were stricken out. The single question, then, is whether the admission of this particular piece of testimony, which no doubt expresses the conclusion of the witness, can be considered as a harmful error. Without now determining whether such an opinion is or is not competent, we are entirely satisfied that it was in no wise prejudicial to the defendant. Had the court charged the jury that they were warranted in finding, even without direct proof, that the plaintiff, the captain of an ocean steamer, "was very much distressed" about an article which charged him with abandoning 14 fellow seamen to a horrible death, we should not be inclined to reverse the judgment; and the simple statement of the witness added nothing to the presumption the jury was entitled to make. The case is very different from that relied on by defendant (*Cudlip v. N. Y. Evening Journal*, 174 N. Y. 158, 66 N. E. 662), where the ex parte affidavit put in evidence (against valid objection as hearsay,

etc.) not only averred that plaintiff was innocent of the charge of theft which the paper published, but had "really been the victim of a great outrage" and the "innocent victim of a conspiracy, while another person was the real criminal who stole the ring"—circumstances which might not unnaturally influence the jury on the question of damages.

2. The only other exception is to the admission of evidence that the "general reputation of the plaintiff was very high as an officer and a man." It is not necessary again to discuss this question. We considered the whole subject and the many conflicting decisions of different courts in *Press Publishing Co. v. McDonald*, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53, and held that such general testimony, not, however, extended to minuter details, might properly be put in proof.

The judgment is affirmed.

BIDWELL v. LEVI, BLUMENSTIEL & CO.

(Circuit Court of Appeals, Second Circuit. May 28, 1906.)

No. 209.

CUSTOMS DUTIES—MERCHANDISE IN WAREHOUSE—FORAKER ACT.

Merchandise from Porto Rico, which at the time of importation was not subject to the tariff laws, because not imported from a foreign country, did not, by reason of the fact that it was entered for warehouse and was not withdrawn until after the passage of the Porto Rico tariff act of April 12, 1900, c. 191, 31 Stat. 77, become dutiable under the provision in said act that duty should be enacted on "merchandise previously entered * * * under bond for warehousing."

In Error to the Circuit Court of the United States for the Southern District of New York.

The Circuit Court directed a verdict in favor of the defendants in error, against George R. Bidwell, collector of customs at the port of New York. The controversy related to merchandise from Porto Rico, which was imported and entered for warehouse after that island had become a part of the United States but before the passage of the so-called Foraker Act of April 12, 1900, c. 191, 31 Stat. 77, imposing a duty on merchandise imported from Porto Rico. Under the decision of the Supreme Court in *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, the merchandise was not subject to the provisions of the tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], because not imported from a "foreign" country within the meaning of the enacting clause of that act, and if it had been entered for consumption no duties could have been collected. But on its withdrawal from warehouse the collector enforced the payment of duty on the authority of section 5 of said Foraker Act, 31 Stat. 78, the pertinent part of which reads as follows: "Sec. 5. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof."

The importers paid the duties under protest and brought an action against the collector for their recovery. In directing a verdict for them the court used the following language:

PLATT, District Judge. The merchandise in question reached the port of New York from Porto Rico during the month of September, 1899. It is clear from the decisions that, if the importer had protested against the payment of duties and had then taken the merchandise, and entered it for consumption, he would have been entitled to recover them. I cannot see that the mere fact that the collector undertook to put into force the customs administrative act changes the situation. I can see no more reason for storing that merchandise in a bonded warehouse than for storing it in the collector's cellar. I understand that the importer protested at the time of withdrawing the merchandise, and I can see no reason why he is not entitled to recover the money so paid. The jury are therefore directed to render a verdict for the plaintiff.

J. O. Nichols, Asst. U. S. Atty., for collector.

Coudert Brothers (Frederic R. Coudert, of counsel), for importers.

Before **WALLACE**, **LACOMBE** and **TOWNSEND**, Circuit Judges.

PER CURIAM. Judgment affirmed.

WHITE-SMITH MUSIC PUB. CO. v. APOLLO CO. (two cases).

(Circuit Court of Appeals, Second Circuit. May 25, 1906.)

Nos. 216, 221.

1. COPYRIGHT—CONSTRUCTION OF STATUTE.

The law of copyright, being statutory and conferring distinct and limited rights not existing at common law, must be strictly construed, and cannot be extended, either by resort to equitable considerations or to a strained interpretation of the terms of the statute.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 1.]

2. SAME—INFRINGEMENT—MUSICAL COMPOSITION.

A copyright of a musical composition printed with staff notation is not infringed by a perforated record or sheet designed for use with mechanism to play the composition on a musical instrument; not being a "copy" of the copyrighted publication within the meaning of the copyright statute.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 63.]

Appeals from the Circuit Court of the United States for the Southern District of New York.

These causes come here upon appeal from a decree of the United States Circuit Court for the Southern District of New York, dismissing bill alleging infringement of copyright. The facts are stated in the opinion of the court below. 139 Fed. 427.

Charles E. Hughes, for appellant.

C. S. Burson, for appellee.

A. H. Walker, for Auto-Music Perforating Co.

Before **LACOMBE**, **TOWNSEND**, and **COXE**, Circuit Judges.

PER CURIAM. The questions raised in these cases are of vast importance and involve far-reaching results. They have been exhaustively discussed in the clear and forcible briefs and arguments of

counsel. We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant. But in view of the fact that the law of copyright is a creature of statute, and is not declaratory of the common law, and that it confers distinct and limited rights, which did not exist at the common law, we are constrained to hold that it must be strictly construed, and that we are not at liberty to extend its provisions, either by resort to equitable considerations or to a strained interpretation of the terms of the statute.

We are therefore of the opinion that a perforated paper roll, such as is manufactured by defendant, is not a copy of complainant's staff notation, for the following reasons: It is not a copy in fact. It is not designed to be read or actually used in reading music as the original staff notation is; and the claim that it may be read, which is practically disproved by the great preponderance of evidence, even if true, would establish merely a theory or possibility of use, as distinguished from an actual use. The argument that, because the roll is a notation or record of the music, it is therefore a copy, would apply to the disc of the phonograph or the barrel of the organ, which, it must be admitted, are not copies of the sheet music. The perforations in the rolls are not a varied form of symbols substituted for the symbols used by the author. They are mere adjuncts of a valve mechanism in a machine. In fact, the machine or musical playing device is the thing which appropriates the author's property and publishes it by producing the musical sounds, thus conveying the author's conception to the public.

The decree is affirmed, with costs.

LAW CHIN WOON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 19, 1906.)

No. 1,272.

WITNESSES—ACCUSED AS WITNESS—PRIVILEGE—ALIENS—PROCEEDING FOR DEPORTATION OF CHINESE PERSON—NATURE OF ACTION.

A proceeding for the deportation of a Chinese person as being unlawfully within the United States is civil and not criminal in its nature, and the defendant may be sworn and examined as a witness for the government.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1042½; vol. 2, Cent. Dig. Aliens, § 94.

Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

Appeal from the District Court of the United States for the Northern District of California.

Marshall B. Woodworth, for appellant.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. In this case, as in *Low Foon Yin v. United States* (just decided) 145 Fed. 791, appellant's counsel objected "to the commissioner proceeding with this hearing on the ground that he has not jurisdiction of this matter, and, further, on the ground that the government has presented no proofs or evidence to show that the defendant is unlawfully in the United States; and I object to the defendant being sworn at this time by the commissioner and compelled to testify against himself, and to any questions being propounded to him with reference to the charge herein contained."

These objections were overruled, and Law Chin Woon was examined as a witness by the United States Attorney. At the close of his testimony his counsel moved "to strike out all the testimony of this witness on the grounds previously stated." This motion was denied, and an exception to this ruling was taken.

The record then states:

"The Commissioner: Have you any testimony on behalf of the defendant?"

"Mr. Woodworth: I hold that we are not called upon to produce any evidence in his behalf. I desire at this time again to raise the question of the jurisdiction of the commissioner in this case.

"The Commissioner: I overrule the objection pro forma."

Law Chin Woon was then ordered by the commissioner to be deported.

The District Judge thereafter "ordered that the said judgment of deportation be, and the same is hereby, affirmed," from which judgment the appeal herein is taken for the purpose of raising the question of jurisdiction.

This case, although the testimony was on somewhat different lines, is identical in principle with that of *Low Foon You*, in which the question involved was fully considered, and decided adversely to the views contended for by appellant.

Upon the authority of that case, the judgment herein appealed from is affirmed.

UNITED STATES ex rel. SCHAUFFLER v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Second Circuit. May 24, 1906.)

APPEAL AND ERROR—JUDGMENT AT LAW—MODE OF REVIEW.

A judgment in an action at law in a federal court is not reviewable by appeal, and an attempted appeal in such case does not give the appellate court jurisdiction.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 10-14.]

Appeal from the District Court of the United States for the Southern District of New York.

On motion to dismiss appeal.

Frank H. Platt, for the motion.

Hubert E. Rogers, opposed.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. This is a motion to dismiss the appeal, so called, taken from a judgment for the defendant in an action at law. Instead of obtaining a writ of error, the plaintiff in the suit in the court below served a notice of appeal upon the attorney for the defendant, and the judge of the court below indorsed it "Appeal allowed," and afterwards signed a citation. This court did not obtain jurisdiction, and the motion is therefore granted. In *Stevens v. Clark*, 62 Fed. 321, 10 C. C. A. 379, the authorities are collected, and that decision is in all respects in point.

Ordered accordingly.

SCHOCK v. OLSEN & TILGNER MFG. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1249.

1. PATENTS—INFRINGEMENT—BARREL-WASHING MACHINES.

The Klamt patent, No. 400,346, for a barrel-washing machine construed and held not infringed.

2. SAME—ANTICIPATION.

The Schock patent, No. 605,138, for a barrel-washing machine is void for anticipation.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below, see 145 Fed. 633.

The appellant, Gustav Schock, was the complainant below and sued the appellees for infringement of two patents for barrel washers, and this appeal is from a decree on final hearing, dismissing his bill for want of equity.

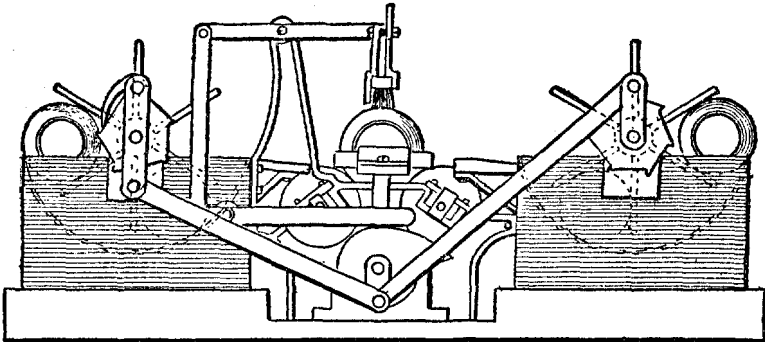
The first patent is No. 400,346, issued to E. Klamt, March 26, 1889, and assigned to the complainant December 6, 1897, containing seven claims, of which the first three are involved in the alleged infringement, namely:

"(1) The improved automatic barrel-washing machine herein described, combining a tank adapted for filling the barrels with water, top and end brushes operated by levers for washing and scrubbing said barrels, a tank adapted for cleansing and rinsing the barrels after being washed and scrubbed, rollers to cause the barrel to revolve, and an arm for automatically transferring the barrel to the rinsing-tank, as and for the purposes set forth.

"(2) An automatic barrel-washer combining a plurality of washing tanks, a carrier for conveying or transferring the keg or barrel from one tank to the next, and a scrubber or washer for removing the adhering dirt in the transfer, as set forth,

"(3) In a barrel-washing machine, a water-tank, a revolving shaft provided with arms for receiving, holding, and automatically discharging the barrel from the tank, pawl-and-ratchet wheel for regulating the motion of the shaft, crank, levers, and rods connecting said shaft with the main driving-shaft of the machine, substantially as described, and for the purposes set forth."

The structure of this patent is illustrated as follows:



The other patent is No. 605,138, issued to Gustav Schock, June 7, 1898, on application filed May 14, 1897, and infringement is alleged of claims 1, 2, 3, 4, 5, 7, and 8, reading as follows:

"(1) In a barrel-washing apparatus, the combination of a barrel-feed tank, an inclined run in said tank adapted to support a plurality of barrels and to enable them to move thereon in one direction, and revolving hooks and means for revolving them in the opposite direction so that they will mechanically pick the first of said barrels off of the inclined run in the feed-tank, substantially as described.

"(2) In an apparatus for soaking, scrubbing and washing barrels at one continuous operation, the combination of a scrubbing device, a feed-tank, mechanism for transferring the barrels from the feed-tank to the scrubber and gravity-runs within the feed-tank for automatically feeding barrels in one direction to the transferring mechanism moving in the opposite direction.

"(3) In a barrel-washing apparatus, the combination of a barrel-feed tank, gravity-runs therein in pivotal connection with the tank, and means for adjusting the said runs so as to give the keg the desired quantity of water so that large and small packages can be supplied with water to the desired extent, substantially as described.

"(4) In a barrel-washing apparatus, the combination of a barrel-feed tank, movable gravity-runs therein, means for raising and lowering one end of the runs whereby to supply the barrels on the runs with the desired quantity of water, and means for lifting the barrels off of said runs.

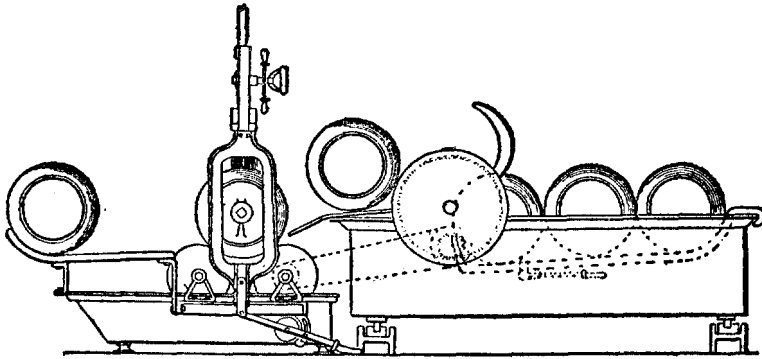
"(5) In a barrel-washing apparatus, the combination of a barrel-feed tank, gravity-runs therein, arms for picking up barrels from the gravity-runs and delivering the same from the tank, and gear for operating the arms in a direction opposite to the motion of the barrels on the gravity-runs.

"(6) In an apparatus for soaking, scrubbing and washing barrels by one continuous operation, the combination of a barrel-feed tank, inclined runs therein, means for adjusting the runs to various inclinations, means for lifting the barrels from the barrel-feed tank, and a barrel-scrubber to which the barrels are delivered by the lifting mechanism, the barrel in the scrubber being automatically discharged and replaced by the next succeeding barrel delivered from the lifting means.

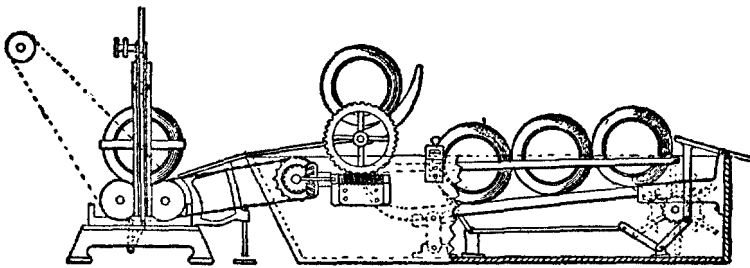
"(7) In an apparatus for soaking, scrubbing and washing barrels by one

continuous operation, the combination of a barrel-feed tank adapted to contain a plurality of barrels, inclined gravity-runs within said tank along which runs the barrels are free to move from end to end, a barrel-scrubber, revolving hooks moving in a direction opposite to that of the feed of the barrels, said hooks being adapted to lift the first barrel of the series off the runs and deliver it from above to the scrubber, the barrel in the scrubber being automatically replaced by the next succeeding barrel delivered from the revolving hooks."

And the following drawing exhibits the structure in side elevation:



The alleged infringement device of the appellees is illustrated as follows:



Arthur Briesen, for appellant.

Thomas Banning, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The two patents in suit are for barrel-washing machines, having special adaptability for cleansing beer kegs for refilling in the use of breweries. Various prior devices are in evidence, and the object sought in each, alike with these patent structures, is to wash the kegs, inside and out, in rapid succession, with the utmost saving of manual labor. The appellant's device, under his patent No. 605,138, is an obvious improvement, in function at least, over the prior

patents referred to, and its utility is not only recognized by the trade, but in effect conceded on the part of the appellees by the adoption of like means in their rival machine. With that patent considered alone, the language of its claims in suit plainly covers the appellees' structure, and the only inquiry in that view is whether they are valid and entitled to such literal interpretation. The prior patent to Klamt, No. 400,346, involves other considerations, particularly on the issue of infringement, and the contention that a decree in favor of the appellant is authorized under this patent, raises the first question for review.

1. The Klamt patent, in specifications and drawings, expressly describes a two-tank machine—one for hot water to soak and fill the kegs and the other for cold water to rinse them—with intermediate scrubbing means. Infringement is alleged of claims 1, 2, and 3. Claim 1 specifies this dual provision of tanks, in combination with brushing mechanism, rollers to revolve the barrels and an arm to transfer them to the rinsing tank; claim 2 specifies the combination of "a plurality of washing tanks," a carrier to transfer the barrels from one to the other and a scrubber; and claim 3 reads:

"In a barrel-washing machine, a water-tank, a revolving shaft provided with arms for receiving, holding, and automatically discharging the barrel from the tank, pawl-and-ratchet wheel for regulating the motion of the shaft, crank, levers, and rods connecting said shaft with the main driving-shaft of the machine, substantially as described, and for the purposes set forth."

No distinctively novel mechanism appears in this arrangement, and unless invention resides in the double tank provision in the combination, neither of these claims is sustainable under the evidence. So claim 3, equally with claims 1 and 2, must be limited to the double tank type of machine, and the single tank machine of the appellees (having no rinsing or cold water tank) is not within either claim. The contention that the appellees' spraying and scrubbing means—an old device, exemplified in the Pohl (1879) patent, No. 213,447—furnishes the equivalent of the rinsing tank of the patent, is untenable. It does not perform the function claimed in the patent of rinsing the inside of the kegs; nor can the claims be thus extended under any admissible view of invention disclosed in the patent. Without reference to other substantial departures from the means specified in this patent, we are satisfied that infringement does not appear.

2. The validity of the Schock patent (No. 605,138) is challenged, both for anticipation and for want of invention in the light of the prior art. From the file wrapper in evidence it appears that the application and claims as presented were repeatedly rejected by the Patent Office, upon various references to prior patents, including the above-mentioned Klamt patent. After repeated amendments of the claims, to meet objections for conflict or want of invention, the claims in suit were allowed and the patent issued. The limitations thus imposed leave little, if any, scope for the claims beyond the several means which are specifically shown; and if invention appears in the adaptation of either means or in combination as an entirety, it is unquestionably of narrow scope under the references.

Use of a "barrel-feed tank" supplied with hot water to soak and fill the kegs, in combination with tracks and means to convey and transfer them in succession, was well known in 1897, when the Schock application was filed. Such use is exemplified, among other references in the above-mentioned proceedings in the Patent Office, in Klamt's (1889) patent, No. 400,346, Gottfried's (1891) patent, No. 450,149, and Anderson's (1893) patent, No. 489,066; and incline skids for runways and lifting arms or hooks for removing the kegs are distinctly shown in the Klamt and Gottfried patents. Indeed, priority in these features is disclaimed on behalf of the appellant, except for the inclined skids or so-called "gravity runs" in the combination.

Aside from these prior patents, however, the testimony is convincing and undisputed that barrel-washing machines were in constant public use in one brewery, at least, more than two years prior to the Schock conception, which were anticipations of the patent structure and embodied substantially all the elements in either of the claims in controversy. Three instances of prior construction and use of like barrel-washing devices are in evidence—one made in West Side Brewery, Chicago, in 1888 or 1889, another in the Blatz Brewery, Milwaukee, Wis., in 1894, and the third in Cream City Brewery, Milwaukee, in 1896. The machine of the Blatz Brewery is established by proof which satisfies the utmost requirements of the strict rule applicable to such issue—as to date, structure and use—and we are satisfied that it is decisive, without reference to the other instances not so well defined.

Previous to October, 1794, several machines, under the Anderson patent, No. 489,066, were in use in this brewery, consisting of soaking tanks about 20 feet in length, equipped with gear wheels, traveling chains and cross bars, so that the barrels were delivered at one end, and conveyed through the water and discharged at the other end. In the month of October, 1894, one of these tanks was stripped of its chain and conveyor equipment, and in lieu thereof was provided with rails or skids for a roll way for the kegs, together with a revolving shaft at the discharge end on which lifting arms or hooks were mounted to pick up the kegs and thus discharge them automatically from the tank (filled with hot water) to a scrubbing device. The structure and operation of the machines so equipped as a barrel washer are described by numerous witnesses on one side and the other, and all concur in the substantial facts. It is contended (1) that the use shown was experimental and practically abandoned and (2) that the skids were not inclined and arranged for automatic operation. But neither of these propositions is tenable under the testimony. Continuous use of such equipment, in one and another of the tanks on hand, up to the time of taking the testimony, appears beyond doubt; and the facts that the skids were inclined, though differing in degree from the patent device, and that automatic operation was secured, are equally well authenticated. Moreover, it appears that this Blatz machine was shown to and examined by the patentee (appellant) in 1898 (when he visited

the brewery to introduce his patent device), and he neither explains the structure thus found, nor controverts the testimony, nor excuses his silence.

When the application for the patent was pending in the Patent Office, various claims were rejected upon rulings, (1) that "to incline the runs, if desired, displays no invention," and (2) respecting their adjustability, that "no invention is required to make anything adjustable." So the distinctions on which escape is sought from this prior structure and use are without force in any view of the present claims, and the patent cannot be upheld.

The decree dismissing the bill for want of equity, therefore, is affirmed.

WELD MFG. CO. v. JOHNSON SERVICE CO.

(Circuit Court of Appeals, First Circuit. August 15, 1906.)

No. 643.

PATENTS—INFRINGEMENT—HEAT REGULATOR.

The Johnson patent No. 542,733 for a heat-regulating apparatus using compressed air motors, controlled by a thermostat, to actuate a valve controlling the heat supply, was not anticipated by the Chadbourn patent No. 502,090 for a ventilating apparatus, but is for a primary invention in its specific field and the patentee is entitled to a construction of its claims broad enough to protect him from infringement by a use of the general system with specific devices somewhat different in details. Also *held* infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

James C. Chapin (Edwin H. Brown, on the brief), for appellant.

William K. Richardson and Wm. W. Dodge (Brandeis, Dunbar & Nutter, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This suit is for infringement of claims 1 and 3 of letters patent No. 542,733, granted to Warren S. Johnson July 16, 1895, for an improvement in heat regulating apparatus:

"Claim 1. In a valve or damper-controlling apparatus, the combination of a primary, a secondary, and a tertiary valve; fluid-pressure motors for actuating the primary and secondary valves; and a thermostatic motor for actuating the tertiary valve; the primary valve serving to regulate the heat supply, the secondary valve serving to control the delivery and release of fluid pressure to and from the primary valve motor; and the tertiary valve serving to open and close an outlet of the fluid-pressure motor of the secondary valve and thereby to control the fluid pressure of the secondary valve motor."

"Claim 3. In combination with a main heat-controlling valve or damper, a fluid-pressure motor for actuating said valve or damper, a second valve controlling said fluid-pressure motor, a second fluid-pressure motor controlling said second valve, and a thermostat controlling the relative supply and waste of fluid in the second fluid-pressure motor."

The defendant relies chiefly upon the patent of Chadbourn, No. 502,090, dated July 25, 1893, for a ventilating apparatus.

It is quite clear that the combinations claimed by Chadbourn are different in terms from those of Johnson. Each claim of the Chadbourn patent specifies as an element a ventilator, and neither in the specification nor claims is there a suggestion of applying the combination, or any of its elements, to the purpose of shutting off and opening a heat-controlling valve or damper. In a very broad sense, we may speak of both a ventilator, which lets out hot air from a room or lets in cold air, and the valve of a steam pipe or a register, as heat regulating apparatus. There is, nevertheless, a very practical difference between the effects upon temperature caused by opening a window and the effects caused by shutting off steam or hot air.

The practical art which Johnson was engaged in perfecting had for its object the maintenance of a uniform temperature by an automatic and quickly-acting control of the heat supply through the action of a thermostat. Closeness of regulation was his object. He states that:

"Commonly the variation permitted either way from the normal or prescribed temperature is 2° Fahrenheit, and only very carefully constructed electrical apparatus will regulate within these limits."

Also:

"The present system, however, is so exceedingly delicate, owing to the fact that fluid pressure is employed in the secondary motor, and to the further fact that the thermostat has only to close or open a very minute orifice without the intervention of any links, joints, or moving parts whatever, that a good mercurial thermometer is incapable of showing any deviation from the predetermined degree, although the apparatus may operate many times."

Chadbourn shows no conception of a device operating by minute changes of temperature. He intends to open a ventilator when the heat becomes excessive, and to shut it when the temperature drops. There is no indication that the device was intended or adapted to operate on very minute variations, and thus prevent the heat from becoming excessive. Chadbourn seems to have relied upon considerable variations from a normal temperature, while Johnson intends to prevent considerable variations of temperature by a delicate apparatus sensitive to slight variations.

There is an important practical difference between apparatus designed to control the rise and fall of temperature by minutely regulating the supply of heat to a room, and thus storing or economizing the heat, and an apparatus which reduces temperature without reducing the consumption of heat. By the first, the heat may be stored or distributed elsewhere; by the second it is lost.

Nor do we think that the Chadbourn patent contains such suggestions as to make it a publication which limits the substantial novelty of Johnson's combination. If the problem were merely of valve actuation by a thermostat, then it might be said that a ventilator, a transom, a register, and the valve of a steam pipe were substantially the same, and that it required no invention to substitute a valve regulating

the heat supply for Chadbourn's ventilator. But regulation of temperature by a thermostat is something more than valve actuation.

The inventor seeks to obtain the advantages of cutting off and putting on the heat supply through means suitable for use in dwellings, living rooms, etc., as well as in buildings like greenhouses. As a practical matter, Johnson employs compressed air to operate both his primary and secondary motor. Chadbourn's idea was to use water, which, according to the evidence, would be impractical for heat regulation.

While Chadbourn says that "air or any other suitable fluid may be employed," his apparatus is devised for water, and is not designed to secure, or to profit by, the advantages which compressed air has over water. Chadbourn apparently sees no practical difference between the two, and mentions air merely as an equivalent for water. He makes no suggestion that air pressure is superior to electricity, or that it will regulate closer. He simply throws off this suggestion, use air for water, as a stroke of the pen, rather than as an expression of any perception of the advantages following the use of air. Chadbourn attempts to operate a water valve, a plug valve, by the action of a thermostat.

The use of air permits the use of a form of valve different from that suggested by Chadbourn. Johnson was fully alive to the fact that the mechanical work to be done by his thermostat would be comparatively slight in controlling an air motor. There is no reason to think that Chadbourn ever saw the advantages of the use of air, or the beneficial modifications that might be made in a motor using air, or the lessened requirements upon the thermostat when air was used.

There can be no question that, from the use of a compressed air relay, important advantages result in a system of heat regulation governed by a thermostat; and there can be no doubt that Johnson did see these advantages, and incorporated them in his combination. He is indebted to Chadbourn for nothing in this respect.

The Chadbourn patent, however, does show the use, for ventilating purposes, of a secondary relay using fluid pressure. It suggests that air be used as an equivalent for water in apparatus designed for water. To start from Chadbourn's ventilating device and to arrive at Johnson's heat-regulating device, it would not be enough to transfer the Chadbourn ventilator motor to a heat-supply valve, and to appreciate the advantages of controlling the heat supply rather than a heat exit; but it also would be necessary to select as the "fluid pressure" compressed air specifically, with a foresight of its practicability and advantages over water, and with an appreciation of the fact that valves could be used of an entirely different character from those suggested by Chadbourn for use with water, thus relieving the thermostat from the work of turning a plug valve. Chadbourn's passing suggestion that air might be used instead of water contains no suggestion of giving less or another kind of work to the thermostat, or of using a valve which does not require to be turned mechanically.

While it is true that Chadbourn and Johnson both use the term "fluid pressure," and thus create a verbal similarity in their descriptions, it is obvious that, looking at the things signified, Chadbourn

meant water, or, as its equivalent, air operating in the same way on a plug valve; and that Johnson meant by fluid pressure compressed air, or any kind of fluid pressure which would be substantially the same as compressed air for use with valves of the general kind that he described, and with a thermostat simply operating to open and close an opening or port.

The defendant contends that, inasmuch as Chadbourn discloses the generic combination, the only novelty of Johnson lies in the form of his secondary motor, or in the form of his secondary valve. This, in our opinion, is erroneous. Chadbourn does not disclose or claim a combination which regulates the heat supply, nor does he disclose practical mechanism which, merely by transfer to the heat-supply valve, would give the Johnson combination. It is true he makes the suggestion of the use for valve actuation of a secondary motor controlled by a thermostat, but this is far from showing or suggesting the advantages to be derived in a heat-regulating apparatus from a secondary motor which, because it uses compressed air, could be of different construction from a motor using water or air as equivalents, and is far from showing that by using compressed air the thermostat could merely open or close a port and need not turn a plug valve. Johnson saw that by using compressed air he could dispense with plug valve turning. While it may be true that he uses a thermostat and an air motor like Easton's, yet his entire combination is not anticipated by Easton or by Chadbourn.

In view of these considerations we think it cannot be said that Johnson merely applied Chadbourn's valve actuator to a heat-supply valve. He was first to regulate the heat supply, using a relay or secondary motor operated by compressed air, and this seems to have been a very practical and important contribution to the art of heat regulation. We are of the opinion, therefore, that Johnson, and not Chadbourn, is to be regarded as the inventor of the generic combination, and that the claims are to be construed not merely as for minor and detailed improvements, but as for a primary invention in the specific field of heat regulation. It should be kept in mind, in considering Chadbourn's place in the art, that Johnson, before Chadbourn's date, had devised a practical system and apparatus for heat regulation in which the thermostat had actuated an electric relay which turned on and off the compressed air that actuated the main heat-controlling valve. The generic combination in which a relay was used had been already described by Johnson. In the present patent in suit Johnson says:

"My present invention secures the advantages of apparatus employing electricity without the use of electricity, and has also advantages peculiar to itself arising from the action of the thermostat alone directly upon the fluid pressure."

Chadbourn's apparatus, constructed to operate either by water or air, which disregards differences between air and water, conveys no information of a kind of relay or apparatus superior to that formerly employed by Johnson. To see that a compressed-air relay might be a superior substitute for a practically operative electric relay in the prac-

tical art of heat regulation required a broader vision than that of Chadbourn's when he suggested that air might be used as a substitute for water in a device designed to be operated by water, through thermostatic action which turned a plug valve.

In order to hold that Chadbourn's patent in any respect anticipates or limits the patent in suit, we should be obliged to lay great stress on a mere verbal suggestion of Chadbourn as to the use of air, and to ignore the fact that he had apparently no conception whatever of the modifications which the use of a compressed-air relay would permit in practical apparatus for heat regulation. We also should be obliged to ignore entirely Johnson's exact and definite conception which led to an important improvement upon an art which Johnson had already brought to a high degree of development.

We are of the opinion that, in sustaining the Johnson patent, and in giving it a construction commensurate with Johnson's actual contribution to the practical art, we are well within the principles laid down and applied in *Lawther v. Hamilton*, 124 U. S. 1, 6, 8 Sup. Ct. 342, 31 L. Ed. 325; *Western Electric Co. v. La Rue*, 139 U. S. 601, 606, 11 Sup. Ct. 670, 35 L. Ed. 294; *Potts v. Creagor*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; *Cash Register Case*, 156 U. S. 502, 515, 15 Sup. Ct. 434, 39 L. Ed. 511; *Hobbs v. Beach*, 180 U. S. 383, 392, 21 Sup. Ct. 409, 45 L. Ed. 586; and applied by us in *Watson v. Stevens*, 51 Fed. 757, 759, 2 C. C. A. 500; *Davey Company v. Prouty Company*, 107 Fed. 505, 509, 46 C. C. A. 439; and *Forsyth v. Garlock* (C. C. A.) 142 Fed. 461, 462.

Upon this view of the scope of the Johnson patent we have no doubt upon the question of infringement. The defendant's device, while not a mere copy of Johnson's apparatus, contains the generic combination claimed by Johnson, and of which, in our opinion, he was the primary inventor. The precise mechanical character of the operating connection between the secondary valve and the secondary motor, whether by toggle joint or by an ordinary lever of the first class, is a matter not made material by the claims. Neither do we think that we are required to read into the claims any special form of mechanical connection, as an additional element, or as a limitation.

Fig. 1 illustrates, and the specification describes, in a broad way, a system, without any limitation whatever as to details. The combination resulting in a general system of heat regulation was the pith of the invention, and the precise details of such a system is a subordinate matter affecting neither the claims nor the substance of the case. Johnson showed the details by which such a system could be made practical, and was entitled to claims broad enough to protect him from infringement by a use of the general system with specific devices somewhat different in details.

We are also of the opinion that the defendant does not escape infringement because its device controls both the outlet and inlet of the secondary motor, instead of the outlet alone. Assuming that this variation is an improvement upon Johnson, it is still true that it embodies the substance of Johnson's definite conception that a secondary

motor using compressed air was, in the art of heat regulation, a substantial improvement over the electrical and other devices of the prior art.

As we disagree with the view that Chadbourn, by his merely off-hand suggestion to use air as an alternative for water in a secondary motor, became the first inventor of the generic combination, and as we are of the opinion that Johnson was first to see and to apply to heat regulation the specific advantages that result from the use of the compressed-air relay or secondary motor, the question of infringement must be determined by the inquiry: Does the defendant use the substantial and characteristic feature of Johnson's combination to secure for itself the substance of the practical improvement that Johnson introduced into the art? We are of the opinion that the defendant does this, and that, construing this patent as for a primary combination, the control of the fluid pressure—to wit, compressed air—at both the outlet and inlet, must be regarded as substantially the same as controlling it merely by the outlet. The main point was that it should be controlled through the action of the thermostat in opening and closing a port. Whether at the outlet or inlet, or at both outlet and inlet, is a secondary matter.

We entirely agree with the learned Circuit Judge that the defendant insists too much upon minute literalness in its interpretation of the words "a thermostat controlling the relative supply and waste." We think that, while this language describes the control of a waste and a supply occurring at the same time, it also describes the control of supply and waste respectively, whether they occur simultaneously or successively. We are of the opinion that Claims 1 and 3 are both valid and are both infringed.

The decree of the Circuit Court is affirmed, and the appellee recovers the costs of appeal.

RAWSON & MORRISON MFG. CO. v. C. W. HUNT CO.

(Circuit Court of Appeals, Second Circuit. June 16, 1906.)

No. 270.

PATENTS—UNAUTHORIZED REISSUE—EFFECT ON VALIDITY OF OLD CLAIMS REPEATED.

Where the drawings and descriptions of a reissue patent are identical with those of the original, the validity of claims of the original, which are repeated and separately stated in the reissue, is not affected by the invalidity of other claims, nor by the fact that the reissue itself was unauthorized.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 220-222.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal by complainant from a decree dismissing on demurrer bill for infringement of reissue patent No. 12,085, granted to Almon E. Norris, assignor to complainant, February 24, 1903, for clutch mechanism. The opinion of the court below is reported in 140 Fed. 716.

C. S. Jones, for appellant.

A. M. Austin, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The bill was demurred to on the ground that the reissued patent was void, because it appeared from the averments of the bill that there was no inadvertence, accident, or mistake in the omissions from the original patent which were inserted in the reissued patent, because the application for the reissue was unreasonably delayed without adequate excuse, because the Commissioner of Patents had no jurisdiction to grant the reissue, and because, therefore, the bill did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, dismissed the bill, and ordered final judgment in favor of the defendant.

It is unnecessary to consider the questions raised by the demurrer or discussed in the opinion of the court below for the following reasons: The drawings and descriptions of the two patents are identical, as are all the original four claims, except the first, which, in the reissue, is broadened. The scope of the original patent is further broadened by the addition of seven new claims in the reissue. The bill alleges infringement of all the claims of the reissued patent, and the demurrer attacks the validity of the reissued patent as a whole. We are of the opinion that the validity of the claims in the reissue which were identical with those in the original patent are not affected thereby. Mr. Walker, in his work on Patents, says as follows:

"Sec. 249. Where some, but not all, of the claims of a reissue patent are void because they are obnoxious to the doctrine of *Miller v. Brass Co.* [104 U. S. 350, 26 L. Ed. 783], or because they are not for the same invention as the original, that fact does not vitiate the other claims of that patent. The reissue will, in either of those cases, have whatever validity it would have had if it had not contained the invalid claims, provided there is no unreasonable delay to file a proper disclaimer of them.

"Sec. 201. Reissue patents, as well as original patents, are entitled to the benefits of the law relevant to disclaimers; and that too, even where the matter disclaimed was not claimed in the original, but only in a reissue granted upon its surrender."

In *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601, the court says as follows:

"The invalidity of the new claim in the reissue does not indeed impair the validity of the original claim which is repeated and separately stated in the reissued patent. Under the provisions of the patent act, whenever through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original and first inventor or discoverer, his patent is valid for all that part which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the Patent Office a disclaimer in writing of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before the disclaimer he cannot recover costs. Rev. St. §§ 4917, 4922 [U. S. Comp. St. 1901, pp. 3393, 3396];

O'Reilly v. Morse, 15 How. 62, 120, 121, 14 L. Ed. 601; Vance v. Campbell, 1 Black. 427, 17 L. Ed. 168. A reissued patent is within the letter and the spirit of these provisions.

"The decree of the Circuit Court proceeds upon the ground that the first or new claim of the reissue has been infringed; but the plaintiffs' bill is not so restricted, and alleges generally that the defendants have infringed the reissued patent. If the defendants have infringed the second, or old, claim, the plaintiffs, upon filing a disclaimer of the new one, are entitled to a decree, without costs, for the infringement of the old and valid claim. Considering that the question of the validity of the new claim in the reissue is a question of law upon the face of the patent, and that its validity has been sanctioned by the Commissioner of Patents in granting the reissue and upheld by the Circuit Court, there has been no unreasonable delay in entering a disclaimer; for the plaintiffs were not bound to disclaim until after a judgment of this court upon the question. O'Reilly v. Morse, above cited; Seymour v. McCormick, 19 How. 96, 15 L. Ed. 557."

See, also, Yale Lock Manufacturing Co. v. Sargent, 117 U. S. 536, 6 Sup. Ct. 934, 29 L. Ed. 954; Leggett v. Standard Oil Co., 149 U. S. 287, 13 Sup. Ct. 902, 37 L. Ed. 737; International Terra Cotta Lumber Co. v. Maurer (C. C.) 44 Fed. 618.

It does not appear that this point was brought to the attention of the court below, it was not discussed in the briefs or argument in this court, and it is only very generally covered, if at all, by the assignments of error; but, inasmuch as the whole record is before us for review on demurrer, the question is presented by the comparison of the original and reissued patents.

The decree of the court below is reversed, and the cause is remanded to the court below, with instructions to overrule the demurrer, with costs, and with leave to defendant to answer.

RAILWAY APPLIANCES CO. V. MUNROE.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,259.

PATENTS—VALIDITY AND INFRINGEMENT—CAR STARTER.

The Ripberger patent, No. 493,736, for a car starter, while it covers an improvement only on the prior art by a new combination of old elements, was not anticipated, and discloses invention. Also *held* infringed.

Appeal from Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 145 Fed. 646.

Thomas A. Banning and Samuel W. Banning, for appellant.

Frank T. Brown, for appellee.

Before BAKER and SEAMAN, Circuit Judges, and QUARLES, District Judge.

QUARLES, District Judge. The bill in equity in this case was based upon United States letters-patent 493,736, granted to Ripberger March 21, 1893, and was in the usual form, praying for an injunction

and accounting. The answer denies patentable novelty and invention, and sets up anticipations in the prior art, citing several references. Infringement is also denied.

The single claim of the patent in suit reads as follows:

"The combination in a car starter of the lever, A, having a wedge-shaped toe, B, a pair of jaws, D D', slotted vertically at d d' and pivoted to each other by a single bolt, E and a pin, C that traverses said toe, B, and slots, d d' and descends within said slots when said lever is depressed, all as herein described and for the purposes stated."

The alleged invention is described by the appellee as follows:

"Ripberger devised a combination in which a lever is fulcrummed or pivoted between the upper ends of a pair of jaws by a transverse bolt which latter is arranged to slide in vertical slots in these jaws, and shaped as a wedge for throwing them apart, and in which the jaws themselves are in turn pivoted together at a lower point by a longitudinal pivot, or pivot at right angles to the first-named pivot."

The Circuit Court condensed the definition as follows:

"Whatever there is of novelty in complainant's device must consist of the use of the lower longitudinal bolt, holding the lower limbs of the clamping jaws in fixed relation to each other when not in use, in combination with a lever handle, pivoted on a separate pivot at right angles thereto, and acting as a wedge."

Car starters of several forms had been constructed and patented before the patent in suit was issued. It was a common expedient to employ a pair of jaws to clamp the rail and serve as a fulcrum for the lever, and such lever had more than once been employed as a wedge to actuate the jaws. It is frankly conceded by appellee that all the elements with which Ripberger dealt were old in the art. This conclusion is amply verified by the references and drawings appearing in the record.

Underhill, No. 255,054, presented a structure which disclosed nearly all the elements of the patent in suit; but there was a serious structural defect in the method in which he pivoted the jaws. The bolt or pivot was inserted transversely, so that all the strain from the wedging process was brought to bear upon the head or nut of the bolt. It was to be expected that the nut would be torn off and the threads stripped by the action of the jaws. Besides, the structure was heavy and cumbersome.

Stone, No. 259,598, revealed a complicated and expensive structure, but he had the jaws pivoted on a longitudinal pivot, obviating the mechanical objections that applied to the Underhill device.

Wheeler, No. 135,187, had the jaws of the patent in suit, but the pivot upon which the jaws acted was subject to the same objection as in the structure of Underhill. Wheeler rejected the lever entirely, and had no wedge-shaped toe. His device was operated upon an entirely different principle, namely, the wheel and axle principle.

Ripberger made a judicious selection of elements from these earlier structures, and succeeded in producing a new combination and in constructing an improved device which was less heavy and cumbersome, and more practicable than anything that preceded it in the art. He

appears to have made no use of his invention for 13 years, which may indicate that railway employes still cling to the use of the crow-bar, with such make-shift fulcrum as may be at hand, rather than to stop and hunt up any improved device. Theoretically, at least, the patent in suit presents a new combination which, though narrow when considered as an improvement, rests on something more than mere mechanical skill. The defendant's expert while upon the stand, was constrained to make the following admission: "I should say that it [Ripberger] would be likely to be a more satisfactory device in practice than any one of them." The chief excellence of the Ripberger structure lies in the fact that he has one pivot for the jaws and another for the lever, both of which are so adapted that the nut or head of such bolts is not subjected to the strain in the wedging process, which arrangement admits of better control of the jaws and should prove otherwise advantageous in actual operation. We find no earlier device that anticipates Ripberger's conception. We therefore agree with the conclusion of the Circuit Court, that the Ripberger combination discloses novelty and invention sufficient to sustain a patent.

Infringement was conceded in the Circuit Court by the counsel for defendant, and such fact was recited in the opinion of the circuit judge. This understanding was adhered to in the preparation of printed briefs on both sides. Appellee having submitted the case on briefs in this court, counsel for appellant on the oral argument called attention to an alleged distinguishing feature of the defendant's structure, which he claimed relieved it from infringement. It was urged that Ripberger had committed himself by his claim and specifications to a vertical slot, while in the defendant's device the slot was not vertical but oblique, and that such construction conferred a manifest advantage in practical operation. We have carefully considered the briefs of counsel which were submitted on this point after the oral argument by leave of the court. We cannot agree with the contention of the appellant on the merits. Even if his proposition were sound from a mechanical standpoint, we should hesitate to entertain the same at this time in view of the history of the case, which shows that this defense had been expressly and deliberately waived by counsel.

For these reasons the judgment of the Circuit Court is affirmed.

McCASLIN v. LINK BELT ENGINEERING CO. et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 228.

PATENTS—INFRINGEMENT—ENDLESS CHAIN CONVEYOR.

The McCaslin patent, No. 503,870, for an endless chain conveyor, claims 2 and 4, construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree (139 Fed. 393) dismissing bill alleging infringement of complainant's patent No.

503,870, granted to George W. McCaslin, August 22, 1893, for an endless chain conveyor.

Thomas Ewing, Jr., for appellant.

Francis W. Parker and Charles Howson, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. In view of the discussion by the court below in its opinion of the questions at issue herein, it is only necessary to state our conclusions upon one or two points specially pressed upon our attention in the argument of the appeal.

The patentee, near the close of the specification, says as follows:

"The guard rail, 1, performs a special function in the construction of Fig. 1. If there were no device for preventing the tilting of the buckets, in case two adjacent buckets were unequally loaded, there would be a collision at the point where the buckets leave the lower horizontal track and pass onto the ascending track."

The second claim covers the entire machine, comprising, inter alia:

"Gravity buckets * * * provided with overlapping lips as described, and means substantially as described for preventing the collision of the loaded buckets at the point where they pass from the lower track to the ascending track, as set forth."

In our opinion it is immaterial whether this claim does or does not cover complainant's specific method of hanging the buckets in the chain, which it is asserted defendants do not use, because, in view of the insertion in the claim of the construction referred to in the language of the specification quoted above as performing a special function, the guard rail must be read into the claim as one of the means for preventing collision as the loaded buckets commence to ascend. As defendants have no such guard rail and no equivalent therefor they do not infringe said claim.

The question of infringement of the fourth claim was not specifically discussed by the court below. It is argued that defendants use means equivalent to those specified and claimed "for tilting the buckets and shifting the lap of said lips when the buckets move onto the descending track." If the patent in suit covered a primary or generic invention, we should be inclined to hold that defendants' construction was, broadly speaking, the equivalent in function and operation of that of the complainant. But this patent did not first disclose a construction of lips so overlapping as to prevent spilling between the buckets, nor means for tilting or turning such buckets so as to change the overlap in order to avoid collision, for both of these results were accomplished by the invention of McCaslin's prior patent, No. 486,809, in a machine which was practically operative, and successfully used. Nor was he even the first to devise the positive means of the patent in suit for changing an overlap at the point of a curve, for the Davidson patent showed means practically identical, consisting of double-lipped conveyors so tilted out of position by positive cam action with a definite angular relation of the lips to each other as to accomplish the shifting of the overlap of the lips in the same manner as in the patent in suit. We concur with the court below in the view that the Davidson patent

was for a prior invention, and that it is here to be considered merely to construe the claims in suit, and not to anticipate them. What was really new with McCaslin in the patent in suit was the double-lipped gravity bucket. The double lip of this bucket effected two results, the one to balance, and thus secure the symmetrical position of lipless buckets, the other to provide a covering for the whole space between the buckets to avoid spilling when loading. But this latter object was equally accomplished in the single-lipped bucket of the prior McCaslin patent, as shown above. By this patent he created an obstacle in operation, namely, double lips, and thereby having combined the advantages of the symmetrical balance of the old lipless buckets with the bridging of the single-lipped bucket of his prior patent, he devised special means to get rid of said obstacle and to prevent collision, namely, cams to positively cause tilting, and guards for holding the buckets in position at a certain point, neither of which means is used by defendants.

It is claimed that in the machine complained of as an infringement there is, in fact, a slight tilting of the buckets for shifting the laps. But we do not find either in the patent or in the illustrative model any indication that its construction requires any tilting movement for this purpose in the operation of the device. We conclude, therefore, that the status of the patent is such that the reasoning of the court below properly applies to the fourth, as well as to the second, claim, and we concur in the conclusion that the bill should be dismissed.

The decree is affirmed, with costs.

LIBRARY BUREAU v. YAWMAN & ERBE MFG. CO.

(Circuit Court of Appeals, First Circuit. April 11, 1906.)

No. 640.

APPEAL—DECISIONS REVIEWABLE—INTERLOCUTORY DECREE—PATENTS—SUIT FOR INFRINGEMENT.

The rule of *Marden v. Campbell Printing Press Co.*, 67 Fed. 809, 15 C. C. A. 26, applied, to the effect that an interlocutory decree, adjudging certain claims of a patent valid and infringed, and directing an accounting, and other claims invalid or not infringed, is not final as to the latter, and an appeal does not lie therefrom by complainant.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 329-332, 336.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

On motion to dismiss appeal.

Odin Roberts, for appellant.

Frederick F. Church, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. This is a motion to dismiss an appeal by the complainant in the court below from an interlocutory decree for an injunction and an accounting in a suit for an alleged infringement of letters patent for an invention. The interlocutory decree held one of the claims of the patent valid and infringed, and the other claims invalid or not infringed, and the complainant appealed from so much thereof as related to the claims which were adjudged invalid or not infringed. Thereupon the respondent below, now the appellee, filed a motion to dismiss on the ground that the appeal was premature. The respondent below took an appeal from so much of the interlocutory decree as adjudged one of the claims valid and infringed and directed an injunction in regard to the same. The motion to dismiss this appeal must be allowed on the authority of our decision in *Marden et al. v. Campbell Printing Press Co.*, 67 Fed. 809, 15 C. C. A. 26, a case decided by us on May 4, 1895, and also of *Ex parte National Enameling Company* (decided by the Supreme Court on March 19, 1906) 26 Sup. Ct. 404, 50 L. Ed. 707.

It is ordered that this appeal be dismissed, without prejudice to any proceedings in the Circuit Court, or to the right of the appellant to take any subsequent appeal, and without prejudice to any questions which may be raised by such subsequent appeal, if lawfully taken, with costs in this court for the appellee incident to its motion to dismiss.

YAWMAN & ERBE MFG. CO. v. LIBRARY BUREAU.

(Circuit Court of Appeals, First Circuit. July 5, 1906.)

No. 641.

PATENTS—INFRINGEMENT—LOCK ROD FOR CARDS.

The Hunter patent, No. 628,886, for a lock rod for cards, while disclosing invention, is merely for a new mechanical arrangement of old elements, constituting an improvement on the prior art, and the invention is not so far an original one as to entitle the claims to a broad construction or application of the doctrine of equivalents. As so limited, *held* not infringed by the device of the Weidner patent, No. 760,404.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Frederick F. Church, for appellant.

Odin Roberts (Charles D. Woodberry, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The rights of the Library Bureau, the complainant below, reside in patent No. 628,886, to David E. Hunter, dated July 11, 1899, as it may stand affected by the prior art; and the Yawman & Erbe Manufacturing Company, the defendant below, rests its contention, for the right to manufacture and sell the device complained of, upon the Weidner patent, No. 760,404, granted May 17, 1904, as it may stand affected by the prior art.

Both patents relate to locks intended to secure in its place a device for holding index and reference cards used in private and public libraries and in banks, counting houses, and in other places of business.

The evidence discloses a large demand for a convenient device which shall secure such card records, designed for ready reference, from accidental and intentional derangement. The various patents relating to the same subject, and the prior state of the art with respect to locks, plugs, plungers, slots, grooves, and latches, variously adapted so as to be put in operation through the instrumentality of springs and released by the use of keys, put both the patents in suit in the field of inventions which relate to improvements upon existing conditions of the art, rather than in the domain occupied by patents relating to entirely new and original inventions and discoveries.

The learned judge of the Circuit Court in effect sustained both the Hunter and the Weidner patents, and, applying the rule of broad construction to the Hunter, held that the defendant infringed its fourth claim.

We quite agree with the conclusion below that both Hunter and Weidner conceived and described a mechanical arrangement amounting to patentable invention. We cannot, however, agree that Hunter's invention was so far original as to entitle it to a rule of construction which shall include other arrangements of old mechanical elements and means so adapted as to accomplish the same result or perform the same service in a substantially different way.

The Circuit Court seems to have acted upon the idea that as Hunter was the first to invent or adapt a spring lock contained altogether in the rod, with its plug or enlarged end, and in the housing, the rule of broad construction should be accorded to his claims. We cannot accept this assumption as altogether without defect, because the idea of throwing a plug or bolt into a slot for holding purposes, through the instrumentality of a spring mounted above or upon the side of a rod or the thing to be locked, was old. That Hunter's mechanical arrangement for mounting the spring in a housing above the rod, so adapted that it will throw the plunger into its proper holding position in the enlarged end of the rod, and so adapted that the rod can be relieved from the holding function of the plunger through the instrumentality of a key of a peculiar size and shape, with a hook or projection at the top point of its forward end, corresponding in size to the opening in the rod and to the point of the plunger—a key so shaped, by cutting away its lower edge beneath its hook, that, when thrust into position in the slot in the end of the rod, that, by pressing downward upon its rearward end, it is tilted like a lever over a fulcrum; a fulcrum created by its own peculiar shape, with the result that the hook or point projecting against the plunger presses it upwardly, thus unlocking the rod, when it may be withdrawn by the hook by pulling upon the key—was an ingenious mechanical adaptation and a useful invention, we make no question. We look upon what he did, however, as an ingenious mechanical arrangement of old elements, and, while we agree that he should be protected in what he

did and what he described, we hold the view that his invention was not so far an original one as to entitle the claims to the rule of broad construction.

In looking at the question of infringement and the question of equivalency of means and adaptation, it must be remembered that the groove in the large end of the Hunter rod, as described, is lengthwise with the rod, and only a sufficient width to enable it to receive a plunger of limited diameter, and that the holding slot into which the plunger is thrust by the spring when the rod is brought into a position to be locked has a circumference only sufficient to receive a plunger of such diameter as can pass through the groove, and it follows that the rod can only be inserted when the groove of the rod is directly upright and in alignment with the plunger, and thus when the rod is passing to its position of security, the groove receives the plunger which is already forced down by the spring, and the groove is so shaped at its bottom that when the rod is passed it presses the plunger upward until the slot is reached, when the plunger is forced into it by the spring, and the drawer is locked.

It must also be remembered that the hook of the key is designed not only to force the plunger upward and thereby to release the rod, but that the hook on the key is also designed to perform the function of withdrawing the rod from its place when unlocked, and that the rod would remain in its position unless withdrawn by the key by pulling at its rearward end.

It is clear that the leverage or pivotal action of the Hunter key under downward pressure upon its rearward end, which forces the hook upon the forward end of the key upwards and against the dog or plunger held down by the spring, is what unlocks the Hunter device. This is made clear by lines 80-104 of the specification, at page 1, where the mode of operation is described, and where it is pointed out that the key is left in a position to act as a withdrawing hook.

The Weidner device, based upon the Weidner patent, which it is urged infringes the fourth claim of the Hunter, has a rod not particularly unlike that of the Hunter in its general aspects. It likewise has an enlarged rearward end, with a groove rather than a slot therein, designed under mechanical adaptation to co-operate with other elements in locking the rod and the drawer.

It is claimed by the appellant that Weidner, in arranging and describing a device which would be useful in accomplishing what the demands of the public required, acted independently of the Hunter adaptation and without any knowledge of his invention. We need not deal with that aspect of the case, for the reason that we look upon both patents as describing an invention which should be limited under reasonable rules of strict construction to the mechanical arrangement and the adaptation of means which they describe. In other words, as we look upon the Hunter device as one accomplishing a desired and valuable service through an ingenious and inventive adaptation of old means, and upon the Weidner as accomplishing the same result through a substantially different mechanical arrangement of things that were known, we need not consider whether Weidner

was acting independently, or whether he was attempting to improve upon the Hunter idea through a different and useful arrangement of known mechanical appliances.

In the Weidner the bow spring, which is intended to lock the rod and the drawer by forcing its arms into the groove of the rod when the rod is thrust longitudinally forward through the thimble into its place for locking, is not mounted in a housing above the rod, but rests astride a bridge in the thimble, which is created by transversely slotting the thimble in such a way as to permit the arms of the spring to project transversely through its interior, and so adapted as to permit the arms of the spring to engage and hold the inserted rod at the shoulder of its circumferential groove. The spring itself locks the rod by its arms, which spring into the groove intended to receive them, rather than by a plug or plunger thrust into a socket by a spring mounted in a housing above. With the Weidner rod the rearward enlargement, designed to force open the spring as the rod is thrust forward to the place where it is to be locked by receiving the arms of the spring into its groove, is conical in shape at the forward end of the enlargement, and as the rod is forced forward the spring is opened by the cone-shaped enlargement until the rod is in its place, when the arms of the spring adjust themselves to the shoulder of the circumferential groove of the rod, and the rod and the drawer are locked. The groove to which we have referred extends circumferentially entirely around the rod, and it results from the cone shape of that part of the rod which opens the spring and from the fact that the groove extends around the rod that the rod may be inserted and thrust forward to its place without regard to any particular adjustment with reference to a limited slot designed to receive the point of a plunger operated by a spring like that in the Hunter. It is also true that under this arrangement the key may be partially inserted in the slot intended to receive it without regard to whether the slot or aperture designed to receive the key is upright in its alignment or otherwise. The key is square at its end, and is designed under forward and turning pressure to rotate in and with the rod, but without any influence upon the lock until the key comes into a position which permits it to pass between and engage the spring holding arms, when, while rotating, the key spreads them and disengages the rod, thus permitting a small and independent spring which resides within the thimble (engaging the conical-shaped portion of the rod at its tapering end and remaining under tension while the rod is locked) to throw the rod backward and outward, the rod thus being unlocked and thrown backward while the key is rotating under forward pressure.

The function of this independent spring in the Weidner device, which forces the rod backward when it is disengaged, is pointed out in the closing lines of claim 10 of the Weidner patent, where it is said that the unlocking permits the spring to actuate the rod longitudinally.

The Weidner key has no hook like that of the Hunter, and if it were to be mechanically changed, as was illustrated in argument,

so as to present a hook point, the hook would perform no function in removing the rod, because there is nothing in the mechanical arrangement upon which it could operate by either forward or backward movement, while in the Hunter the hook is an essential and necessary element of the Hunter construction, which it would seem can only be operated to unlock by pressing downward upon the rearward end of the key, thus forcing its point and the plunger upward, and when the rod is released from locked engagement by pulling backward and downward upon the rearward end of the key, its hook engages a shoulder within the sleeve or thimble designed with that idea, and the rod is pulled backward and outward, and thus the hook of the key, as pointed out in the Hunter specification, would seem to be a necessary means for withdrawing the rod.

Without undertaking to say which is the superior device, it seems clear to us that the mechanical arrangement is essentially different in the two inventions. The conclusion, therefore, is that the Hunter and the Weidner patents should each stand upon its merits, unaided by a liberal rule of judicial construction extending the claims beyond the mechanical arrangement described. Where two patents like those in question relate to improved mechanical arrangement, and where the two structural and mechanical adaptations are so entirely different, and the modes of operation are so entirely unlike, the situation does not admit of the doctrine of equivalents as a foundation for finding and holding infringement.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with directions to dissolve the injunction, and for further proceedings not inconsistent with this opinion; and the appellant recovers its costs of appeal.

**AUTOMATIC SWITCH CO. OF BALTIMORE CITY v. CUTLER-HAMMER
MFG. CO.**

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 118.

ABATEMENT AND REVIVAL—ASSIGNMENT OF INTEREST IN PENDING SUIT.

If a sole complainant suing in his own right assigns his whole interest to another, he can no longer prosecute the suit, which is completely suspended until revived, and all orders and proceedings taken in the meantime are nugatory. After such abatement the successor in interest may revive the suit by an original bill in the nature of a supplemental bill, to which the defendant may plead, but has no other right until such revivor, and a reassignment to the original complainant carries only the same right and does not operate to restore the suit to its original status before the first assignment.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 212-220.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 139 Fed. 870.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, finding validity and infringe-

ment of a patent and decreeing injunction and accounting. The patent is No. 499,769, granted June 20, 1893, to George H. Whittingham for "Improvements in Automatic Switches," title to which was in complainant prior to and at the commencement of the suit.

R. N. Kenyon and W. Clyde Jones, for appellant.

Philip Mauro, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. After the Circuit Court had filed its opinion, and before decree was signed, defendant on March 27, 1905, suggested the existence of an assignment which it contended operated to abate the action and prayed for a dismissal of the bill or for such other relief as might seem equitable, just, and proper. Nevertheless, on April 20, 1905, the Circuit Court denied the motion and signed the decree. No discussion of this point is found in the record. Quite possibly the court thought it best that its decision on the merits should be embodied in a decree, and that the technical point thus raised should be reserved for the appellate tribunal. It seems to be controlling of the disposition to be made of this appeal.

The bill of complaint was filed July 2, 1901. On July 10, 1902, the complainant, sole complainant, executed an assignment to the Otis Elevator Company. This document, after reciting that the Automatic Switch Company "are now the sole owners of * * * the said patent and invention and * * * all rights thereunder," in consideration of \$5 and other valuable considerations sold, assigned, transferred, and set over to the said Otis Elevator Company, its successors and assigns, "the entire right, title and interest which we have or may have in, to and under the aforesaid letters patent, invention and improvement and any reissues or extensions of said letters patent granted or to be granted throughout the United States and the territories thereof," and also "any and all claims or demands for damages and profits accrued or to accrue for past or any use of said improvements or invention without right or license, with the right to use our name in legal proceedings and to sue for and recover all such damages and profits." By this conveyance the switch company stripped itself of every right, title, and interest to, in, and under the patent—nothing was left to it. The assignment states that it is agreed between the switch company and the Otis Company that in the event of the patent being sustained by the Court of Appeals in the suit at bar the Otis Company would pay an additional consideration of \$2,000. That agreement gave the switch company no legal or equitable interest in the patent. It was further agreed that the Otis Company should pay all subsequent expenses of the litigation, and that the switch company should devote its best energies to pushing the suit to a final determination under the supervision and direction of the Otis Company. This agreement in no wise changed the mutual relations of the parties to the assignment.

The effect of this assignment was to abate the suit. If a sole plaintiff, suing in his own right, assigns his whole interest to another, he is no longer able to prosecute the suit because he is without inter-

est in the litigation. It is unnecessary to refer to any authorities in addition to those cited in our opinion in *Ecaubert v. Appleton*, 67 Fed. 917, 15 C. C. A. 73. The suit is completely suspended and cannot be proceeded in till it is revived, and all orders and proceedings pending such abatement will be considered nugatory. After such an abatement, i. e., one caused by assignment of plaintiff's whole interest, the successor in interest, claiming by a title which may be litigated, may revive the suit by an original bill in the nature of a supplemental bill. Of such a bill Story says:

"But in the other case [an original bill in the nature of a supplemental bill] a new defense may be made. The pleadings and depositions cannot be used in the same manner, as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree." *Equity Pleading* (9th Ed.) § 384.

From the execution and delivery of the first assignment till after the filing of the opinion in the Circuit Court, a period of nearly three years, the litigation was being conducted by a person who had no interest in the patent or in any claim arising under the patent. Under all the authorities such proceedings were nugatory. The defendant was entitled to have the controversy conducted, not by a stranger, but by the owner of the patent and of the claims for profits and damages, and all the testimony taken in such a moot case may be disregarded, and any orders made during such period may be discharged.

Complainant sought to avoid the effect of this well-settled rule of practice by obtaining an assignment to it by the Otis Company of the entire right, title, and interest in the patent and all claims or demands for past and future damages and profits. Such assignment was executed April 6, 1905, and submitted to the court before decree was signed. The effect of this, however, is only to convey to the switch company exactly what the Otis Company had to convey on April 6th. So far as its effect on this suit is concerned, what the latter company had to convey on that day was the right to apply to the court for leave to file an original bill in the nature of a supplemental bill, and, upon filing the same, to take up the cause in the condition it was on July 10, 1902, with whatever additional defenses the defendants might interpose to the latter bill, and prosecute the same to a conclusion. That is what the Otis Company had to convey, and that is what the switch company obtained by the assignment.

It is to be regretted that by reason of this failure to conform to well-settled rules of practice the time, labor, and money which has been expended upon this voluminous record and on the preparation and presentation of arguments on the merits has gone for nought—temporarily at least, no doubt in future litigation most of this testimony will be stipulated in. One source of regret, however, is absent in this particular case. The unfortunate result has been brought about, not through any oversight of counsel, but solely by the client's own extraordinary conduct. Although the original assignment was executed in July, 1902, the switch company, for some inscrutable reason, kept the transaction a profound secret from its own counsel

who, as he says, learned of it only when defendant made its motion after opinion was filed. Possibly the officers of the company apprehended that if the lawyers once knew of the assignment they would make all sorts of troublesome suggestions, which might increase the delay or the expense of the proceeding. If so the overastuteness of the lay mind has produced a lamentable result. Certainly the client has paid a very heavy price for learning the lesson that it is essential for any one who enters into litigation to tell his counsel the whole story.

The decree is reversed, with costs of this court, and cause remanded, with instructions to allow complainant or the Otis Company, or both, to file an original bill in the nature of a supplemental bill, and, in the event that no such bill is filed within a reasonable time, to dismiss the bill with costs.

AMERICAN ACETYLENE BURNER CO. v. KIRCHBERGER et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 159.

PATENTS—INVENTION—ACETYLENE GAS BURNERS.

The Shaffer patents, Nos. 617,942 and 634,838, for acetylene gas burners, are void for lack of invention.

On reargument. Affirmed.

For former opinion, see 142 Fed. 745.

H. E. Shaffer and F. F. Church, for appellant.

L. C. Raegener, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We are so forcibly impressed by the apparent equities in favor of the appellant in this case that a reargument was granted upon the contention of the patentee, Shaffer, that he was the first inventor of a burner made of one piece of refractory material, and which further consisted in such a rearrangement of air passages that it had effected a revolution in the art of acetylene gas burners. We have given careful consideration to the contentions presented on the reargument, and in the light thereof have thoroughly familiarized ourselves with the state of the prior art. What the patentee confessedly undertook to do was to make the accepted type of burner of the prior art in one piece of steatite. We are satisfied, however, in view of what is shown in the earlier patents, that a one-piece steatite burner was so fully covered in all the different features of its construction that no invention was involved in the disclosures or suggested improvements of the patent in suit.

Our former decision affirming the decree is therefore reaffirmed.

NATIONAL GLASS CO. v. UNITED STATES GLASS CO.

(Circuit Court, W. D. Pennsylvania. August 30, 1906.)

No. 34.

1. PATENTS—INFRINGEMENT—FURNACE FOR REHEATING GLASSWARE.

In the Schulze-Berge patent No. 411,131, for a furnace for reheating or fire-finishing glassware, claim 1, which covers a furnace "provided with a 'glory hole' or 'glory holes,' accessible from below, for the introduction and withdrawal of glass articles substantially as and for the purposes described," must be limited to a furnace which is capable of being combined and operated with the mechanism specified and covered by the other claims comprising the whole invention. As so limited *held* not infringed.

2. SAME.

The Caldwell patent No. 442,855 for a furnace for reheating and finishing glassware is not of a pioneer character, and the claims, which describe specific mechanism, must be limited to such mechanism or its equivalent. Claims 3, 5, and 7, which describe as an element of the combination therein claimed a horizontally revolving table supporting vertical rods for carrying the articles to be heated, and which, by its revolution, carries them through the furnace in the arc of a circle, are not infringed by a mechanism in which the carrier is an endless chain moving through the furnace in a straight line, and mounted on a movable frame so that the whole may be withdrawn from the furnace.

In Equity. On final hearing.

W. L. Pierce and James K. Bakewell, for complainants.
Marshall A. Christy and George H. Christy, for defendants.

ARCHBALD, District Judge.¹ The subject of suit is a device for the fire-finishing or glazing of glassware, particularly tumblers. As they come from the mould, these articles look dull and greasy, and are sometimes marred or pitted with imperfections. The edges also are rough and sharp. To remedy this, they are subjected to a process known as "reheating," "fire-finishing," or "glazing," by which by the melting of the surface exterior marks are removed, a luster imparted, and the rims or edges are melted down and rounded. By the hand method which was in vogue at the date of the patents in suit mould-pressed tumblers, while still hot, were taken up by a boy with a rod or punty, the end of which he stuck to the bottom with a lump of melted glass, and were carried by that means and in that position to the "glory-hole" of a reheating furnace, into which they were inserted a sufficient length of time to become melted superficially by the flame, being slowly rotated in order to be affected equally on all sides. Still fastened to the punty rod, they were next taken to a workman by whom they were smoothed outside and in with a wooden rod, and the shape restored where it had

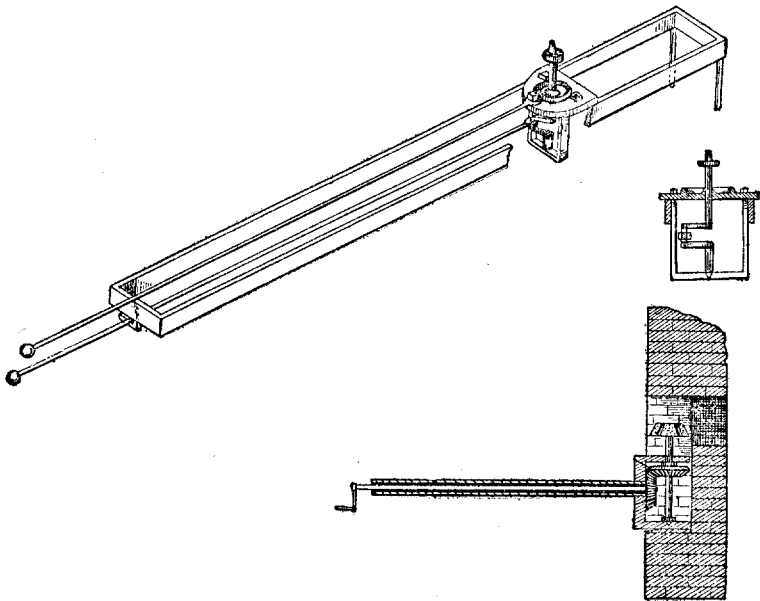
¹Specially assigned.

broken down. Being detached from the punty rod by a blow, the bottom of the tumbler was generally left so rough as to require smoothing off on a roughing wheel, then grinding down on a finishing wheel, and finally polishing with pumice. Blown tumblers were somewhat differently handled, the details of which are not important. It is sufficient to note that they were left as the result with sharp cutting rims, to remove which they were taken in a cup on the end of a rod, and the projecting tops exposed, the same as pressed ware, in the flame of a "glory-hole," by which the edges were rounded down. Another form of rod, mainly for pressed articles, was provided with a clutch or snap by which the base was gripped and held, the disadvantage of this being that it prevented the fire-finishing of the bottom.

But when held in the "glory-hole" horizontally, at the end of a punty rod, the tumblers were liable to break down under the heat, requiring further handling to restore them. This was true also where a snap was used, with the other disadvantage which has been alluded to. When held in a cup there was not the same danger, but as this dispensed with labor it was not in favor with the Glass Workers' Union, and so did not largely obtain. A certain advance in the art was, therefore, made by the invention of Lyon and Anderson, patented August 22, 1882, by which these difficulties were obviated. By this device, the article to be reheated was presented to the "glory-hole" supported on a spindle-like holder or plug, which was set on a frame, and the end of the apparatus made to rest on a ledge in the outer wall of the furnace, a little below the level of the "glory-hole," so as to be out of the immediate range of the flame. The plug or holder had a rim or flange at the top to prevent the article from slipping off, and by means of a rod and driving crank below, or beveled gears and a crank handle at the other end of the rod was able, while in position, to be rotated by the workman. It could also be drawn away from the "glory-hole," along the frame, by means of a second rod, and the article removed; or the apparatus could be carried back and forth, as a whole, one plug or holder being replaced in turn by another, with another article.

The mechanism of this device, however, although somewhat below and out of range, was more or less exposed to the intense heat of the "glory-hole," and being found to need protection, a guard or hood was devised to cover it. This was built up, around, and over it, the plug or holder, with the article to be fire-finished upon it, being allowed to project above it, through a longitudinal slit in the top, along which the plug was able to be moved back and forth. This left the glass in the full blaze of the "glory-hole," while the frame and crank or gears were under cover below. A protecting device of this character was constructed and put in use, about the same time, at two different factories in Pittsburg, independently; at the works of the O'Hara Glass Company, who own the Lyon & Anderson patent; and at those of Ripley & Co., a licensee; the one

being made of brick and the other of tile and clay; the use of both extending back to 1885, or earlier. A somewhat modified "glory-hole" was also employed in this connection, at the O'Hara Works, as shown by the Anderson drawings.



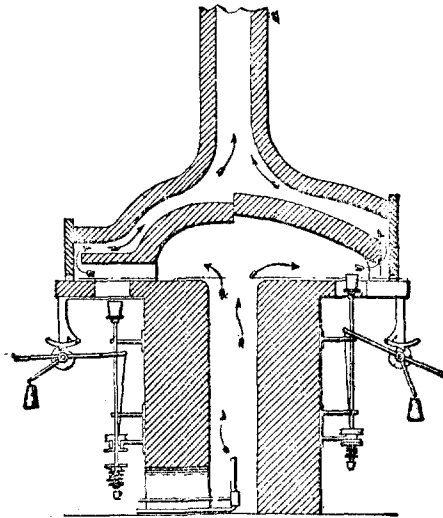
This was the general state of the reheating art at the time of the invention involved in the first patent in suit; with one exception to be presently noted, the French publication of 1883, there being nothing as yet to suggest the use of machine in place of hand action. This is as true of the Lyon & Anderson device, with the accompanying Ripley hood, as of anything which had preceded them; both of which are to be assigned to the hand art, the former being nothing more than a ponderous tool weighing some 15 or 18 pounds, and requiring to be carried back and forth, as well as rotated at the "glory-hole," by hand. It is still in use, but only for forming and finishing the lips or rims of large and high-priced ware, which can stand the expense, and not for tumblers, which can hardly do so.

The complainants charge the infringement of two patents which they hold, the first of which was issued to Hermann Schulze-Berge, for a reheating furnace, September 17, 1889. The characteristic feature of the combination which is there described is the existence, either in the floor or the projecting ledges of the combustion-chamber or flue, of a "glory-hole" which is accessible from

below. As set forth in the first claim, which is the one relied on here, it is stated as follows:

"1. A furnace for heating glass ware, consisting in a combustion-chamber provided with a floor over which the gases of combustion pass and which is provided with a 'glory-hole' or 'glory-holes' accessible from below for the introduction and withdrawal of a glass article, substantially as and for the purposes described."

This is combined in the other claims—expressive of the full invention—with proper mechanism for introducing into the "glory-hole," and rotating there, the glass article to be reheated, the former being accomplished by a hand-operated lever, and the other by a steam-driven belt pulley attachment or other gearing. Means are provided for regulating the extent to which the article shall



be inserted; and it is also suggested, that the motion of the carrying rod, in raising or lowering the article, need not be absolutely vertical, but may be more or less inclined, and that it may be adapted to be raised and lowered simply, without being rotated. Speaking of the advantages of the device, it is said by the inventor in the specifications:

"The elevation of the glass articles from below, instead of inserting them horizontally into a 'glory-hole' as now practiced, enables me to dispense with tightly-gripping holders, which may mar or scratch the glass. The operation of heating the article may [also] be performed with great rapidity, and the extent to which the heating shall reach * * * may be accurately limited, so that, if desired, the rim of a tumbler may be fused, without affecting the lower portions."

There is nothing to be found in the prior art which in any way anticipates this patent, and the only question is the range it is to

take. It is said to be a mere paper patent, having never been put to any practical commercial use, and that it is not, therefore, to be brought forward now to block other meritorious devices. *Deering v. Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153. But is it not necessary to consider that suggestion, there being no occasion in any event for giving it other than a literal construction. The invention consists, not so much in a furnace having a "glory-hole" accessible from below, as in the combination by which this is made effective and useful. Of this, no doubt, a furnace so equipped is a material element, but taken by itself, it is a question whether it would be patentable, there being nothing particularly inventive in transferring the "glory-hole" from one position to another, aside from the object to be accomplished thereby. The claim for a furnace with this feature, therefore, is not to be separated from its connection, and whatever be the generality of expression there found, a furnace must be taken to be meant which is capable of being combined and operated with the mechanism specified, comprising the whole invention. And this, in fact, is what it says. Taking the claim as it reads, it is for a furnace "provided with a 'glory-hole' or 'glory-holes' accessible from below for the introduction and withdrawal of a glass article substantially as and for the purposes described." It is not to be extended broadly to any and every furnace, which, disregarding the connection, may happen to come within this designation, to which the mind of the inventor was not addressed, and which is not therefore to be regarded as within the scope of the invention.

In the defendants' device, as we shall see more fully later, the "glory-hole" proper is in the side of the furnace, and the article to be reheated is presented from that direction. It is not withdrawn, moreover, but passes through to the other side, on an endless carrier, which is provided with a number of supports or holders, so that a continuous series of articles may be fed into the furnace. This carrier is itself supported on a movable frame, mounted on wheels, which runs under the furnace, the supports or holders projecting up into it slightly; to permit of which, there is a slot or opening in the bottom of the furnace, extending from side to side, in the direction in which they are to travel. This, in a sense, undoubtedly makes the "glory-hole" accessible from below, but not within the meaning nor for the purposes of the patent. The slot in the floor of the furnace by which this is made possible (the *Lazure & Denning* patent, under which the defendants operate, to the contrary, notwithstanding) does not pertain to the "glory-hole," of which it is in fact no part, but to the form and fashion of the furnace, into the construction of which it directly enters. The "glory-hole" may be thus accessible from below, by reason of the opening in the floor, but not, as called for by the claim, "for the introduction and withdrawal of a glass article"—which is the significant thing—which enters and goes out at the side, and not from that direction. The combined accessibility, which is thus provided for, approaches

much more nearly, in both design and function, to what is shown in the Anderson machine, so called, or the Ripley & Co. device, in which, as we have seen, the article to be reheated is presented to the "glory-hole" laterally, as here, while the frame which carries the support or holder is inserted below, under protection of the hood, through the slot in which the holder with the glass article upon it projects upwards into the flame. Indeed, it may be well claimed that in the double access, which is so arranged for, the "glory-hole," if such it is to be considered, is of as novel and distinct a character as that upon which the complainants rely, by which it clearly was not anticipated, and on which the use of it does not, therefore, infringe.

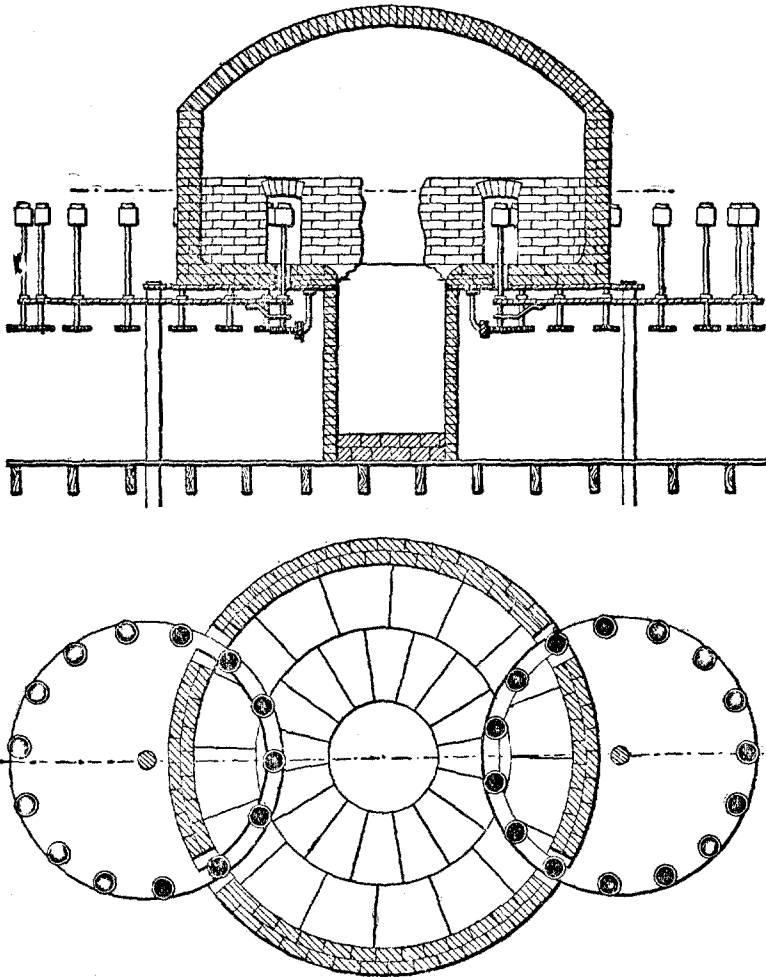
This brings us to the other patent in suit, which was granted to M. R. Caldwell, December 16, 1890; the following being the claims advanced:

"3. In a furnace for reheating and finishing glassware, a number of revoluble supporting-rods provided at their upper ends each with a head to receive the glass article and at their lower ends each with a pinion, in combination with a table carrying said rods, a fixed rack engaging said pinions, means for rotating said table, and a furnace through the fire-chamber whereof the said glass supporting rods are carried."

"5. In a glass reheating or melting furnace, a fire-chamber having vertical wall-openings and coincident bottom openings extending through the fire-chamber and connecting two of said wall-openings, in combination with a table arranged beneath the bottom of the fire-chamber, having vertical ware-carrying supports arranged in the line of said openings, and means for rotating said table for carrying the ware into the fire-chamber through one wall-opening and out at the other."

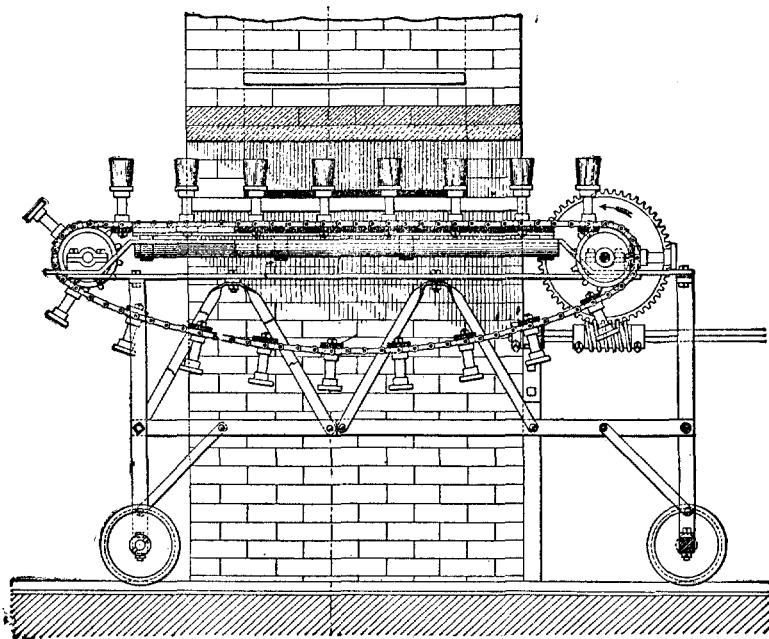
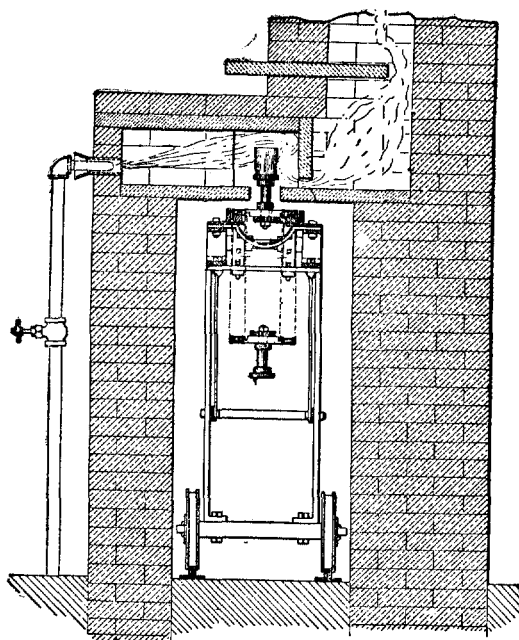
"7. In a furnace for reheating and finishing glassware, the combination, with a furnace having vertical wall-openings, of several intermittently-revoluble supporting-rods, each provided with a holder for the glass article, and a continuously-revoluble table carrying said rods, whereby the ware is caused to move through the fire-chamber with a compound movement."

As stated in the specifications, the object of the invention, which is so given in outline, is to secure the uniform fire polishing and finishing of the edges and surface of glassware, by subjecting it to heat, while under two simultaneous motions, "one sweeping horizontally through the fire-chamber, where the heat is most effective, and the other a motion of rotation during its passage through the fire;" the work, as it is said, being also expedited, preparatory to further action in an annealing oven. The means selected to this end, as is there set forth, consists in a revoluble or rotating table, by which the articles to be reheated are carried into and out of the furnace in continuous succession, on supporting-rods or holders, on the bottom of which are pinions, which engage, while in the furnace, with the teeth of a segmental rack underneath, by which they are made to turn as they advance. To permit of the entrance and exit of the ware in this manner, vertical openings are provided, at opposite sides, in the walls of the furnace, and a circular slot in the floor, uniting these openings, coincident with the path of the holders, which project up through it from the table and rack below. This is illustrated by the accompanying figures taken from the patent.



As will thus appear, the articles to be reheated traverse the furnace in the arc of a circle, and the table on which the supporting-rods are carried rotates in a plane underneath the bottom and parallel to it. If these are essential features of the invention to which it is committed, either by definite selection or the prior state of the art, the defendants make use of another and different mechanical construction, and do not, therefore, infringe; and it is upon this that the question turns.

The defendants' apparatus has been already partially described, and is shown by the following diagrams.



It will be seen therefrom that the articles to be reheated enter the furnace in continuous succession, through a vertical opening in the wall, and pass out at a similar one on the other side, traversing the furnace in a direct line. They are supported on holders or standards, which project upwards into the furnace, through a corresponding slot in the floor, these standards being mounted on blocks, fixed to the links of an endless chain, below which they are fitted with pinions, which enmesh with a rack, by which they are rotated as they progress. The chain in turn is strung over sprocket wheels at either end, driven by appropriate gearing, and mounted in a movable frame, which is run under the furnace, and may be withdrawn again, without disturbing the driving mechanism. It must be confessed that there are many points in common here with that of the Caldwell patent. The glass articles are presented to, and pass into and out of, the furnace, in the same manner, through verticle openings in the walls on opposite sides; they are supported on similar standards, which travel in the same kind of a slot in the floor, through which they get access from below; they are made to rotate in both, as they advance, by means of engaging pinions and rack; and continuous succession is secured, in the one as in the other, by an endless revolving carrier, which both employ. The only difference is that, as stated, the Caldwell calls in terms for a rotating or revoluble table, with its attendant circular path; while the defendants make use of an endless chain, strung vertically, advancing and returning over revolving sprocket wheels in a direct line. The question of infringement which is so presented is not altogether free from difficulty. It depends on the range of equivalents to be accorded to the patent. If the defendants' apparatus can be said to accomplish the same thing by substantially the same mechanical means, having due regard to the equivalents to be allowed, infringement is made out. But otherwise not. And the burden is on the complainants.

The Caldwell is undoubtedly a meritorious invention, three times the work being done by it that was done before, with a most material saving in labor and expense. It has also a certain primary prominence, being the first to provide to any substantial degree for machine handling in reheating. It was declared, however, by the Court of Appeals of this Circuit in *Bryce v. National Glass Company*, 116 Fed. 186, 53 C. C. A. 611, where it was considered in another connection, not to be of a pioneer character, and that, the same as the Schulze-Berge, already passed upon, it was to be confined to the precise device described in the specifications and claims. "The patents are not for methods," says Judge Gray, "but for particular mechanisms. As such, like all machine patents, they are entitled to a fair construction, and to one that will fully secure to the inventor the monopoly of his real invention. Any device or combination which accomplishes the same result by substantially the same means will be held an invasion of that monopoly. Care must be taken, however, in all cases, that we do not by an uncalled-for application of the doctrine of equivalents practically give to the patentee a monopoly of the function of his mechanism. This, of course, we are not permitted to do, directly or indirectly." It is true that the attention of the court in that case was practically di-

rected to the furnace feature of the patents, and not to the handling mechanism. At the same time, what was so said of them was spoken generally, and was evidently the result of a general consideration, and is to be accepted as an authoritative declaration upon the subject. The merit of the Caldwell device, as I understand it, resides, not so much in the character of the work which it turns out, as in the expedition with which this is done, in which the inventive idea is to be chiefly found. The former, it may be, is not to be lost sight of, the ware, as it is claimed, being more reliably and thoroughly finished by means of it, than when held in a "glory-hole" by inexperienced or careless hands. At the same time, the Lyon & Anderson and the Ripley tools are capable of higher results and are still resorted to for the fire-finishing and fashioning of certain better grades of ware, and in point of efficiency and reliability the defendants' apparatus, also, would seem to be preferred. The method of handling is thus the feature by which the complainants' device is to be brought into comparison with that of the defendants' and the question of infringement judged.

Turning then to the claims of the patent which are relied upon, it is to be observed that, while capable of being distinguished in other particulars, they each call for a rotating or revoluble table, and to this or its mechanical equivalent, as an essential element, they are in terms tied. Thus in claim 3, roughly stated, the different features of the combination are:

"A number of revoluble supporting-rods provided at their upper ends each with a head * * * and at their lower ends each with a pinion, * * * a table carrying said rods, a fixed rack engaging said pinions, means for rotating said table, and a furnace," etc.

In claim 5:

"A fire-chamber having vertical wall-openings, and coincident bottom-openings, extending through the fire-chamber and connecting two of said wall-openings, * * * a table arranged beneath the bottom of the fire-chamber, having vertical ware-carrying supports arranged in the line of said openings, and means for rotating said table," etc.

And in claim 7:

"A furnace having vertical wall-openings, * * * several intermittently-revoluble supporting-rods * * * and a continuously-revoluble table carrying said rods," etc.

That a table in the ordinary conception, consisting of a flat, horizontal, plane surface, duly supported from below, was in the mind of the inventor in what is so stated, there can be little question, as the specifications and drawings abundantly show. It is described, for instance, in the former as mounted on a vertical shaft, revolving horizontally, carrying the ware, as it is rotated, in the arc of a circle, through the fire-chamber; incident to which, the convenient removal of the ware and its replacement by other pieces—evidently by one and the same operator in the course of a single revolution—is commented upon; all of which is consistent only with the one idea. A definite and distinct character of mechanism is thus suggested, which is, also, carried into the claims, in the way that we have seen; and to this, by all rules of construction, the patent is necessarily to be confined. If the inventor had anything

more comprehensive than this in mind, it can only be said that he was not happy in expressing it. Generalizing broadly, a conception is possible, which, while expressive of the principle involved in the device patented, goes considerably outside of it, and under proper circumstances might stand for the inventive idea. But assuming that the inventor saw it, and that it was, in fact, his real invention, instead of declaring for it in broad terms, he was content with a combination of specific mechanical parts which cannot now be enlarged, without applying a range of equivalents only accorded to a pioneer invention, which this is not. There was nothing new in the idea of plural handling, nor yet in the particular means adopted, whatever there may have been in the way it was worked out. Not only were the different devices employed for a similar purpose brought home to the inventor by the conveyors and carriers in general mechanical use, but this was particularly the case, by those of like character to be found in the annealing and color baking of glassware, branches of the same glass-heating art, in both of which, as shown by the record, revolving frames or tables and endless chain carriers indifferently appear. Even closer, if possible, than this, in the French publication of 1883, already alluded to, an endless chain is shown in a machine for melting down the edges of glassware, these articles being carried in succession, on independently rotated supports, under suitably arranged blow-pipe flames. The open-air treatment which is so pursued is said to be impracticable, and the successful operation of the apparatus constructed by Mr. Ripley is challenged. But this is not the point. The endless chain carrier is what gives it its significance, and the disclosure thereby made, if not the limitation imposed. Instructed and admonished by these different and indifferently interchangeable means of plural handling and carriage, as the inventor was, the necessity for a broad claim, if that was to be insisted upon, was clearly enforced. He could not, in selecting and specifying one form, expect to cover and monopolize all. If that was his intention, and expressive of his real invention, it could only be secured by comprehensive terms which unfortunately have not been employed.

While then, it may be true, if the patent were a primary one, entitled to a correspondingly liberal construction, the endless chain carrier of the defendants might be regarded as substantially equivalent to the complainants' rotary table; as the case stands, they are not to be so identified. They differ in mechanical construction, they operate differently, and while devoted to the same general purpose, within that, to a certain extent, they accomplish different results. A table is a table, and there is little else to be made out of it, or to take its place. Divided up into radial arms or sectors, or in the form of a skeleton frame or wheel, it may be that, for the purposes of what we have here, it would be regarded as sufficiently retaining its identity or equivalency of structure. The same might also be true of it, if turned into an endless carrier, traveling in a horizontal plane. But to set it up on edge, broadening out, and cutting up its periphery into transverse sections, and then stringing them over vertically revolving sprocket wheels, like a belt

or chain, all of which would be necessary to make out any sort of correspondence with the defendants' apparatus, is to abandon all form or semblance of what it was before, adopting a construction and giving it a character inherently and radically not its own.

But this is not all. With a rotary disk or table, such as is specified in the patent, the line of movement through the furnace is in the arc of a circle, with the result that the article being reheated cannot be seen after it passes in, until it is about to emerge again. In decided contrast with this, the defendants' carrier pursues a straight course, and the articles can be observed at all stages of it, enabling the operator to see how they are being affected, and where the heat and cold spots of the furnace are; and not only to remove with his tongs any article that may be collapsing, but to regulate and adjust the heat bearing upon the ware, if found too little or too great. By having a straight run also, the carrier is able to be made movable, being mounted on a wheeled frame, traveling upon a track, along which it can be run under the furnace and withdrawn again without affecting the driving mechanism, or other change. This is most important, both as respects the life of the apparatus, and the making of repairs; one-third of the holders or spindles in the Caldwell having, on the other hand, to remain in the furnace after the day's work is done, and repairs being practically impossible without taking the apparatus apart. As the result of the same construction, there is also a different delivery of the article at the close of the operation, which in the defendants' device is dumped automatically into a box of sand, while in the complainants' it is removed by the hand of the operator, who stands at the side and takes one article off as he puts another on. There are other distinctions which possibly might be insisted on, going not only to the working, but to the efficiency of the two devices. But without stopping over them, it sufficiently appears in those which have been referred to that there is not only a decided mechanical difference between the two, but not a little functional difference as well. The general fire-finish result is the same, although that is somewhat disputed, and it is accomplished by the same general means. But with that the resemblance ends. At a critical point the two devices diverge; the carrier or conveyor in the one being an endless belt or chain, passing over vertically revolving sprocket wheels, by which the supporting-rods are made to advance and retrograde in a direct line; and in the other, a horizontally rotating table or disk by which the supports are moved through the furnace, in an upright position, in the arc of a circle with the different possibilities which this brings about. If it was a question of method or process, it might not matter. But in a machine, and as to an invention, which is not broadly new, the two cannot be regarded as equivalent; and infringement, therefore, is not made out.

Let a decree be drawn, dismissing the bill with costs.

CUTLER-HAMMER MFG. CO. v. UNION ELECTRIC MFG. CO. et al.

(Circuit Court, E. D. Wisconsin. June 2, 1906.)

1. PATENTS—VALIDITY—INSERTION OF NEW CLAIM IN APPLICATION.

The fact that a new claim was inserted in an application for a patent by the attorney for the applicant without any new oath does not render the patent invalid as to such claim, where it was within the invention described in the specification.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 142, 152.]

2. SAME—MISTAKE IN DRAWING.

The drawings of a patent are addressed to those skilled in the art, and must also be considered in connection with the claims and specification and with each other; and a patent is not invalidated by a clerical mistake in a drawing, which, when so considered, would not mislead one skilled in the art to which it relates.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 140.]

3. SAME—INFRINGEMENT—ELECTRIC SWITCH FOR MOTORS.

The Blades patent, No. 418,678, for an electric switch for motors, was not anticipated, and discloses patentable invention. Claims 1 and 4 also *held* infringed by the device of the Keeney and Rhine patent, No. 777,637, which, while it may embody improvements, contains the material features of the earlier patent.

4. SAME—CONTRIBUTORY INFRINGEMENT.

A defendant which manufactures and sells certain elements of a patented combination with intent that they shall be used as a part of the full combination, as well as in other combinations, is chargeable with contributory infringement in so far as its sales are for use in the patented combination.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 402. Contributory infringement of patents, see note to Edison Electric L. Co. v. Peninsular Light, P. & H. Co., 43 C. C. A. 485.]

5. SAME—INVENTION—ELECTRIC RESISTANCE COIL.

The Baker patent, No. 368,807, for an electric resistance coil, is void for lack of patentable novelty and invention.

In Equity.

This is a final hearing in equity. Complainants by their original bill allege exclusive ownership of two certain letters patent of the United States, Nos. 418,678 and 368,804, for former, known as the "Blades Patent," being for an electric starting box or rheostat, and the latter, known as the "Baker Patent," being for an electric resistance coil, which two devices are capable of conjoint use in the same structure, and complainant avers that it employs and associates the same in a single unitary mechanism; that the defendants habitually employ both such patents in such conjoint use in its devices which it has put upon the market, and has thus infringed the claims of both such letters patent. The prayer of the bill is for an accounting and injunction. The answer denies that there is patentable novelty or invention involved in either of such patents, and many references to the prior art are cited whereby it is claimed that both such patented inventions have been anticipated. Infringement is also specifically denied as to both patents. Defendants admit the manufacture and sale of certain electric rheostats, but claim protection under United States letters patent No. 677,360, granted July 2, 1901, and No. 701,012, issued May 27, 1902, to the defendant Union Electric Manufacturing Company as assignor of Defendant Brown and Rhine. By supplemental bill the complainant sets up that in 1900 this complainant and the Cutler-Hammer Manufacturing Company of Illinois, to whose assets, rights, and interests the complainant has succeeded, commenced a suit in equity in

the United States Circuit Court for the Northern District of Illinois against Edward W. Hammer and Edward R. Harding for the infringement of United States letters patent No. 418,678; that such suit was vigorously defended in such court, and on the 31st day of March, 1903, a final decree was entered in favor of complainant, which decree is set out in *hæc verba*; that an appeal was thereupon taken by said Harding and Hammer, defendants therein, to the Circuit Court of Appeals for the Seventh Judicial Circuit, which appeal was prosecuted, and resulted in an affirmance of such decree; that such decree of said appellate court is still in full force and effect as a final adjudication in said cause. General acquiescence of the public is also set out, and a large number of firms and corporations are named who have settled with complainant, and acquiesced in and agreed to respect such letters patent. Insolvency of defendants is set up, and, so far as the defendant Union Electric Manufacturing Company is concerned, such averment is admitted by the defendant. In June, 1904, complainant moved the court for a preliminary injunction *pendente lite* to restrain infringement of letters patent No. 418,678, and thereupon, on the 13th day of June, 1904, such preliminary injunction was granted. On the 21st day of December, 1904, a second supplemental bill was filed by complainant, setting up that since the granting of such preliminary injunction defendants had abandoned the manufacture and sale of the starting-box that they had formerly made; that in lieu thereof defendants were manufacturing and selling a new form of motor starter of somewhat different type, which, however, is alleged to be an infringement of both the Blades and the Baker patents; that such new form of motor starter employs both such patents conjointly in one and the same structure. The defendants answered the supplemental bill, admitting the abandonment of the former type of motor starter, alleging that the new device is entirely different in form, design, and mechanical construction from that theretofore made by defendants, and that the same does not infringe either of the letters patent of complainant; that such new device was not sold or used prior to January, 1904, or prior to the commencement of this suit. Replication by complainant.

Jones & Addington, for complainant.
Benedict & Morsell, for defendants.

QUARLES, District Judge (after stating the facts). This suit involves the validity of two distinct patents. The testimony taken is very voluminous, as the prior art in both fields has been thoroughly explored. The arguments of counsel on both sides have been able and exhaustive. The briefs are more like treatises on the electric art.

We will first consider complainant's letters patent No. 418,678, which will be for convenience hereafter designated as the "Blades Patent." Claims 1 and 4 of this patent are alone in controversy. Such claims are in the words and figures following, to wit:

"(1) In a shunt-wound electric motor, the combination, with the field circuit, of a magnet in the said circuit, a hand-switch adapted to open and close the armature circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and means for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field circuit, substantially as described."

"(4) In a shunt-wound electric motor, the combination, with the field circuit, of a magnet in said circuit, a hand-switch adapted to open and close the armature circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and a spring for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field circuit, substantially as described."

With reference to the issue of patentable novelty and invention, the consideration first in point of time and importance is to what extent

this issue has been foreclosed by the decision of the Circuit Court of Appeals in the Harding-Hammer Case, 128 Fed. 730, which involves the same patent. The doctrine of *res judicata* has been urged upon the court, but it is clearly inapplicable, because the parties are not the same. The maxim *stare decisis* has been invoked, but that relates to decisions in the same or some co-ordinate tribunal. But the duty under which this court rests to follow the authority of the Circuit Court of Appeals of this circuit is imperative and obvious, without reference to any of the legal maxims. Its interpretation is the law so far as this court is concerned. If the facts differ, the lower court must inform itself as best it may, by inspection of the record and briefs, or by statement of counsel who participated in the cognate case.

Westinghouse El. Manufacturing Co. v. Stanley Co., 133 Fed. 172, 68 C. C. A. 523. Therefore, I must start out with this basic proposition as laid down by the Circuit Court of Appeals, when considering the patent in suit:

"The prior art contains no equivalent combination. We think there was patentable novelty in the application of an under load retaining magnet to a manual starting-box, in the location of such a magnet in the field circuit of a self-regulating shunt-wound motor, and in adjusting it to act in that location, with the starting-box located in the armature circuit. We find nothing in the prior art to militate against the allowance of the claims in suit [1 and 4]." *Cutler-Hammer Mfg. Co. v. Hammer* (C. C.) 128 Fed. 733.

It is manifestly necessary to ascertain what propositions were actually considered and passed upon by the appellate court, and what material evidence has been adduced on this trial that was not before the Circuit Court of Appeals when its opinion was rendered. The defendants insist with great vigor that the claims in suit are void for lack of oath by the inventor; that the history of the patent in the patent office discloses that all of the original claims were rejected, and new and different claims were substituted therefor by the attorney of the inventor, which were in conflict with the original claims, and were not verified, as required by law; that the retaining magnet by the original claims was located in the same circuit as the switch, whereas in the amended claims the magnet was placed in the field circuit, and the switch in the armature circuit. The test laid down by the authorities in such a case is whether the claims as amended were within the original specification. *Williams Co. v. Miller* (C. C.) 107 Fed. 290, 292. A reference to the original specification shows that Blades therein located the retaining magnet "preferably in that circuit." Judge Baker evidently had this distinction in mind when he said in the opinion:

"No matter, therefore, how broad the applicant made the original description of his invention, the narrowing of the specification and the limitation of the claims in suit left the invention as now claimed within the preferred range of the original specification."

Several other objections are raised based upon alleged irregularities in the patent office and amendments of claims and drawings, but an examination of the briefs of the respective counsel in the Harding-Hammer Case discloses the fact that all of these several objections

were made and insisted upon in that case, except that it is now objected for the first time that the Blades device was inoperative because the retractile spring was coiled in the wrong direction, and, second, that the cores of the electro-magnet, as they appear in Fig. 3, would short-circuit the switch, and render the machine inoperative. To dispose of these two objections we must remember that the drawings of a patent are addressed to those who are skilled in the art. Furthermore, drawings must be considered in connection with the claims and specification, and each figure must be construed in the light of the other drawings. Now, the function of this coiled spring was stated to be to retract the contact arm from an "on" to an "off" position when the retaining magnet became de-energized. Any one skilled in the art would know that such spring to be operative should be so adjusted as to increase the tension as the contact arm is swung from the initial to the final position. If he saw that the inventor had indicated by his drawing a spring so adjusted as to be relaxed at the point where the greatest tension was required, he would understand at a glance what was intended, and that a mere clerical mistake had been made.

The same reasoning disposes of the other objection. If Fig. 3 were considered with Figs. 1 and 2, no electrician could be misled for a moment as to the conception of the inventor. We therefore dismiss these points as without merit. *Royer v. Coupe* (C. C.) 29 Fed. 358, 370; *Western Telegraph Co. v. American Telegraph Co.*, 131 Fed. 75, 65 C. C. A. 313.

All of the numerous references to the prior art cited here appear in evidence in the record of the *Harding-Hammer* suit, except *Thomson & Houston*, No. 220,948, *Ries*, 356,963, *Griscom*, 374,673, *Mather*, 382,714, *Loomis & Coley*, 350,754. Neither of these patents, standing alone, is a complete anticipation of *Blades'* conception, which involved the location of a retaining magnet in the field circuit, mounted upon a starting-box to protect a self-regulating shunt-wound motor, such starting-box located in the armature circuit, with means to retrieve the contact arm when released by the magnet through failure of potential. It is unnecessary to point out the structural details of these several devices. It is enough to say that neither discloses the same combination of elements embodied in the *Blades* patent. Neither has a retaining magnet located in the field circuit as an adjunct of a rheostat in the armature circuit. Neither has a magnet which without change would be operative in the current of the field circuit to accomplish the function imposed upon it in *Blades'* conception.

It is only necessary to comprehend the evolution of the electric motor to understand why the various regulating devices formerly interposed to absorb or delay the current have disappeared before the self-regulating motor with constant potential. With the shunt-wound motor, however, came new perils. It was found that the shunt-wound motor with an armature of low resistance was practically defenseless during the period of starting. To obviate this danger the manual starting-box was devised, whose function it was to cut out the resistance gradually while the armature was developing sufficient speed to be self-

protecting. This manual rheostat had its limitations, because it was dependent upon human agency. If, through the negligence of an employé the contact arm were left in intermediate position, disaster might follow to the starting-box and to the armature of the motor. Some suitable automatic device was still needed that would be more reliable than human instrumentality. That was the problem that confronted the art when Blades appeared with his invention. The necessary elements of such a contrivance were already in the prior art. The starting-box, the resistance-coils, the contact-lever adapted to sweep over the contact points and gradually cut out the resistance, the retaining magnet, the retractile spring to actuate the lever, were all old. It remained to organize these old features into a single device that would automatically furnish protection to the motor as well as the rheostat when for any reason the circuit was opened and liable to be suddenly closed. It was a prevalent idea among electricians at that time that the magnet in such a device ought not to be located in the field circuit; that current being delicate, it was thought that a magnet of sufficient power to be available would rob the derived circuit, and render the machine inoperative. Prof. Jackson testified (C. R. 331): "So that it became traditional in the art that the shunt-wound circuit should not be tampered with, and that no extraneous features should be introduced therein." But there remained a serious danger consequent upon a break in the field circuit, which might be followed by disastrous results to the armature, if the current were turned on after it had lost its counter electric motor force. So Blades arranged his combination of these old elements, placing a retaining magnet of low power in the field circuit mounted upon a manual starting-box adapted to open and close the armature circuit.

Shepardson had grasped the problem, but he stopped at the main circuit. Walter had arranged to cut out the resistance coil by means of a pulling magnet with dash-pot attachment located in the field circuit, but had no automatic appliance to retract the contact arm and protect the motor in case of a break in the field circuit after the motor was once under way. It appears from the evidence that the Walter device did not prove an operative or commercial success. C. R. 332. Blades found the manual rheostat where Mather left it, adapted to interpose or withdraw resistance in the path of the armature circuit just as it is now. He did not change or undertake to improve it. It was a complete device while operated by hand. He desired to retain the manual features, to insure the presence of the operator for greater safety until the lever had reached its final position, and had been embraced by the retaining magnet, so that the current passed to the armature without obstruction. His contribution to the art belonged to that class of invention where greater merit lies in the conception that a certain new result can be accomplished by a new combination of elements than by any mechanical ingenuity in working out the combination. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; *Comp-tograph Co. v. Mechanical Co.* (C. C. A. 1st Cir.) 145 Fed. 331. To embody that conception he had merely to adopt from the prior art certain well-known devices, and associate them in a unitary structure—the

manual starting-box located in the armature circuit, a retaining magnet of low power attached to the same, to respond to a failure of potential in the field circuit, and means to retract the contact lever automatically when the same was released by the de-energized magnet. Thus resistance was instantaneously and automatically interposed, equal to the counter electric motor force of the armature, in anticipation of a sudden re-establishment of the current. As soon as his inventive thought had shown the way, it seemed a simple and almost obvious thing. For instance, Thomson & Houston, as early as 1879, were granted a patent for an ingenious device to protect an electric generator whose function was to supply a storage battery. Perhaps from a mechanical standpoint this invention disclosed a greater number of elements of the Blade combination than any other reference to the prior art. This patent was issued many years before the self-regulating shunt-wound motor had been evolved; therefore there was no starting-box or field circuit as elements in that early combination. There was a dial with contact points swept by a lever, a retaining magnet adjusted to hold the lever in final position and to release the same on failure of the current from the generator, and a retractile spring to retrieve such lever, and thus interpose resistance in the path of a reverse current from the storage battery, which, if not arrested, would work injury to the generator and reverse the magnets.

Now it is argued with great assurance and with considerable plausibility that each of these several elements so appropriated by Blades, performs the same function in the new combination in the same way, and that no invention was involved in associating them in a new environment; that Blades' conception would be naturally suggested to any mechanic by the Thomson & Houston device. If this were true, how did it happen that Thomson & Houston, who were both great electricians and inventors in the same field, never thought of using this device to protect a shunt-wound motor? They were prominent figures in the struggle to arrive at the very improvement that Blades was the first to suggest. They were associated with some of the great companies that acquiesced in the novelty of Blades' conception, and paid tribute to him as the first inventor. While approaching the patent in suit in mechanical contrivance, the Thomson & Houston device was wholly lacking in the inventive thought that dealt with the two derived circuits, and virtually established new relations between them. The Thomson & Houston magnet lay in the path of the main circuit, and had to be wound to carry such current continuously. Without new winding it would be entirely inoperative in the field circuit.

It is not seriously contended that either of the five new references, standing by itself, completely embodies all the features of the patent in suit; but it is earnestly argued that the Thomson & Houston patent would furnish certain mechanical features, and the Mather patent certain electric adjustment, which, being skillfully combined, would make an operative device, which would discharge the functions and prove the equivalent of the Blades structure. Therefore, it is contended that such combination involved no invention. No doubt after Blades had solved the problem it seemed simple enough. But the

reasoning of defendants' counsel is fallacious, and may be best answered by a paragraph from the opinion of the Supreme Court in *Imhaeuser v. Buerk*, 101 U. S. 647, 660, 25 L. Ed. 945:

"Before entering upon a separate examination of these several patents, it is proper to remark that it is not contended that any one of these embodies the entire invention secured to the complainant in his letters patent. But it is insisted that each contains some feature, device, or partial mode of operation corresponding in that particular to the corresponding feature, device, or partial mode of operation exhibited in the complainant's patent. Suppose that is so, still it is clear that such a concession cannot benefit the respondent, it being conceded that neither of the exhibits given in evidence embodies the complainant's invention or the substance of the apparatus described and claimed in his specification. Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and still another in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement."

Again, the Supreme Court in *Loom Company v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177:

"It is further argued, however, that, supposing the devices to be sufficiently described, they do not show any invention, and that the combination set forth in the fifth claim is a mere aggregation of old devices, already well known, and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed—one which would occur to any mechanic skilled in the art. But it is plain from the evidence and from the very fact that it was not sooner adopted and used that it did not for years occur in this light to even the most skillful persons. It may have been under the very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. * * * Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit."

It is well understood, as argued by defendants, that the transference of a given device to a new field does not involve invention. With all these principles in mind, the Circuit Court of Appeals determined that *Blades* did something more than to borrow from the prior art; that he was able to bring before his mind certain dangers to which the manual starting-box, as *Mather* left it, was subjected, and a new arrangement of old elements to meet the long-felt want, which had eluded all the inventors in that field, whereby danger from a failure of potential in the field circuit might be automatically anticipated, and adequate resistance promptly supplied to protect the starting-box in the armature circuit against a probable re-establishment of the current and resulting damage, and that his contribution to the art exhibited a high degree of inventive talent. Although the elements were all old, this eminently useful and novel combination embodied the highest quality of invention. *Morrley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715.

The new references cited here would not in my opinion have changed the conclusion reached by the Court of Appeals. The claims of neither

of such five patents respond to the inventive thought of the patent in suit, and we must therefore hold that Blades' conception involved patentable novelty and invention.

Do the defendants infringe claims 1 and 4 of the patent in suit? It is practically settled by the Court of Appeals that the former device of the defendant was an infringement, and the defendants have acquiesced by an abandonment of that machine. Since January, 1904, the defendants have been operating under the Keeney-Rhine patent, No. 777,637, which was granted since the decision of the Circuit Court of Appeals in the Hammer-Harding Case. The fact that the defendants have been able to secure a patent is not conclusive on the issue of infringement. *Ries v. Barth Manufacturing Co.* (C. C. A.) 136 Fed. 850. "Where a complainant patentee has accomplished a new result by a new means, a defendant cannot escape the charge of infringement merely by showing a later patent. The field covered by the primary patent is not free for defendant's plow without the owner's consent."

Prof. Jackson, who was the complainant's expert, on pages 56 to 58 of the record has made a careful analysis and comparison of the claims of these two patents, from which, and from a careful examination of the structures in evidence, it satisfactorily appears that the defendants have appropriated every material feature of the claims of the Blades patent. They seem to have combined the same elements substantially in the same way to produce the same result. The defendants, however, claim that there are two essential and distinctive features in their patent which differentiate it from the patent in suit: First. The contact lever is split into two pieces, pivoted at the same point. Second. It is contended that the defendant's switch is not located in the armature circuit, but in the main circuit.

Let us consider first the split arm. It is true that when the contact arm consists of two pieces—the one bearing the armature for the magnet and the contact lever proper being free to move over the contact points while the armature is engaged by the magnet—the reading of the claims must be necessarily different, and to effect that difference in language would seem to be the purpose of the changed construction. No useful purpose is disclosed for this alleged improvement, and the conclusion, therefore, is well nigh irresistible that it was a mere colorable evasion, or what the courts have called, a "studious avoidance of the literal definition of the specification and claims." *Crown Cork Co. v. Aluminum Co.*, 108 Fed. 845, 866, 48 C. C. A. 72. It appears that the freedom of movement of the contact lever while its other half is held by the magnet in the "on" position not only subserved no useful purpose, but suggests an obvious danger that it may be left in an intermediate position, thus bringing a portion of the resistance coils into the current, where they cannot long survive. This danger is pointed out in the specifications of defendant's patent. To obviate this danger a short circuiting device was added, whose function is to neutralize their alleged improvement. This practically amounts to a mechanical confession. The avowed purpose of the new electrical device is to secure unity of action, which has been purposely impaired by splitting the arm. Therefore, the defendants cannot es-

cape infringement by reason of this elaboration, whose only function seems to be to change the reading of the claim.

Second. Is the difference in circuit arrangement substantial? It is contended that the defendants' switch is located in the main circuit, while in the patent in suit it belongs in the armature circuit. The fact is that the contact arm in the defendants' device is pivoted at the point of juncture. The claims of the patent in suit do not specifically locate the switch, but provide that it shall be "adapted to open and close the armature circuit." The defendant's switch must be so adapted as to control the current that passes through the armature, or it would fail in its chief function. It is manifest from an examination of the claims of defendant's patent that no such distinction was in the mind of the inventor when he made his application, because in the eighth claim he uses the exact language of claims 1 and 4 of the patent in suit: "In a shunt-wound electric motor, the combination with the field circuit of a magnet in said circuit, a hand-switch adapted to open and close the armature circuit," etc. This would indicate that the claim now made is an afterthought.

As the court said in *Lourie Improvement Co. v. Lenhart*, 130 Fed. 122, 129, 64 C. C. A. 456:

"One may not escape infringement by changing the form of the patented device, unless the form is the distinguishing characteristic of the invention, while he retains its principles and mode of operation and attains its result by the use of the same or equivalent mechanical means."

The real question is whether the inventive idea of the original patentee has been appropriated, and whether the defendants' device contains the material features of the patent in suit, even though the defendants may have supplemented and modified those features to such an extent that he may be entitled to a patent for the improvement. *Crown Cork Co. v. Aluminum Co.*, *supra*; *Benbow Manufacturing Co. v. Simpson Mfg. Co.* (C. C.) 132 Fed. 614; *Austin Mfg. Co. v. American Wheel Works*, 121 Fed. 76, 57 C. C. A. 330.

The case of *Eck v. Kutz* (C. C.) 132 Fed. 758, 766, is very much in point. There the complainant's patent had a cross-arm actuated by a lever. Defendant subdivided this cross-arm, and the two parts were separately pivoted. But, as the court said, they "retain the same relative position, and do the same work as that of which they take the place." The outer arm was also similarly divided up, and was given an inclined axis. But the court further said:

"With all this, the operation is essentially unchanged, not only of the whole, but of each part, and that is the significant thing. Except where form is of the essence, it has little weight, and departure from it does not escape infringement where identity of operation is retained."

But if it were conceded that the split lever was a valuable improvement, it would not change the result as to infringement. The improver must pay tribute to the patentee inventor, whose conception and mechanism he has borrowed as a basis for improvement.

Contributory Infringement.

Blades made a shunt-wound motor one of the elements of his combination. He thereby limited the scope of the invention. The defend-

ants claim that their switch may be used, and in practice is used with series wound motors. It is conceded that certain changes must be made in the wiring of the box to adapt it to the series wound motor. But as the defendants do not manufacture or sell the self-regulating shunt-motor, they do not put upon the market the complete combination called for by claims 1 and 4 of the Blades patent. In such case the law is well settled that to make defendants liable for contributory infringement it must be shown either that defendants sell a part of the patented combination with intent that it shall be incorporated by the purchaser into a patented device, or that the portion of the structure so sold by defendants is not capable of use except in combination with the other elements of the complainant's device.

Considerable evidence was given tending to show that the starting-box manufactured by the defendants, embodied in the exhibits in evidence and shown in their printed literature, is incapable of use except with a shunt-wound motor, either of the simple or compound type. But without discussing that proposition, it is clearly established by the printed catalogues and literature of the defendants that they intended to sell a starting-box to be associated with a shunt-wound motor. On page 1 of one of their catalogues in the record appears the following paragraph:

"Ordering. In ordering rheostats, state what type is wanted, the horsepower, voltage of the motor, and if series or shunt or compound. When no information is given, we always ship rheostats for shunt-wound motors."

This would seem to conclude the defendants as to their purpose and as to their liability. Of course no contribution can be claimed from the defendants for rheostats sold for use in connection with series wound motors.

The following cases lay down the rules governing contributory infringement as here applied: *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100; *T. & H. Electric Co. v. Ohio Co.*, 80 Fed. 712, 723, 26 C. C. A. 107; *Westinghouse Co. v. Dayton (C. C.)* 106 Fed. 729; *Red Jacket Manufacturing Co. v. Davis*, 82 Fed. 432, 27 C. C. A. 204.

In the final decree to be drawn and in the accounting the defendants will be held as contributory infringers of claims 1 and 4 of the patent in suit upon the principles here laid down. The complainant will be awarded an injunction.

Baker Patent, No. 368,804.

The claim of the inventor is as follows:

"An electric resistance coil, consisting of a tube made from material which is a nonconductor of electricity, and fine wire coiled upon the tube in coils not in contact with each other, substantially as and for the purpose specified."

Defendants deny infringement, and set up anticipation by sundry and divers references to the prior art. It is manifest that this claim, standing alone, does not disclose either novelty or invention. The prior art affords numerous resistance coils, each consisting of a tube made from material which is a nonconductor of electricity. Fox (No. 254,764) shows a tube of nonconducting material with fine wire wound about it loosely. Starr (No. 266,910) discloses a tube of glass or hard rub-

ber. Lieverman & Robb (No. 276,840) shows tubular cores with wire wound thereon, such wire being wrapped with asbestos thread. Benton (No. 357,592) employs a tube of earthenware. British Patent to Zamie discloses a cylinder of ebonite, upon which bare wire is wound. It is required by the statute that the inventor "particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery."

It is the function of a claim to accurately describe the real invention. 2 Robinson on Pat. 5526. If the patentee knew of what he was the actual first inventor, he did not comply with the statute. Terry Clock Co. v. New Haven Clock Co., 3 Ban. & A. 332, Fed. Cas. No. 13,841; Day v. R. R., 132 U. S. 98, 102, 10 Sup. Ct. 11, 33 L. Ed. 265. The patent as granted was broader than the invention.

It is argued by complainant that the elastic phrase "substantially as and for the purpose specified" supplies the defect in the claim, and limits its scope to the use of asbestos paper as the material to be employed in making the tubes. The argument proceeds upon the theory that asbestos paper has been selected and is the chief feature of the discovery. Numerous advantages are pointed out which result from the employment of this new material. But it appears that in the specification the inventor declines to be limited to asbestos paper. This would seem to neutralize the formula "substantially as and for the purpose specified." Boyer v. Keller Tool Co., 127 Fed. 130, 134, 62 C. C. A. 244.

But if the invention is limited to the selection of a new material out of which to construct an old device, such change does not rise to the dignity of invention. Cylinders and tubes of fire-proof nonconducting material upon which bare wires has been wound being common to the art, and asbestos thread having been employed in the structure, the substitution of asbestos paper was a simple and obvious expedient open to any one. Hotchkiss v. Greenwood, 11 How. 248, 265, 13 L. Ed. 683; Florsheim v. Schilling (C. C.) 26 Fed. 256, 261; Sloan Filter Co. v. Portland Co. (C. C. A.) 139 Fed. 23, 26; American Road Mach. Co. v. Pennock, 164 U. S. 26, 17 Sup. Ct. 1, 41 L. Ed. 337.

For these reasons, we are constrained to hold that the patent while in life exhibited neither patentable novelty nor invention, and that, so far as the Baker patent is concerned, the bill must be dismissed.

Let a decree be entered accordingly.

In re KALLAK.

(District Court, D. North Dakota. September 13, 1906.)

BANKRUPTCY—PAYMENT OF TAXES—INTEREST.

State and municipal taxes due from a bankrupt do not constitute a claim against his estate to be proved like those of creditors, and the rule that interest will not be allowed on debts after the filing of the petition has no application thereto, but it is the duty of the court, under Bankr. Act, July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447] to direct the payment of such taxes together with such penalties or interest as have accrued thereon under the laws of the state to the time of actual payment.

In Bankruptcy. On certificate of referee.

John E. Greene, for trustee.

George A. McGee, for Ward County.

AMIDON, District Judge. This matter comes before the court upon the certificate of John H. Lewis, Referee in Bankruptcy. The question presented arises upon the following facts: The adjudication was entered April 16, 1906. Among the debts listed by the bankrupt are state, county, and municipal taxes for the year 1905. These taxes became due December 1st of that year and became delinquent March 1, 1906, at which time a penalty of 5 per cent. was added. Thereafter, on the 1st of each month, a further sum of 1 per cent. of the original tax attached, which, by the revenue laws of the state of North Dakota, is usually spoken of as interest, but sometimes as penalty. After a certain length of time these taxes are placed in the hands of the sheriff for collection. In this case the trustee offered to pay the county treasurer the amount of the original tax with penalty and interest which had accrued previous to April 16, 1906, the date of the adjudication. This sum the county, upon the advice of the state's attorney, refused to accept, claiming that it was entitled to further interest up to the date when the payment was actually made. The matter was thereupon brought before the referee who ordered the trustee to pay the taxes in full with penalty and interest to the date of payment. The trustee feeling aggrieved by this decision, it is certified to the court for review.

The decision of the referee was correct. The contention of the trustee rests entirely upon the ground that public taxes constitute a claim against the bankrupt estate to be paid with other claims in the ordinary course of administration. As other claims are not permitted to draw interest after the adjudication, it is therefore contended that the amount of the public demand for taxes is subject to the same restriction. The fact is, however, that under the bankruptcy law (Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) and other provisions dealing with the same subject, public taxes do not constitute a "claim" in bankruptcy. It is not necessary for the public authorities to appear in a court of bankruptcy as ordinary claimants. They have no right in the administration as creditors and no voice in the selection of trustee, and the liability for taxes is in no way affected by the discharge of the bankrupt. On the other hand, the duty of affirmative action rests upon the court of bankruptcy. It is the duty of the trustee to ascertain from the public records the amount due for taxes and bring the matter to the attention of the court, and thereupon it is the duty of the court to order their payment if there are sufficient funds in the estate for that purpose. There are two reasons why ordinary claims of creditors are not permitted to draw interest subsequent to the adjudication: First, it is important that the proportionate interest of the several creditors in the estate be ascertained and fixed. If interest were to accrue, however, after the adjudication, the amount of the several claims would vary from time to time, according to their respective rates of interest and the propor-

tionate share of the several creditors would be subject to constant readjustment. The second reason is the convenience of administration. If, at the declaration of every dividend, a new basis of apportionment were required, depending upon varying rates of interest, the administration of the estate would be seriously complicated. *Chemical National Bank v. Armstrong*, 59 Fed. 372, 379, 8 C. C. A. 155, 28 L. R. A. 231; *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686, 28 L. Ed. 603. In the case of public taxes, neither of these reasons has any application because they do not share the estate with the claims of private creditors. On the contrary, section 64a expressly provides that before anything shall be paid to the creditors by way of dividends all taxes owing by the bankrupt shall be fully discharged. The reason for claims becoming fixed at the date of the adjudication, so that interest shall not subsequently accrue having no application to public taxes, the rule itself should not be applied in such cases.

Something is said in the opinion of the referee touching the paramount sovereignty of the federal government in the matter of bankruptcy. It has, however, been the settled policy of all departments of the federal government, the legislative as well as the judicial, to avoid as far as possible, without the sacrifice of constitutional powers, any conflict between national and state authorities. It was in such a purpose that section 64a of the bankruptcy act had its origin. It is important to remember that the powers of the national government in enforcing the system of bankruptcy are purely administrative. The federal government has no proprietary interest in the estate, but is only concerned that it shall be so administered as to do justice to all parties in interest. On the other hand, the power of taxation is one of the high and indispensable attributes of sovereignty. For the national government to take over the estate of the bankrupt and apply it to the claims of private creditors without making full provision for the discharge of taxes owing to the state and its subordinate municipalities, would be to prefer private to public rights and would constitute a wholly unjustifiable interference with the state in matters pertaining peculiarly to its authority. Section 64a, providing for the payment of the taxes in full in case there are sufficient funds in the estate available for that purpose, and section 17, of Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428] which provides that the discharge of the bankrupt shall in no way affect public taxes, clearly show that it was the intent of Congress that the public revenues of the state should be in no way prejudiced by the administration of the bankruptcy act. So strongly have these considerations appealed to the courts, that the estates of bankrupts, even while in custodia legis, have been held subject to taxation by the state and its subordinate agencies. *Swarts v. Hammer*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060. If estates may be taxed under such circumstances, no sound reason can be advanced why revenue laws fixing the penalty and interest for delinquent taxes should not be given full effect in the case of taxes legally levied and assessed prior to the adjudication.

What ought the trustee to pay under section 64a? The answer is found in its own language, "All taxes owing by the bankrupt." What-

ever would be owing by the bankrupt at the time the payment is made if no bankruptcy had intervened, that the court should require the trustee to pay. It includes the original tax and all other sums accrued thereon under the revenue laws of the state up to the time the payment is actually made or tendered. The decision of the referee is therefore affirmed.

In re QUINCY GRANITE QUARRIES CO.

(District Court, D. Massachusetts. July 22, 1904.)

No. 8,574.

1. BANKRUPTCY—CORPORATION—MINING INCLUDES QUARRYING.

A corporation engaged in operating a granite quarry, which it owned, and selling the stone, either for building or paving purposes or after it had been manufactured and finished for monumental or other purposes is chiefly engaged in mining and manufacturing and is subject to bankruptcy proceedings under Bankr. Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], § 4b, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683.]

[Ed. Note.—What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

2. SAME—INVOLUNTARY PETITION—RIGHT TO WITHDRAW.

Creditors who have joined in a petition in involuntary bankruptcy against a debtor are not entitled to withdraw without the consent of all when the effect would be to require a dismissal of the proceedings.

In Bankruptcy. On involuntary petition.

The respondent corporation was incorporated for the purpose, among other things, of "manufacturing building stone, ornamental stone, paving stone, monuments, and other forms of manufactured stone from granite and other kinds of stone, and for that purpose, quarrying, cutting, dressing, carving, and otherwise fashioning granite and other kinds of stone; and selling, exporting, or otherwise disposing of all forms of granite and other kinds of stone."

Robert K. Dickerman, for Curtin.

William H. Russell, for receivers of respondent.

LOWELL, Circuit Judge. Involuntary petition against a corporation. On the findings of the referee and the evidence, I have no doubt that the corporation is within the purview of the bankrupt act. At one time and another four alleged creditors have joined in the petition. I find that three of these, the Mt. Wollaston Bank, Sherburne, and Faxon, are creditors entitled to prove. On the other hand, they have asked to withdraw from the petition, and that it be dismissed. They should not be permitted to withdraw to the prejudice of the other petitioner, Curtin, trustee in bankruptcy of Tucker; but, if the respondent is right in its contention that Curtin is not a creditor, then the only petitioners with provable debts are here seeking to have the petition dismissed, and their prayer may be granted. The decision of the case turns upon the status of Curtin.

That the respondent was at one time indebted to Tucker is not disputed, but it contends that its indebtedness was settled by a

promissory note given to Tucker and now outstanding in the hands of a third person. There is controversy when this note was made. One Nolte, the treasurer of the respondent and the agent of Tucker, testified that he drew it some time before Tucker's general assignment. If this is true, the precise date of the note is not material. He testified that the note was delivered at Tucker's office into the hands of Tucker's agent, and was retained for an appreciable time by the agent. Beyond a certain vagueness in his testimony, there is nothing to impeach it. The petitioner Curtin, however, contended that the note was not properly indorsed to Tucker. It was signed by "The Quincy Granite Quarries Company, by Geo. H. Nolte, Treasurer," drawn to the order of "Geo. H. Nolte, Treasurer," and indorsed by "The Quincy Granite Quarries Company, by Geo. H. Nolte, Treasurer." While this might not have been a proper indorsement at common law, it appears to be good under Rev. Laws Mass. c. 73, § 59. That the note was given in payment is established, unless I am to disbelieve Nolte's testimony altogether in the absence of evidence to impeach it.

The title to this note is in controversy between Curtin and Cole. If the title is in Curtin, then he may by amendment to the petition in bankruptcy state his debt as a debt on a note, instead of for moneys advanced and loaned as now alleged in his petition. If the title is in Cole, the petition should be dismissed. As this question is in litigation in the state courts, action upon the petition in bankruptcy must be deferred until a decision has there been reached.

MITCHELL v. MITCHELL.

(District Court, E. D. North Carolina. September 7, 1906.)

1. BANKRUPTCY—SUIT BY TRUSTEE—JURISDICTION OF COURT OF BANKRUPTCY.

Where a trustee in bankruptcy has instituted a suit in equity in the District Court to set aside an alleged fraudulent conveyance, and the defendant has answered and submitted his claims to the court or master without objection, he cannot thereafter object to the jurisdiction on the ground that the bill does not state a case in equity.

2. SAME—VALIDITY OF MORTGAGE—CLAIM OF EXEMPTIONS.

The personal property exemptions given to a debtor by the laws of North Carolina are for his own benefit and can only be claimed by him personally; a mortgagee of a bankrupt cannot set up the latter's right of exemptions in the mortgaged property to validate his mortgage against the charge that it constituted a fraudulent transfer under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

3. SAME—FRAUDULENT MORTGAGE.

Where a chattel mortgage on a stock of goods was not recorded for several months after its execution nor until less than four months prior to the bankruptcy of the mortgagors, who in the meantime were permitted to remain in possession of the property, and to sell the same in the usual course of business and replenish the stock, such mortgage is fraudulent and void as against the bankrupt's creditors, both prior and subsequent.

4. SAME—SUIT BY TRUSTEE TO RECOVER PROPERTY.

Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] vests a trustee in bankruptcy with title to property fraudulently transferred by the bankrupt within four months prior to the bank-

ruptcy, and he may maintain a suit to recover possession of the same regardless of whether or not there are judgment creditors who could have maintained a creditor's bill.

In Equity. On exceptions to master's report.

J. B. Martin, Day & Bell, and Murray Allen, for complainant.
Pou & Fuller and Francis D. Winston, for defendant.

PURNELL, District Judge. The above-entitled suit in equity was instituted in the District Court and after answer to the bill, replication, reference to a referee and various orders, appears to have been by consent referred to a master. Said order of reference is missing from the files.

This is one of the class of cases, out of the general rule, where consent confers jurisdiction under the statute. *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. And jurisdiction thus acquired is retained to the end of the controversy. And questions touching the jurisdiction seem to have been ignored, and the controversy submitted to the master and court until the filing of defendant's brief when the point is made that the action should have been at law, not in equity. This point was not pressed, and if it had been the court is of the opinion there is sufficient equity to sustain the jurisdiction. The District Court, strictly speaking, has no equity jurisdiction except such as is conferred by the bankrupt act. This is in a great measure inferential to be gathered from the act. But even this question is raised too late and complainant having invoked the jurisdiction of the court, and defendant submitted his claims to such jurisdiction, the court will dispose of the cause on the record. Section 67e of Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] and the amendment of Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 691], seems to confer jurisdiction on the court of bankruptcy, which under the act is the District Court.

The master reports as follows:

"The counsel for the respective parties agreed upon a partial statement of facts as follows:

"On February 23, 1904, a petition in bankruptcy was filed against I. J. Baker and J. A. Hollowell, trading as Hollowell & Baker, and they were duly adjudged bankrupts on March 8, 1904. On August 3, 1903, a mortgage on the stock of goods of Baker & Hollowell was given to C. W. Mitchell to secure three notes aggregating \$1,000, dated August 3rd, and due on November 1, 90 days from date, and four months from date respectively. This mortgage was not registered until November 5, 1903, less than four months before the petition in bankruptcy was filed. From the time of the execution of the mortgage and until the filing of the petition in bankruptcy, the mortgagors, Baker & Hollowell, remained in possession of the stock of goods, continuing the business, and disposing of and adding to the stock. On February 15, 1904, Baker & Hollowell made a general assignment, making C. W. Mitchell, the defendant, preferred creditor. On February 25, 1904, the defendant, C. W. Mitchell, sued Baker & Hollowell and Geo. W. Lassiter, trustee under the general assignment, for the possession of the goods, in the superior court of Bertie county. In this action no answer was filed and no defense made, and C. W. Mitchell was adjudged to be the owner of the stock of goods and entitled to possession thereof by virtue of the mortgage held by him. This action is to set aside the mortgage of Baker & Hollowell to C. W. Mitchell and put the trustee, J. R. Mitchell, in possession of the stock of goods or the value thereof."

In addition to the foregoing, the master finds as follows:

"That the mortgage in question (a copy of which is included in the examination of the defendant, which examination is made a part of this report) was executed in good faith and for a present consideration, to wit, money advanced to enable the said bankrupt firm to pay its bills. There is no evidence from which the master can find that the said firm was at that time insolvent within the meaning of the bankrupt act of July 1, 1898, c. 541, section 1, subd. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]. The mortgage was not registered until November 5, 1903, about three months before the filing of the petition herein. It does not appear that at the time of the registration the defendant mortgagee knew of the insolvency of the said firm, though it was in fact insolvent. The master finds, however, from all the circumstances, that the defendant at that time had reason to believe and did believe that the said firm was embarrassed, but that in registering the mortgage there was no purpose to acquire a preference, the purpose being to perfect his lien under the said mortgage. It appears to the satisfaction of the master that the sale of the goods was fairly conducted, after having been duly advertised, and in the absence of testimony to the contrary, the price, \$1,500, was reasonable.

"It is further found that C. W. Mitchell, the defendant, disclaimed taking under the deed of assignment, but his debt was inserted therein with the knowledge and consent of his attorney, he having instructed the said attorney to represent him in the matter. No personal property exemption has ever been assigned, nor does it appear that the members of the firm have consented that it shall be laid off to them as individuals, either for themselves or the benefit of the mortgagee.

"The assets, as appears in the schedule, exclusive of the stock of goods, is \$104.00 in chattel property, \$225.00 in open accounts, and an insurance policy of \$1,000 on the life of I. J. Baker, a member of said firm. Exclusive of the mortgage to defendant Mitchell (upon which no payments have been made, there being now due \$1,000, and interest; and exclusive of a mortgage made to Mrs. Baker during the same year of 1903, there being due upon it \$600), the said firm, according to the schedule, contracted an indebtedness during the year 1903 of \$3,242.76, the same being for goods and merchandise. It does not appear that any of these creditors had notice of the mortgage. Of these debts the sum of \$771.47 was contracted between August 3, 1903, the date of the execution of the mortgage, and November 5, 1903, the date of its registration. They are as follows:

"H. B. Goodrich.....	\$ 96 79
"The Lowey Drug Store.....	27 15
"E. A. Davis & Son.....	14 62
"H. S. Nichols & Co.....	24 45
"Watkins, Cattrell & Co.....	9 70
"J. E. Hurst & Co.....	598 76

"Conclusions of Law.

"(1) The Master is of the opinion and so finds, that the taking and registering of the mortgage under the circumstances do not constitute a preference under the bankrupt act.

"(2) That the mortgage to the defendant is good and valid except as to those creditors whose debts were contracted between the execution and registration of the same, and as to these it is, as a matter of law, fraudulent and void.

"(3) That the proceedings ending in a judgment by the superior court of Bertie county for the possession of the goods is not *res judicata* so far as this action is concerned.

"(4) The master recommends that judgment be entered in favor of the plaintiff for the benefit of said creditors in the sum of \$771.47 and the costs of this action."

To this report all parties file exceptions. Complainant's first exception is to the finding of the master that there has been no consenting or demand for personal property exemptions for the bank-

rupts and refers to the answer. The personal property exemptions provided for by the Constitution of North Carolina, art. 10, § 1, is personal for the debtor, not for the benefit of creditors, and can only be demanded, and selected by him. The provision of the Constitution is well understood as construed by the Supreme Court of the state. If construed as contended for, to give a creditor a preference under the bankrupt law, it would be in contravention of that act of Congress and void. Certainly it cannot be given this effect by the courts of the United States administering the bankrupt act. It would be giving a preference which is prohibited. Homestead and personal property exemptions are intended for the debtor and his family (In re Richardson, 104 Fed. 873, 44 C. C. A. 235), not for creditors. This exception is overruled. The argument of defendant is based on a misconception of the purposes and intent of exemption laws. The true intent is that where a man is overtaken by misfortune or his financial ventures prove out disastrous he shall be allowed from the wreck a pittance for the purpose of keeping himself and family from actual want. Such laws are based on this beneficent idea, not to aid or benefit shrewd, unmerciful, grasping creditors, whose principal study is to aid such in evasions of the true intent of the law, to avail themselves of "short cuts." Here the personal property exemption is claimed by the mortgagee whose mortgage was secreted and recorded as found by the master. This article of the Constitution contemplates, as often held, that the personal property exemption shall be laid off and set aside out of property then owned by the debtor. The master, himself, for many years chief justice of the Supreme Court of the state, probably had in mind all the opinions on this article of the Constitution construing the same and properly held there had been no proper demand for a personal property exemption. Such reservation in a deed of trust or mortgage would furnish conclusive evidence of fraud. *Boone v. Hardie*, 87 N. C. 72.

Defendant further excepts to the finding of fact in section 4 and insists that it was the duty of those creditors to show they had no notice of the mortgage—they are seeking to recover on the ground they had no actual notice. There seems to be no pretense that plaintiff had actual notice of the mortgage and there was no legal notice or notices in contemplation of law until the mortgage was registered, three months after its execution and within a short time—less than four months of the adjudication. The intent of the parties can best be arrived at from the mortgage itself, which is filed as an exhibit. Except for sinister purposes it is difficult to imagine why a party holding a mortgage on a stock of merchandise when the statute provides for its registration, should wish to secrete the mortgage, carry it in his pocket, instead of putting it on record, thus giving notice to the commercial world of the financial condition of the mortgagor. The well-earned character of the state of North Carolina and of its native population for honesty, favoring a square deal, is in keeping with the law as decided by the state Supreme Court in *Cheatham v. Hawkins*, 76 N. C. 335, that such

dealings constitute fraud and render such mortgage void, especially as decided by the master as to creditors who sold the mortgagors goods subsequent to the execution of the mortgage.

There is some diversity of opinion as to what law will be followed by the bankrupt courts in determining the validity of a chattel mortgage, some courts holding that the law of the state in which the transaction occurred will be followed (*In re First National Bank* [6th Circuit] 135 Fed. 62, 67 C. C. A. 536). In this case the court holds if the mortgage is made in good faith, it is a good security under the Ohio law from the time the mortgagee takes possession and before such actual possession is taken it is void as a matter of law as to purchasers and creditors of the mortgagors. *Dugan v. Beckett*, 129 Fed. 56, 63 C. C. A. 498; *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171. Others hold it is a doctrine of general jurisprudence not depending for its support upon any provision of the state law, and not binding on the bankrupt courts or the United States courts upon such questions. *Crooks v. Stuart* (C. C.) 7 Fed. 800; *In re Hull* (D. C.) 115 Fed. 858; *Robinson v. Elliott*, 89 U. S. 526, 22 L. Ed. 758, which holds that a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, and to use the money thus obtained to replenish his stock, is invalid, and the court can, as a matter of law, pronounce it void. The discussion as to which law governs is therefore merely academical, as both the state and United States court holds the same doctrine. In the case at bar, the mortgage does not contain such a provision in express terms, but the intention is plain, and the answer admits, and the master finds as a fact, that the intention was carried into effect. What was done was intended and what was intended was done. In defendant's answer it is admitted that "it is true the said firm remained in possession of the said stock, and sold and disposed of some of it, and replenished some of it," but they did so without authority of this defendant except such as arose from the relationship between them of debtor in possession of property under mortgage.

The courts of the state have not gone as far as the Supreme Court of the United States in declaring such mortgage void as a matter of law; they have held that where a mortgagor is allowed to remain in possession with power to sell, the mortgage is presumptively fraudulent, and unless this presumption is rebutted by evidence the mortgage is fraudulent in law. *Cheatham v. Hawkins*, 76 N. C. 335; *Id.*, 80 N. C. 161; *Boone v. Hardie*, 83 N. C. 470; *Id.*, 87 N. C. 72.

The reasoning in the first case cited seems to be conclusive. The opinion was written by one of the most clear-headed justices ever on the state supreme bench. True, there have been some modifications of the doctrine in *Cheatham v. Hawkins*, but in equity and courts controlled by equitable principles such mortgages should be declared void, especially when kept secret and not recorded as provided by statute they shall be. The inference of fraud arising in such case is not rebutted by proof that the debt secured is a bona fide debt, and that

the insolvency of the mortgagor was unknown at the time of the execution of the mortgage. *Holmes v. Marshall*, 78 N. C. 262.

Nor can it be rebutted by evidence of the parties that the deed was made in good faith, and not to defraud creditors. *Cowan v. Phillips*, 119 N. C. 26, 25 S. E. 711.

Another fact which tends to show that this mortgage is fraudulent is the failure on the part of C. W. Mitchell to have it recorded until a short while before the petition in bankruptcy was filed and some time after its execution.

The fact that a mortgage is withheld from record and finally recorded just before the mortgagor makes a general assignment for the benefit of creditors, is a circumstance to be considered with other circumstances, as indicating fraud. *Jones on Chattel Mortgages*, § 337.

The withholding of a mortgage from record is a matter open to explanation. But, if it appears that the mortgage was withheld from record in order to enable the mortgagor to remain in possession of a stock of goods, and to deal with it as his own and thereby aid him in making purchases of new goods on a false credit, the mortgagee will be estopped as against parties so misled from asserting the existence of a lien under his mortgage. *Jones on Chattel Mortgages*, § 337; *Lyon v. Savings Bank (C. C.)* 29 Fed. 566, 577.

The use of the word "reserve" in the last section, wherein the mortgagors "reserve all right, title, and interest in the property mortgaged until the debt is paid" would constitute another badge or evidence of fraud, and render the mortgage invalid.

A trustee in bankruptcy may avoid a mortgage fraudulent under a bankrupt law. The title attempted to be passed by such mortgage vests in such trustee. He stands in the shoes of the bankrupt, but represents the creditors, and is entitled to possession, and may bring an action to enforce his right of possession. He can maintain any action either could maintain. Such an action is not analagous to a creditor's bill, and it is no objection to it that the claims against the bankrupt are not in judgment. The title is vested in him by operation of law.

The bankrupt law instead of vesting in the trustee the remedies of the creditors against the property judgment, execution, and creditor's bills, vests in him at once the title to the property—makes him the owner.

It is argued that the mortgage in controversy being good as between the parties is also good as between the mortgagees and trustee in bankruptcy of the mortgagor; but the rule is well settled that the trustee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of creditors. It is so provided in the statute. The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had no proceedings in bankruptcy been instituted.

In *re Garcewich*, 115 Fed. 87, 53 C. C. A. 510, is in many respects on all fours with the case at bar. Judge Wallace, in delivering the opinion of the Circuit Court of Appeals, Second Circuit, quotes the decision of the lower court, the language of the referee, as follows:

"I understand that a trustee in bankruptcy can maintain an action to set aside a fraudulent transfer of property whether a judgment has been previously recovered by a creditor or not."

The opinion of the Court, delivered by Judge Wallace, affirms this view of the referee. This was an action to recover certain property sold the bankrupt upon credit and upon the understanding that the title to such of them as should not be sold by the bankrupt should remain in the vendor until paid for. The learned Judge uses this language:

"Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee that the mortgagor may sell his chattels in his business and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely the expression of a confidence by the mortgagee in the mortgagor; and, if made, but not expressed in the instrument, is equally vicious if not more suggestive of a fraudulent purpose. We think that the court below erred in viewing the case as one in which there had been a valid conditional sale good as against creditors. If the sale had been of that character, we think the decision would have been correct, but, being a fraudulent one, it was void as to the trustee."

This is in accord with the provisions of section 67 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], which vests in the trustee authority to recover the property of the bankrupt conveyed or otherwise transferred by him in fraud of his creditors.

The Supreme Court of the United States says in *Glenney v. Langdon*, 98 U. S. 20, 25 L. Ed. 43: "Creditors of a bankrupt can have no remedy which will reach property fraudulently conveyed, except through the assignee, in whom such property thus fraudulently conveyed vests, and who may recover the same."

On the hearing, much stress was laid on the decision of this court in *Re Lillington Lumber Company* (D. C.) 132 Fed. 886, but the facts in that case were entirely different from the case at bar. The syllabus indicates this. "A lien otherwise valid, which is required to be registered within 12 months is valid and will be protected if recorded within that time, although after the bankruptcy of the debtor." This was following the state statute and there was no question of fraud, actual, legal, or equitable—a naked question of law. All the decisions on this question of liens by mortgage are, as the Texas case, cited from (*In re Clifford* [D. C.] 136 Fed. 475) based upon state laws, good faith, fair dealing, and an absence of fraud. From whatever standpoint the mortgage under consideration is viewed, actual, legal, or equitable, it is fraudulent, not only as to subsequent creditors as decided by the master but as to all creditors and should have been so held by the master.

It is therefore, considered and adjudged that the master be and is hereby affirmed in his holding, that the mortgage is fraudulent and void as to subsequent creditors, and it is considered and adjudged said mortgage is, for the reasons hereinbefore stated, fraudulent and void as to all creditors.

All other exceptions to the master's report are overruled and said report both as to findings of fact and conclusions of law is affirmed, and judgment will be entered for the amount claimed in the declaration and for the costs of this suit to be taxed by the clerk of this court.

POURIER et al. v. McKINZIE et al.

(Circuit Court, D. Montana. June 11, 1906.)

1. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT TO DETERMINE INTEREST IN ESTATE.

A federal court has jurisdiction of a suit by citizens of other states to determine and award their shares in the estate of a decedent where none of the property has passed into the hands of an administrator, or otherwise into the possession of a state court, but it is in part held by a receiver of the federal court and in part by the surviving partner of the decedent as a trustee of his interest.

2. MARRIAGE—PROOF TO ESTABLISH.

A marriage between a white man and an Indian woman prior to 1868 held sufficiently established by proof of cohabitation, admissions, and reputation, together with the presumptions arising therefrom in favor of the legitimacy of a child of the parties, under Civ. Code Mont. §§ 280, 282, the parents being dead.

3. DESCENT AND DISTRIBUTION—HEIRS—CHILD OF WHITE MAN AND INDIAN WOMAN.

A child of the marriage of an Indian woman and a white man, who was a citizen of the United States, inherits from the father under the laws of the state.

4. COURTS—JURISDICTION OF FEDERAL COURT—DISTRIBUTION OF DECEDENT'S ESTATE.

Where the right as sole heir to all of the property of a decedent has been established in a suit in a federal court, and the property consists of money which is all within the control of the court, never having passed into possession of an administrator, the court may direct its payment directly to such heir.

[Ed. Note.—Probate jurisdiction of federal courts, see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.]

At Law.

This action is brought by Josephine Pourier and Peter Richard, citizens of South Dakota, against William S. McKinzie and Nelson Story, Jr., citizens of Montana, to recover certain moneys claimed to be due the complainants on account of certain judgments obtained against the government of the United States, part of which judgments were paid to the defendant McKinzie. It is alleged that the complainants are brother and sister, and heirs at law of John Richard, deceased; that a partnership existed between McKinzie and John Richard, deceased, and that certain judgments were obtained against the United States by that partnership, and that McKinzie, surviving partner, collected \$1,324 on one of the judgments; and that there are other judgments in favor of the partnership for sums in excess of \$7,500. The district court of the state of Montana, in and for Gallatin county, appointed Nelson Story, Jr., administrator of the estate of John Richard, deceased, and it is alleged that the action of the state court was without authority. McKinzie's answer denies that the complainants are the heirs at law of John Richard, deceased, and alleges that he left two children, Alvin and Millie Richard. McKinzie filed no cross-bill.

Certain proceedings were had in the federal court, whereby it appeared that Millie Richard Luhan, a citizen of South Dakota, was a daughter of the de-

ceased, John Richard, and the court made an order that she be made a party to the litigation. Thereafter she filed an answer admitting the death of John Richard, and denying that the heirs of the said John Richard are his brothers and sisters and the children of the deceased brothers and sisters of John Richard, deceased, and alleging that John Richard left surviving him Alvin Richard, his son, and Millie Richard Luhan, his daughter, and that Alvin had left home and had not been heard from for more than seven years. She denied that the complainants are entitled to any part of the money. Millie Richard Luhan filed a cross-bill, in which she alleged that during the year 1863 a partnership existed between the defendant McKinzie and John Richard, and that the claims they had against the government of the United States were allowed, and judgments obtained thereon. She alleged that John Richard died intestate in the year 1882, and, further, she alleged that the defendant McKinzie caused proceedings to be commenced in the district court of Gallatin county to procure the appointment of Nelson Story, Jr., defendant, as the administrator of the estate of John Richard, deceased, and that at the time of his appointment there was no property belonging to the estate of John Richard within the state of Montana. McKinzie filed an answer to the cross-bill, in which he admitted the relationship of Millie Richard Luhan, and set up certain claims against John Richard, deceased. Testimony was taken before a referee, and partly in open court. The material questions presented are: (1) Did the district court of Gallatin county, in and for the state of Montana, have jurisdiction of the estate of John Richard? (2) Does the evidence show that Millie Richard Luhan was the daughter of John Richard, deceased? (3) What claims, if any, is McKinzie entitled to have allowed? Complainants prayed for an injunction, and accounting and distribution.

J. A. George, W. H. Robeson, and T. J. Porter, for complainants.

H. N. Blake and Hartman & Hartman, for defendants Nelson Story, Jr., and William S. McKinzie.

Walsh & Newman and J. H. Burns, for defendant Millie Richard Luhan.

HUNT, District Judge. 1. As to jurisdiction. The administrators never have actually had any property belonging to decedent in their hands. The surviving partner has received part of the moneys involved in this action, and a receiver duly appointed by this court holds another part. No judgment directing payment of any assets to heirs or others ever has been made by any court of the state of Montana. There is as yet no custody of any property by the district court of Gallatin county, and no officer of such court has ever had or now has actual possession of any property belonging to the decedent. Millie Richard, as well as complainants, citizens of other states, may apply to the federal courts to determine and enforce rights against the surviving partner, who has moneys in his hands in which decedent had an interest. The case is not one where the administration of the estate is sought to be taken out of the courts of a state, but is to establish and enforce, in behalf of citizens of other states, claims to shares owned by a decedent in partnership property lawfully in the possession of a surviving partner and a receiver of the court. Section 2734, Code Civ. Proc. Mont.

By the decision in *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, a circuit court of the United States may entertain jurisdiction in favor of citizens of other states to determine and award their shares in an estate, where the debts of the estate have been paid, and the estate is ready for distribution, where no adjudication has

been made by the courts of the state. If jurisdiction is properly exercised in such a case, clearly the federal courts will retain it, where the property has not even lawfully passed to the custody of an administrator, but is properly in the possession of a receiver and a surviving partner, as a trustee of the interest of a deceased partner. *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; *Martin v. Fort*, 83 Fed. 19, 27 C. C. A. 428; *Brendel v. Charch* (C. C.) 82 Fed. 262; *Comstock v. Herron et al.*, 55 Fed. 803, 5 C. C. A. 266; *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279; *Hale v. Tyler* (C. C.) 115 Fed. 833; *Waterworks Company v. Owensboro*, 200 U. S. 38, 26 Sup. Ct. 249, 50 L. Ed. 361.

2. Upon the merits. The evidence preponderates in favor of the conclusion of marriage between John Richard, a white man, and Louisa, an Indian woman, mother of defendant Millie Richard Luhan. I find that prior to 1868 they lived together several years in Bozeman, and were there known as man and wife; that they lived together there as man and wife in 1868, before the family moved to Ft. C. F. Smith, and that they lived together after the arrival of the family at Ft. Smith. The family moved to Ft. Smith in the very early spring of 1868, probably in February. Millie was born in December, 1868. Her father undoubtedly quarreled with her mother just before Millie was born, but there is ample evidence of his having recognized the child Millie as his daughter, and of his having often spoken of Millie's mother as his wife. The witness McKinzie says they were married by a justice of the peace in Madison county, Mont. But if he is mistaken in respect to that, still the legitimacy of Millie is established by the weight of the evidence, especially when considered with relation to the presumptions in favor of marriage, where cohabitation, admissions, and reputation are shown. Civ. Code Mont. §§ 280, 282. Let it be granted that the proof of marriage is not as strong as it might be, when we consider the conditions that often existed in the early days of the territory, when men not infrequently cohabited with Indian women without intent to contract a relationship of husband and wife; but even so, it is far stronger that there was marriage than that the relationship was meretricious.

3. As to heirship. Millie Richard Luhan is the only heir, her brother being presumed to be dead. John Richard, Millie's father, is proven to have been a citizen of the United States, and she is entitled to inherit. *Richardville v. Thorp* (C. C.) 28 Fed. 52; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. Rights of inheritance from Indians, members of a tribe, whose tribal organizations are still recognized by the government of the United States, are controlled by the laws, usages, and customs of the tribes, if there are any such laws, usages, and customs upon the matter, and not by the law of the state. But in this case there is no suggestion that the common law of any Indian tribe should obtain, or, if it could, that it would affect Millie's rights to half the property belonging to the firm of McKinzie & Richard.

4. As to an agreement between Pourier and McKinzie. There is a flat contradiction in the testimony as to the existence of this agreement, but, under my view of it, it is wholly immaterial whether an agreement was or was not made, for under no circumstances could it affect the rights of the only legal heir, Millie; nor could any such agreement prevent the courts from proceeding to adjudicate the rights of the respective parties.

5. McKinzie's claims. McKinzie, as surviving partner of the firm of McKinzie & Richard, is entitled to one-half of the amounts recovered upon the judgments obtained against the United States. But I hold that he is not entitled to affirmative relief by way of allowance of the personal claim for \$1,320 he makes for wagons and other things claimed to have been sold to Richard in 1871. The claim is a stale one, not supported by satisfactory proof, and should not be allowed. McKinzie's claims for reimbursement and services rendered in and about the collecting of evidence to sustain the claim of the firm are, however, upon a different footing, and are valid, if substantiated by evidence of their reasonableness. Further evidence as to the items may be heard before final decree is signed in the case.

There is no reason why the decree of this court shall not provide for a direct payment by the receiver of the moneys in his hands to those entitled to take, namely, Millie Richard Luhan and McKinzie. It can likewise be decreed that McKinzie, as surviving partner, shall make direct payment of half of the sum he holds to Millie Richard Luhan, taking her receipt therefor. After McKinzie, as surviving partner, shall have paid to Millie Richard Luhan half of the moneys he may hold, less, of course, her share of such expenses and costs as the decree of this court may find to be lawfully taxed against the sums held by McKinzie, he can then account to the administrator of the estate, setting forth the decree of this court, and his acts duly had thereunder. There is no necessity of payment to Millie Richard Luhan through an administrator. It would be a needless form, only decreasing the value of her share by fees, which can well be avoided. Let a decree be submitted conforming to this opinion.

BRENNAN v. PETER HAGAN & CO.

(District Court, E. D. Pennsylvania. September 12, 1906.)

No. 12.

1. ADMIRALTY—AMENDMENT OF ANSWER.

Amendment of an answer in admiralty will not be allowed after the evidence has been taken, to permit the setting up of a new defense, where the facts must have been known to respondent when the original answer was filed.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 530, 531.]

2. SHIPPING—MASTER OF BARGE—SUIT FOR WAGES—NEGLECT OF DUTY.

Evidence considered and *held* to sustain the claim of a libellant for wages as master of a barge, and to entitle him to recover the same, less a reduction on account of damages sustained by the owner on one occasion because of his neglect of duty.

In Admiralty. Suit for wages.

J. Warren Coulston and Adolph Schewe, for libellant.
John A. Toomey, for respondent.

J. B. McPHERSON, District Judge. The libellant was the master of the respondent's barge H. J. McDermott from March 30, 1904, to March 30, 1905. He claims to recover in this suit wages at the rate of \$75 per month, and \$129.37, money advanced by him for loading the barge and for supplies, a total of \$1,029.37, from which he admits that a deduction of \$776.21 is to be made, leaving a net balance of \$253.16. The libel was filed on April 27, 1905, and on May 16th the following defense was made by the answer:

"First. That in the month of March, 1904, libellant was employed by respondents as master of the barge H. J. McDermott for which he was to receive \$75 per month, with the understanding and agreement that libellant was to employ a hand, which was necessary in order to assist him in managing and navigating said barge, and that libellant was to pay and feed said hand out of the said sum of \$75 per month.

Second. It is not true, as alleged in the second paragraph of said libel, that respondents are indebted to libellant in the sum of \$253.16, or in any other sum of money, as will hereafter appear.

Third. It is not true as alleged in the third paragraph of said libel that: Libellant well and truly performed his duties as said master and is entitled to receive from respondents the balance of his alleged wages and advances made by him. On the contrary the libellant failed and neglected to employ a hand on said barge during six months of the time for which wages are claimed, and also was intoxicated and abandoned the barge for days at a time. That in the month of January, 1905, the libellant, after bringing the barge into the port of Baltimore in a sunken and damaged condition, abandoned her for five days, in consequence of which respondents were obliged to send a man from Philadelphia to attend to the barge and look after her affairs at a cost of about \$50. That on another trip the said barge was damaged and injured while libellant was on board without a hand to assist him. That libellant failed to employ and feed a hand on the barge as aforesaid, in order that he might appropriate to himself the whole of the said sum of \$75 which he had no right to do. That the customary pay of the master of a barge such as the H. J. McDermott is \$40 per month, out of which he must supply his own provisions. That the sum of \$40 per month was ample pay for the services of libellant, had he even properly performed his duties as master of the barge. That after deducting the said sum of about \$50 for sending a man to Baltimore as aforesaid, and also deducting \$35 per month for six months, \$210, while libellant was without a hand on the barge, making \$260 in all, respondents are not indebted to libellant in any sum whatever."

On January 26, 1906, the respondents gave notice that they would ask leave to amend the answer so as to set up a contract for wages at \$70 per month, instead of \$75, and also to set up an additional defense growing out of a general average loss, sustained by them, said to be due to the negligence of the libellant. No application to amend, however, was made until the case came on for argument, and the allowance of the amendment at that time was resisted as being too late. I think the objection is sound, and that leave to amend must be refused. At the time when the answer was filed, the respondents must have had knowledge of the facts relied upon in the proposed amendment—although the amount of the average loss

was not adjusted until July—and should have made their complete defense at an earlier stage of the cause.

Confining the issue, therefore, to the libel and answer I find the important facts to be these:

1. The rate of wages to be paid the libelant was \$75 per month. Out of this sum he was to furnish the food, and pay the wages of another man. He carried out this agreement, except during the last two or three months, when the respondents consented that the additional hand should be dispensed with.

2. There is no satisfactory testimony that the libelant neglected his duties by reason of intoxication, except in January, 1905, after the barge reached Baltimore in a damaged and sinking condition. It is clear from his own evasive testimony, and from the testimony of William Hagan, that he was drunk upon that occasion for several days, and undoubtedly his condition required the respondents to send a man to Baltimore to look after the barge, and have her raised and repaired.

3. The injury to the barge just referred to was caused by ice in the Chesapeake Bay, and not to the libelant's failure to take proper care of the vessel. The voyage began at West Point, Va., and before leaving that port he fastened sheathing on the bow and on both sides of the barge forward; but the ice was so heavy that the sheathing was torn off and so much injury was done that it became necessary to put into Baltimore instead of proceeding to Wilmington, Del., the port of destination. The respondents deny that the vessel was sheathed, but they failed to offer satisfactory testimony on this point; and especially they failed to call any person who was on the tug that towed the barge from West Point, and would therefore have been able to offer evidence at first hand on this subject. The respondents' servant who was sent to Baltimore merely testified that, so far as he could observe, the barge showed no sign of having been sheathed, but I do not think this ought to avail against the libelant's positive averment to the contrary, taken in connection with the fact that the respondent called no one from the tug.

4. The averment "that on another trip the said barge was damaged and injured while libelant was on board without a hand to assist him," was not supported by any competent testimony.

No other defense is set up by the answer, and none will be considered. Other disputes may be gathered from the testimony of both parties—much of it is pure hearsay, and much is so vague as not to be worth noticing—but I see no reason for going out of my way to discuss controversies that are not properly raised by the record. I conclude, therefore, that the libelant is entitled to the amount claimed—no item of which has been specifically objected to, except the rate of his monthly wage—less a reasonable allowance for the expense to which his intoxication and neglect of duty in Baltimore compelled the respondents to submit. On this account I

think \$40 should be allowed, thus reducing the libellant's claim to \$213.16.

For this sum, with interest from March 30, 1905, a decree may be entered with costs.

THE POTOMAC.

THE MASCOT.

(District Court, E. D. Pennsylvania. July 23, 1906.)

No. 76.

TOWAGE—INJURY TO TOW BY STRIKING JETTY—NEGLIGENT NAVIGATION BY TUG.

A tug in charge of an experienced master *held* in fault for an injury to a barge in tow by collision with a stone jetty at the mouth of a creek which the tug and tow were entering across a strong flood tide, because of the failure of the master to make sufficient allowance for the effect of the tide which swung the tow against the jetty, although there was a clear channel of 150 feet at the entrance.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 11-23.]

In Admiralty. Suit against tug for injury of tow.

Francis S. Laws and John F. Lewis, for libellant.

Willard M. Harris, for respondent.

HOLLAND, District Judge. This is an action in rem, brought by the Southern Transportation Company, owner of the lumber barge Potomac, against the steam tug Mascot, to recover damages for injury to the starboard side of the barge, as a result of a collision with the stone jetty, at the mouth of Christiana creek, on the night of November 7, 1904, while in tow of the Mascot. The barge, loaded with pulp wood, was taken in tow by the tug on a hawser about 150 feet long, at Delaware City, between 6 and 7 o'clock p. m., bound for Wilmington. The barge is a wooden vessel about 140 feet long, 23 feet beam, and at this time was drawing eight feet forward and eight feet six inches aft. The barge was properly manned, and all went well until the tug, with her tow, attempted to enter the mouth of Christiana creek. Prior to entering the creek, at a point about one-half mile below, the tug shortened the long hawser to about 50 feet, and put out another of the same length, so that two hawsers of 50 feet each from the stern of the tug were fastened to the barge, one to the port and the other to the starboard bitt. A strong flood tide was running and the hawser was shortened and the additional one put out for the purpose of better enabling the tug to control the action of the barge in entering the mouth of the creek on the flood tide. Christiana river is entered through a channel between two long stone jetties which extend from the shore, one north and the other south. The distance between the points of the north and south jetty is not accurately given, but it appears that the channel at the entrance lies along the northern jetty, which is about 150 feet wide at its mouth, and from its southern side there are mud flats from 150 to 200 feet wide to the point of the southern jetty, and

these mud flats at flood time prevent a nearer approach to the southern jetty than within about 150 feet. So that, in entering Christiana creek, the tug, with its tow, had a channel of the width of about 150 feet in which to accomplish the feat of towing its barge in by the northern jetty at the end of two hawsers each 50 feet.

There is some controversy as to whether or not the barge was given to unexplained sheering and swerving from her course, but the weight of the evidence establishes that the tow was a good steering barge, and had followed the course of the tug from the time it had been taken in tow until it arrived at the point where the injury occurred. It is established by the evidence that the proper way to enter the creek between these two jetties is to gradually bear in close as possible to the southern side of the entrance, so as to keep the tide, as it flows into the creek, as much upon the stern of the barge as possible, which course is intended and would allow for the tendency of the tide to sweep the barge in a northerly direction toward the jetty, and it is very evident that if the tug upon this occasion, having a width of 150 feet, would have kept well down to the south side of the entrance it would have been impossible for the barge to have been swept sufficiently far northward across the 150 feet channel to strike the northern jetty, because the hawsers were only 50 feet long and could not have reached that distance. So that the fact that the barge was injured on the starboard side near the stern is a circumstance corroborating the witnesses who claimed that the collision occurred because the master of the tug stood too far up the river before heading for the entrance; and, as a result, the tug and tow were cutting across a strong flood tide when they entered the creek too close to the northern jetty, and the stern of the barge was swept upon the point of the jetty, causing the damage. The tug had safely passed the danger point, and was making an effort to tow the barge by and had pulled its bow toward the south. That the tug was too far up the river, and was cutting across a strong flood tide when she headed in fully, explains the sudden sheering of the barge, and is entirely consistent with the evidence both of the libelant and respondent.

I do not find there was any fault in the steering of the barge, as the evidence shows it had followed the course of the tug to this point. The captain of the tug had an experience of a great number of years as a tugboat captain, and he in law was required to know the effect of the tide upon a tow entering Christiana creek, and the length of a hawser necessary to enable him to safely tow his charge by the jetties, and it was his duty to so arrange the tow as to enable him, under the circumstances, to conduct the barge safely through the channel. The *Margaret*, 94 U. S. 494, 24 L. Ed. 146, and cases there cited. This he failed to do, and the libelant is entitled to recover damages, with costs.

Let a decree be entered in favor of the libelant.

HORNER-GAYLORD CO. et al. v. MILLER & BENNETT et al.

(District Court, N. D. West Virginia, July 20, 1906.)

1. EQUITY—BILL—MULTIFARIOUSNESS.

In a suit for the appointment of a receiver of a bankrupt prior to adjudication for the purpose of taking possession of property alleged to have been fraudulently conveyed to various relatives of the bankrupt, the bill was not multifarious because many claimants were joined who were the various alleged fraudulent transferees of the property.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 371, 372.]

2. BANKRUPTCY—FRAUDULENT CONVEYANCES—REMEDIES OF CREDITORS—APPOINTMENT OF RECEIVER—JURISDICTION.

Bankr. Act July 1, 1898, c. 541, § 23, subd. b, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], as amended by Act Cong. Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 686], provides that suits by a trustee in bankruptcy shall only be brought or prosecuted in the courts where the bankrupt's estate is being administered by such trustee or might have been brought or prosecuted if proceedings in bankruptcy had not been instituted, unless by the consent of the proposed defendant. except suits for the recovery of property under section 60, subd. b, and section 67, subd. e, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449], which relate to preferences given by the bankrupt and conveyances made by him within four months prior to the filing of a petition with intent to defraud creditors, which are declared void; such sections being amended so as to provide that for the purpose of setting aside such preferences or conveyances any court of bankruptcy and any state court having jurisdiction shall have concurrent jurisdiction. *Held*, that a court of bankruptcy, after the filing of a petition and before adjudication, has jurisdiction of a bill by creditors for the appointment of a receiver and to vacate alleged fraudulent conveyances of the bankrupt property made within four months prior to the filing of the petition.

3. FRAUDULENT CONVEYANCES—TRANSFER TO RELATIVES.

Where certain bankrupts made transfers of their property to various of their relatives, leaving themselves without sufficient means to satisfy their creditors, the transfers were prima facie fraudulent, and the burden was on the grantees to furnish strong proof that the transfers were made in good faith.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 138, 144, 801, 810.]

4. BANKRUPTCY—RECEIVER—APPOINTMENT—INJUNCTION.

Where, after the filing of a bankruptcy petition, but before adjudication, certain creditors filed a bill to set aside alleged fraudulent transfers of the bankrupt's property to their relatives, charging that by far the largest part of the property so transferred consisted of two stocks of merchandise easily dissipated, and that the transferees were actively engaged in secreting and carrying the same away, the bill warranted the appointment of a receiver and the issuance of an injunction restraining the transferees from disposing of any of the property so transferred and requiring them to deliver the same to the receiver.

Douglass & Steptoe, Robert F. Kidd, and C. M. Bennett, for plaintiffs.

Davis & Davis, and L. H. Barnett, for defendants.

DAYTON, District Judge. On June 16, 1906, the Horner-Gaylord Company, a corporation, and others, creditors, filed their petition in involuntary bankruptcy against George Miller and Charles

Bennett, partners trading as Miller & Bennett and also as George Miller & Co., and on the same day they presented to this court their bill against said parties, Porter Bennett, Samuel Bennett, Scott Bennett, William V. Miller, Lutitia Brannon, and Pearl Bennett, in which they allege themselves to be wholesale merchants and creditors of the said partnerships of Miller & Bennett and Miller & Co., setting forth the amounts due to each of them therefrom; that said George Miller and Charles Bennett had been engaged under the firm name of Miller & Bennett in the mercantile business at Tanner in Gilmer county, W. Va. and under the firm name of George Miller & Co. about three miles in the country from Tanner; that they bought on credit and petitioners' debts had been incurred for merchandise furnished by them to said firms; that said defendants George Miller and Charles Bennett were heavily indebted otherwise and wholly insolvent; that the stock of goods carried until about June 9, 1906, by them at the Tanner store was worth about \$4,000, and at the other store about \$1,800; that George Miller, until recently, owned shares of stock in the Tanner Gas Company of the value of \$460, five shares of stock in the Glenville Banking & Trust Company, a tract of land on De Kalb run in said county, incumbered, however, with most of the purchase money unpaid, and some lumber and cross-ties cut from said land; that on June 8, 1906, said George Miller and Charles Bennett, being pressed by creditors, made a pretended sale of the Tanner stock of goods to Samuel Bennett, the father, and Scott Bennett, the brother, of said Charles Bennett, who had full knowledge of their insolvency and fraudulent purpose, and for a fictitious consideration never paid; that since that date Samuel Bennett and Scott Bennett have been in possession and have been secreting, crating, and carrying away, under cover of darkness, large quantities of said goods to get them out of the reach of the creditors of said firm of Miller & Bennett, and if suffered to remain in possession all of said stock of goods will have disappeared; that on or about June 13, 1906, the said George Miller and Charles Bennett made a pretended sale of the other stock of goods held under the firm name of George Miller & Co. to William V. Miller, the brother of George Miller; that William V. Miller had no means with which to buy, that said sale was fictitious, fraudulent, and void, and that said William V. Miller is engaged in boxing up said goods, carrying them away to the home of his mother, and there secreting them in order to get them out of the reach of creditors; that said Miller & Bennett owned a lot of timber, saw logs, and ties which they had contracted to the Little Kanawha Log & Tie Company to be delivered in the Little Kanawha river, but which they refused to deliver themselves, but made a fraudulent and fictitious transfer of to Porter Bennett, another brother of said Charles Bennett, who had sold the same to said Little Kanawha Log & Tie Company for about \$600 cash; that on the 13th of June, 1906, the said George Miller transferred to Lutitia Brannon a part of his stock in the Tanner Gas Company and on the same day conveyed the balance of said Gas Company stock held by him to Pearl Bennett; that Lutitia Brannon is the sweetheart and Pearl Bennett, the wife of Porter Bennett,

is the sister-in-law of said George Miller, and said transfers were without valid consideration, fraudulent, and void; that these alleged bankrupts have thus disposed of substantially all their assets in a very few days; and Charles Bennett has remarked to third parties that "it is a skin game and I might as well have as many of the hides as any one else." The bill then sets forth the filing of the petition in bankruptcy by the plaintiffs against said George Miller and Charles Bennett as individuals and partners, and prays that a special receiver be appointed to take possession of the stocks of goods aforesaid; that Samuel Bennett, Scott Bennett, William V. Miller, Porter Bennett, Lutitia Brannon, and Pearl Bennett be enjoined from selling or disposing of any of the property transferred to them and be required to turn such over to the special receiver; that such transfers be set aside as fraudulent and void, and all of said property be held and made liable for the debts of said George Miller and Charles Bennett, and said receiver hold the same, as well as any other property he may find of theirs, until the further order of this court. Upon the presentation of this bill on said June 16, 1906, the injunction prayed for was awarded and a special receiver appointed to take possession of said properties. Thereupon on June 25, 1906, the defendants Samuel Bennett, Scott Bennett, William V. Miller, Porter Bennett, Lutitia Brannon, and Pearl Bennett jointly served notice upon the plaintiffs that on July 3, 1906, they would move to vacate said injunction and discharge the receiver. On said 3d day of July, 1906, they did make such motion, filing, as of that day, their demurrers and answers, and the plaintiffs filed some 12 affidavits in opposition. It is not necessary to refer to these answers further than to say that they deny the fraud charged in the several transfers to them and assert the validity of such, for it is practically conceded that they, not having been filed until the very day of the motion to dissolve and discharge, can only be used, so far as such motions are concerned, in the nature of affidavits of good faith in the making thereof.

The sole questions therefore arise on demurrer, and counsel earnestly and learnedly argue that two grounds are apparent why the bill cannot be maintained: First, because it is multifarious; and, second, because this court is without jurisdiction at the suit of the plaintiffs (as creditors) to declare the several transfers fraudulent and void and grant the relief prayed for.

The first objection can be speedily disposed of. It is always to be remembered that the determination of the question of whether a bill is multifarious is one largely within the sound discretion of the court, and dependent to a very considerable degree upon the particular facts of each case. *United States v. American Bell Telephone Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729; *Brown v. Guaranty & Trust Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; *South Penn Oil Co. v. Calf Creek Oil & Gas Co.* (C. C.) 140 Fed. 516; *Shafer v. O'Brien*, 31 W. Va. 601, 8 S. E. 298.

In *Brown v. Guaranty & Trust Co.*, *supra*, it is held:

"It is not indispensable that all the parties to a suit in equity should have an interest in all the matters contained in the suit. It will be sufficient, in order to avoid the objection of multifariousness, if each party has an interest in some material matters in the suit, and they are connected with the others."

In the case here the essential basis of the suit is the right, if any exists, to subject certain property to the payment of the debts of the alleged bankrupts, as their property and not that of others. It is one subject-matter, and it is immaterial how many different claimants may arise for it as a whole or to parts of it. The several interests of each can well be determined in the one controversy.

The second objection presents a far more difficult and perplexing question. Counsel for defendants have very clearly and in apt terms expressed the contention, as follows:

"Where property of the bankrupt passed out of the possession of the bankrupt, before the adjudication of bankruptcy, and is held by a third person under an adverse claim, a court of bankruptcy will not entertain a proceeding of a summary character for the purpose of compelling the delivery of the possession of such property by such third person to the officials of the bankruptcy court. The only remedy in such cases is by a plenary suit by the trustee to determine the validity of such adverse claims, which plenary suit may be brought either in the United States District Court or in any appropriate state court."

In short it is insisted that the suit can only be brought after the adjudication in bankruptcy, which alone can give jurisdiction to the bankrupt court of the subject-matter, and by the trustee in whom the property vests and as a property right, and not by the creditors who can only have the right to share in the proceeds of such property after the trustee holding the legal title to it has sold it.

On the other hand, it is as earnestly insisted by learned counsel for plaintiffs that the District Court of the United States sitting as a court of bankruptcy has jurisdiction, upon petition of creditors ancillary to their petition in bankruptcy, to appoint receivers of the estates of bankrupts and restrain adverse claimants of the property from disposing of the same, insisting that such jurisdiction is given by clause 3 of section 2, of Act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421] which authorizes such court "to appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee qualified."

The old vexatious question involved of whether the bankruptcy court has independent jurisdiction, at the suit of the trustee in bankruptcy, to set aside fraudulent transfers of property made within four months of the bankruptcy proceeding, take possession of and sell for the benefit of the bankrupt's estate the property so transferred, should in this connection be considered. The terms of the original act of 1898, section 23, cl. b, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], provided:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee,

might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

On January 15, 1900, the District Court for the Western District of North Carolina, in the case of *Cox v. Wall* (D. C.) 99 Fed. 546, held that this clause operated as a limitation upon the jurisdiction of the Circuit Courts of the United States and did not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act, and therefore district courts in bankruptcy had such jurisdiction. This case was taken to the Circuit Court of Appeals for this circuit and is reported as *Wall v. Cox*, 41 C. C. A. 408, 101 Fed. 403, wherein the District Court is affirmed and such jurisdiction upheld. In the course of an able discussion and review of the question, Judge Waddill clearly and pointedly set forth the evils arising under the contrary theory, in these words:

"To clothe the court with power to entertain a bankruptcy petition, and discharge and relieve the bankrupt from the payment of his debts, and not confer upon it the power to make the person thus receiving an acquittance and release, and those fraudulently colluding with him, bring in and give up to the creditors interested the bankrupt's property which of right belongs to them, would be a strange anomaly. * * * To say that the United States District Court, sitting as a court of bankruptcy, with all the analogous powers and jurisdiction of a court of equity, and with jurisdiction at law and equity specially conferred upon it as ancillary and supplementary to its inherent power in an involuntary bankruptcy proceeding, can only afford the creditors the relief of making certain that the debtor is a bankrupt, and has committed acts of bankruptcy, and that, where he has fraudulently transferred his estate, although it be the act of bankruptcy set up, as in this case, that as against the alleged fraudulent transferee no relief can be afforded, but the creditors must inaugurate in the state courts wherever such transferee happens to reside litigation to secure any substantial relief, would be to impose upon them a burden that would be unreasonable in the extreme, and in many cases one that would be entirely ineffective; and, besides, it would bring about a result manifestly not contemplated by those enacting the law, the predominating feature of all bankruptcy legislation being simplicity and expedition in the collection and administration of bankrupt's estates. Bankrupts wishing to defraud their creditors, and those colluding with them, would be a bungling set of conspirators who could not elude and evade a law so handicapped by the machinery necessary to put it in motion, and the result would be that the estate, pending the many stages of litigation through which creditors would have to pass, and, indeed, in anticipation of the necessity of the various requirements, would be readily placed beyond their reach."

This question was in this case and in several others certified to the Supreme Court which, in the four cases of *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Mitchell v. McClure*, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182; *Hicks v. Knost*, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183; and *Wall v. Cox*, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845, reversed the Circuit Court of Appeals in the latter case and held that the District Court had no jurisdiction except by the consent of the proposed defendant. Doubtless, to meet the unfortunate state of affairs so clearly set forth by Judge Waddill and made apparent by these decisions, Congress, in its amendments to the bankrupt act, passed in February, 1903 (Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 686]), amended this clause b of section 23 by adding to the end

thereof the words "except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e." thereby clearly, I think, making the section limit the right of the trustee to sue in the federal courts (including, of course, the bankruptcy court) in all cases as held by the Supreme Court, except in cases for recovery of property under section 60, cl. b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], and section 67, cl. e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], where the jurisdiction of such courts, by necessary implication alone, would be established as independent and plenary. By reference to these sections we find section 60, cl. b, to relate to preferences given by the bankrupt and section 67, cl. e, to relate to all conveyances, transfers, assignments, or incumbrances of bankrupt's property or any part thereof made by him within four months prior to the filing of the petition (not the date of adjudication nor appointment of the trustee), with intent to hinder, delay, or defraud creditors, which are all declared null and void as against such creditors (the word is not trustee), and all property so transferred is to be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of creditors. And to settle the question of jurisdiction finally the amendments of 1903 (Act Feb. 5, 1903, c. 487, §§ 13, 16, 32 Stat. 799, 800 [U. S. Comp. St. Supp. 1905, pp. 689, 690]), add to both of these clauses of sections 60 and 67 these words:

"For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Thus it will be clearly seen that the jurisdiction found by the Supreme Court in the four cases referred to not to exist in the District Court as a bankruptcy court has been expressly supplied by this legislation, and it is no longer an open question that in an ancillary proceeding such court can maintain and should maintain jurisdiction to set aside fraudulent conveyances made by bankrupts within four months of the filing of petitions seeking to adjudge them as such. In other words, freely paraphrasing the language of Judge Waddill, in *Wall v. Cox*, hereinbefore quoted, we can now say that the United States District Court, sitting as a court of bankruptcy, with all the analogous powers and jurisdiction at law and equity specially conferred upon it as ancillary and supplementary to its inherent power, cannot only afford the creditors the relief of making certain that the debtor is bankrupt, has committed acts of bankruptcy, has fraudulently transferred his estate, but can also enable them to pursue such fraudulent transferees and compel them to surrender the property, which in contemplation of the law, as set forth in section 67, cl. e, is, and has been, regardless of such transfers, the assets of the bankrupt to be administered for their benefit. But is it restricted to one single method of securing control of these assets so fraudulently conveyed? Is it compelled to first adjudicate the bankruptcy, await the selection of the trustee by the creditors, and then be wholly dependent upon his convenience, if not his dictum, when and where he and he alone

as trustee shall institute a suit for the purpose of staying the hand of the fraudulent transferee in wasting and destroying the bankrupt's assets? In other words, is the creature of the court's power, the trustee, clothed with a greater power than the court, at the instance of the true parties in interest, the creditors, has itself? The mere statement of the proposition involves its absurdity. It is true that the courts in all legal proceedings will pursue orderly and fixed methods of procedure; but, so far as courts of equity are concerned, always with the express understanding that the dictates of equity and good conscience will thereby be promoted. When fixed rules of procedure do not promote, but on the contrary prevent the administration plenarily of justice and equity, such courts sweep aside such arbitrary rules of procedure without a moment's hesitation in order to do the right in the premises. It is also true that the power to interfere with the right of a man to control his own property without let or hindrance from another, until by legal proceedings such right of interference is established, should be exercised with the utmost care and caution, only under extraordinary circumstances, and then only to the extent necessary to prevent imminent and great wrong and injury. The appointment of receivers generally is a power inherent in the courts calculated to be greatly abused unless exercised with the wisest caution and forbearance.

While these things are true, it is to be remembered that all men must conform to the true principles of the law laid down by Justinian: "*honeste vivere, alterum non laedere, suum tribuere.*" While a man, by the law, under these rules is guarantied the free use and control of his property, he is not by any principle of justice or equity to be authorized to obtain by fraud the property of another and insist upon its use and control against the interests of the other. He must render to the owner his own. Nor is he authorized to combine and confederate with another to cheat and defraud the creditors of the latter by securing against their interests transfer and control of the property of the debtor to which they have right to look for the liquidation of their debts. He must live honestly and not injure another. Courts of bankruptcy have been uniformly held to be courts of equity with full equity powers within the scope of their jurisdiction, and if their jurisdiction in the premises be once established, as we have shown to be the case here, by express legislative grant, then I insist its right to do equity to all parties in interest, bankrupts, transferees, creditors alike, follows as clearly and logically as day follows the night. It becomes an inherent right, bred in the very bone and marrow of its power and duty to take jurisdiction independent of any and all express statutory provisions. But there is express provision in the bankrupt act for the exercise of this power. Jurisdiction in the court being established, as it has so clearly been, section 2 of clause 3 has full force and virtue. This section authorizes the bankrupt courts "to appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee

qualified." But it is insisted the words in this clause "the property of the bankrupt" cannot mean and cannot be extended to property which he has transferred. This is true so far as property is concerned which he has honestly and legally transferred, for the simple reason that in such case it is not "the property of the bankrupt." It is not true as to property which he has fraudulently and illegally transferred or sought to transfer, because such transfers, by clause "e" of section 67, are expressly declared null and void and the property so involved to be the property of the bankrupt.

So long as there is doubt about the integrity of the transfer, and imminent danger of the loss, waste, or dissipation of the property is not apparent, then the rule by which the court should control its action would seem clearly to be to await the regular course of procedure and allow the trustee, after his appointment, to institute suit to test the transfer's integrity. But where the facts clearly indicate a dishonest, fraudulent, and corrupt character of transfer and an imminent danger of loss and dissipation of the property, then, under authority of this express provision, it seems to me the bankrupt court would violate every principle of equity and good conscience if it did not act, and act promptly, just as courts of equity have always done in such cases for centuries. It therefore reduces itself, as is so often the case in equitable proceedings, to an appeal to the wise discretion of the court under the particular facts arising in each case.

Even before the amendment of 1903, the Supreme Court in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, decided April 15, 1901, restricted the broad construction given to their ruling in *Bardes v. Bank*, and under the particular state of facts existing in the case upheld the jurisdiction of the District Court. In the case of the *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, the proceedings in the District Court reviewed transpired before the amendment of 1903, and in consequence, the decision of the Supreme Court was based upon the original act and is not applicable to the new conditions created by the amendment. This statement is likewise true of the cases of *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Michie* (D. C.) 116 Fed. 749; *In re Baird* (D. C.) 116 Fed. 765; *Beach v. Macon Grocery Co.*, 116 Fed. 143; 53 C. C. A. 463; *In re Sheinbaum* (D. C.) 107 Fed. 247; *In re Kellogg*, 121 Fed. 336, 57 C. C. A. 547; *In re Ward* (D. C.) 104 Fed. 985—cited by learned counsel for defendants, and they are therefore no longer in point. In *Brumby v. Jones* (C. C. A.) 141 Fed. 318, also cited, the facts were so wholly different as to constitute a wholly different question. There the effort was made, by petition, to cancel the satisfaction, regularly entered of record, of a mortgage, and have the mortgage restored as a lien upon the bankrupt's property originally subject thereto, and the court very well held that no jurisdiction of such a controversy could be entertained because the mortgaged property was not in the possession of the bankrupt's trustee, was no part of the estate for distribution, and in which his general creditors had

no interest. On the other hand the cases of *In re Wiesen Bros.* (D. C.) 138 Fed. 164, and *In re Moody* (D. C.) 131 Fed. 525, and especially the case of *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, cited, the latter the only one by the Supreme Court reviewing action taken by the bankrupt court since the amendment of 1903, sustain jurisdiction and substantially uphold the views I have herein expressed.

It only remains therefore to again consider whether this court exercised a wise and cautious discretion, under the circumstances, as set forth in the bill, in awarding the injunction and appointing the receiver. In this connection it is to be noted that the Supreme Court of Appeals of West Virginia, in a long line of cases, some of which are *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892; *Reynolds' Adm'rs v. Gawthrops' Heirs*, 37 W. Va. 3, 16 S. E. 364; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; *Herzog v. Weiler*, 24 W. Va. 199; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Moore v. Gainer*, 53 W. Va. 403, 44 S. E. 458, has laid down the law to be in this state that (quoting the language of the last case):

"When a conveyance in favor of a relative leaves a man without means to satisfy his creditors, it is the basis of a strong suspicion of fraud. It is *prima facie* fraudulent, and calls upon the grantee to furnish strong proof of the bona fides of the transaction."

In other words, the conveyance or transfers made under such circumstances are presumed to be fraudulent, and the burden is not upon the creditors, but upon the grantee or transferee, to show the contrary. In this case, these insolvent partners are charged with having made five distinct transfers, within substantially one week, of practically all their property available to general creditors, to father, brothers, sister-in-law, and sweetheart of one or the other of them, apparently under the impression, if the statement as charged in the bill to have been made by Bennett was so made by him, that "it was a skin game, and he (they) might as well have as many of the hides as any one else." It is also charged that by far the largest part of the property so transferred consisted of two stocks of merchandise easily dissipated, and that the transferees thereof were actively engaged in secreting and carrying the same away. Under these circumstances, while full and fair opportunity will in course of the proceeding be given to these near relatives to uphold and make clear the good faith and integrity of these transfers, as they must first do before they can be sustained, it seems to me that it would have been nothing short of a travesty upon justice, equity, and good conscience not to have stayed their hand and taken possession of the property, the moment appealed to by creditors, and that it would be gross violation of clear duty, at this time at least, to either dissolve the injunction or discharge the receiver.

The motion to this effect will therefore be overruled.

NOTE.—Since the foregoing opinion was written, the cases of *In re Knopf* (D. C.) 144 Fed. 245, and *In re Davis Tailoring Co.* (D. C.)

144 Fed. 285, have been published. In the first named, Judge Brawley, of the District Court of South Carolina, in this circuit, has fully and ably discussed the question herein involved, and arrives at the same conclusion that I have. In the second case, on the contrary, Judge Lanning, of the District Court of New Jersey, may be said to have reached the very opposite conclusion. This conflict indicates the necessity of an authoritative decision of the point, and I express the hope that appeal herein will be taken for that purpose.

THE BUFFALO.

(District Court, W. D. New York. July 24, 1906.)

1. MASTER AND SERVANT—INJURY OF SERVANT—UNSAFE PLACE TO WORK.

Libelant, who was a longshoreman employed to work on the wharves in loading and unloading ore boats, was sent with others with a scow owned by his employers, to lighter an ore steamer which had stranded. After she had been floated, they proceeded to retransfer the ore from the scow to the steamer, using for the transfer a traveling crane upon the scow, resting on rails fastened to the gunwale on which it moved forward and backward to facilitate the swinging of the buckets to the steamer's hatchways and back. It was dark and as libelant stood up after filling a bucket on the scow he was struck by the crane from behind and thrown against the side of the scow, and throwing his arm over the gunwale to regain his feet, it was crushed by one of the wheels of the derrick. Libelant was inexperienced in such work, was not aware of the danger, nor was any warning given the men of the danger or of the movements of the crane. *Held*, that he was entitled to such warning and notice under the circumstances shown, and the failure to give them, render the scow liable for his injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 314-316.]

2. DAMAGES—PERSONAL INJURY.

A longshoreman 22 years old, in good health, and earning \$25 per week during the season of navigation on the Great Lakes, awarded damages in the sum of \$6,000 for an injury resulting in the loss of his arm.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 235, 383.]

In Admiralty. Suit in rem for personal injury. See 147 Fed.—.

Lawrence J. Collins, John Cunneen, and Thomas C. Burke, for libelant.

Hoyt, Dustin & Kelley and Brown, Ely & Richards, for respondent.

HAZEL, District Judge. The libelant, John McNicholl, was employed by Pickands, Mather & Co., the claimants, to work on the wharf or dock as a helper in loading and unloading ore boats. At about noon, on September 28, 1904, he, with other dock laborers, was directed by his employers to board a tug which soon afterwards took the fuel scow Buffalo in tow and proceeded to the assistance of the steamer Venezuela. The latter, ore laden, was aground on the Canadian shore of Lake Erie, a few miles distant from the port of Buffalo. Upon reaching the stranded steamer the scow moored

alongside and the ore and coal gangs, so-called, immediately began lightering the ore. At about 10 o'clock at night the Venezuela was released from her perilous position. Thereupon the men proceeded to reload the ore from the scow to the vessel. The work of reloading the steamer began from the second bin of the fuel scow, and when that was cleared of ore the reloading proceeded from the after bin. The apparatus or machine used in hoisting the buckets consisted of a traveling crane stationed on top of the fuel scow and operated by steam power. It rested on rails fastened to the gunwale about four to six inches from the sides of the scow, and moved forward and backward thereon to facilitate the movements and swinging of the buckets into the hatchway of the steamer and back onto the scow. A power house, with a window in the side, built on a revolving table was adjusted to operate in connection with the hoisting apparatus. Although the operation and movements of the derrick and the raising and lowering of the buckets were accompanied by loud noises, resembling those of rattling chains, pulleys, and machinery, yet they were not distinguishable by an inexperienced workman in the hold of the scow. Two torches were placed on top of the engine house, only one of which was burning at the time of the accident, such light being on the right side of the power house. Why both torches were not aflame does not appear, though it is practically conceded that in the early evening both were burning. The proofs show that when a bucket of ore was dumped in the hold of the steamer, the boom or arm of the derrick extended athwartships from the scow to the hatchway of the steamer, and the light from the burning torch was therefore turned from the hold where the men were engaged in loading the buckets. Thus their place of work was darkened, and the view thereof of the engineer in charge of the power house was temporarily obscured. Signals were given to the engineer to operate the crane by two workmen, one stationed on the steamer, the other on the scow. These men also hooked on and dumped the buckets, but their duties did not require them to warn the workmen of the movements of the crane. The libellant had just finished loading a bucket of ore, and was standing upright resting on his shovel. Suddenly, and without warning, the crane struck him from behind and violently threw him against the side of the scow. In his endeavor to recover his foothold he threw his left arm over the gunwale of the scow. His arm was crushed by one of the wheels of the derrick which came forward and immediately moved in a backward direction. At the time of the accident the arm of the hoisting device was swung athwartships; a bucket being lodged in the hatchway of the steamer, and the light on the power house was turned aft. No testimony was introduced by the respondent, and it is not clear that it was necessary at this time for the engineer to move the derrick forward and toward the men in order to dump the bucket. Indeed, the claimants contend that the engineer moved the rigging forward at a time when it was unnecessary and that his want of care and precaution was the proximate cause of the injury. I am unable to agree in this contention. The evidence sufficiently establishes that the derrick moved slowly

on the rails, and in fact only a short distance before the libelant was struck. It is probable that a slight forward movement of the crane was necessary to enable the bucket to descend without interference into the hatchway of the steamer. This reasonable assumption certainly will not permit holding that the engineer was negligent for moving the apparatus forward, but seems to emphasize the claim of the libelant that the scow was at fault; she having omitted to warn him of the movements of the derrick and of the attending dangers.

Libelant had never previously been on a fuel scow, and was wholly inexperienced in work of this character, and was not familiar with the manner of operating the derrick. He was not at the time of his employment, nor subsequently, warned of any dangers of his occupation. As there was about 12 to 18 inches of ore in the bottom of the scow when the accident happened, the head and shoulders of the libelant, who stood upright, reached above the rails. It cannot be assumed that he had reason to know that the crane would come over the place where the men were engaged in filling the buckets. Moreover, the night was dark, and the men were working with their backs toward the derrick. The place was manifestly a dangerous one in which to work as the nature of the accident and its occurrence would impliedly indicate. *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. To an inexperienced workman the dangers of the employment, as a matter of law, cannot be held to have been obvious. Upon this point the testimony of libelant that he had never before performed work of this character and did not know that the derrick moved on the rails is entitled to weight. His appearance on the witness stand and his manner of giving testimony indicated that he is of dull intellect, and merely appreciated the fact that he was hired to fill the buckets with ore, and did not exercise the faculty of observing and understanding the mechanism by which the hoisting and dumping of the buckets was accomplished. Therefore, I conclude that the dangers from the moving derrick were not apparent to him, and that he was entitled to be informed of the dangers of his employment, and warned of those which threatened him from the forward movements of the derrick. The principle of a safe place in which to work, or of being permitted to work in a dangerous place, and, therefore, entitled to notice and warning, would seem to have application here. As already intimated, this case is not one where the proximate cause of the accident was the negligence or the presumed negligence of the engineer, who was probably a fellow servant; both he and libelant being engaged in the work of a common employer. Abundant authority exists for upholding the proposition that where a longshoreman in the employ of an independent contractor is injured by the negligence of a winchman, an employé of the vessel, the latter is liable. *The Slingsby* (D. C.) 116 Fed. 227, affirmed 120 Fed. 748, 57 C. C. A. 52; *The City of San Antonio* (C. C. A.) 143 Fed. 955. But here it must be considered that the libelant was temporarily employed to load buckets of ore from a scow having attached the rigging heretofore described. His original employment was that of a dock laborer, and it seems to the court that as he was directed to work in a different

field, he was entitled to rely upon the assumption that such employment would not expose him to any greater hazards or dangers than those which he was prepared to encounter. In addition to notice of the dangerous character of the employment it was the duty of the claimants, in the circumstances here presented, to give such proper and suitable warning of the forward movements of the derrick and of its proximity to the place where the libelant was at work as to reasonably safeguard and protect him from injury. *The Pioneer* (D. C.) 78 Fed. 600; *Western Elec. Co. v. Hanselmann*, 136 Fed. 564, 69 C. C. A. 346, 70 L. R. A. 765; *Michael v. Roanoke Machine Works*, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927; *The Magdaline* (D. C.) 91 Fed. 798. The facts in the cases cited are not like the facts and circumstances in suit but the principle there announced is not inapplicable.

The libelant contends that the scow was also negligent, because of her failure to furnish suitable lights. Upon this proposition it may be said that it undoubtedly was the duty of the scow to furnish sufficient lights to enable the workmen to properly and safely perform their work. I think the claimants discharged their full obligation in that regard, means for ample lighting having been supplied, and it may be fairly presumed that the workmen would have called for additional light had they deemed more light necessary. Standing alone, the absence of better lighting facilities is not thought to constitute such negligence on the part of the scow as to render her responsible for the accident had the failure to furnish lights been the proximate cause therefor.

The claimants having failed in their obligations to inform libelant of the dangers of the work and warn him as hereinbefore indicated, a recovery for damages to compensate for the injuries sustained must follow. Libelant, not being guilty of contributory negligence, no reason exists for reducing the amount of the damages to which he is fairly entitled. He was about 22 years of age, was healthy, strong, and earned \$25 per week during the season of navigation on the lakes. After being out of work for upwards of one year he is now earning \$1 per day, and perhaps will never be able to earn a greater sum. That he suffered much pain as a result of the accident is self-evident. The amount to be awarded in a case of this description is difficult of determination, but considering all things, i. e., the loss of his arm, the expense of his cure, the loss of time, the depreciation in earning capacity, I think \$6,000 would not be an excessive award.

A decree, therefore, will be entered for that amount, with costs.

THE CHARLES TIBERGHIEH.

(District Court, S. D. New York. September 19, 1906.)

SHIPPING—SUIT FOR NONDELIVERY OF CARGO—EVIDENCE.

Evidence considered, and *held* not to sustain the claim of libelants of a shortage in delivery of goods shipped from New York to China in bales, but to show by a preponderance that the apparent shortage, as shown by the tally made at the time of discharge, arose from the fact that in many cases two bales were trussed together in one package and such packages were erroneously counted as one bale.

In Admiralty. Suit to recover for nondelivery of cargo.

Wing, Putnam & Burlingham, for libellants.
Convers & Kirlin and John M. Woolsey, for the Charles Tiberghien.
Alexander & Ash, for the Philippine Company.

ADAMS, District Judge. This action was brought by Arnhold, Karberg & Company against the steamship Charles Tiberghien to recover the value of 103 bales of domestics, which it is claimed were shipped on the steamer at New York on or about the 9th day of July, 1902, for delivery at the port of Tientsin, China. The value of the goods, with the advanced freight paid thereon, amounted in all to the sum of \$6,100. On the 19th day of February, 1903, the claimant of the said steamer, filed a petition alleging that the Philippine Transportation & Construction Company was the charterer of the steamer and responsible if any loss occurred, prayed that said company be brought into the action and proceeded against instead of the steamer. Process was accordingly issued against the Philippine Company. Later, answers were filed on behalf of the steamer and of the third party.

It appears that there were two charter parties under which the Philippine Company operated the steamer during the period covering the controversies herein. They were dated April 29, 1902, and made between the agents of the steamer and the Philippine Company. The first provided for a voyage from New York to Hong Kong and Manila, charterer to have the privilege of first sending the vessel to Manila if it desired, and for an additional charter for another month.

The second charter, under the form of a time charter, provided for a month's extension, more or less, from date of delivery under the first charter for the ports of Manila, Hong Kong, Chinese, and Japanese ports. One of its provisions was:

"14. It is understood that this charter is simply an option given by the owners of the steamship 'Charles Tiberghien,' and that if the Philippine Transportation & Construction Co. wish to avail themselves of this charter, they must so notify Master on or before steamer's arrival at Singapore for coal."

This option was duly availed of, by notification to the master at Singapore, where the steamer went for coaling purposes, about the 28th of August.

The master of the steamer gave a written authority to the charterer to sign bills of lading for him. They were accordingly given and contained an acknowledgment for 2,400 bales of domestics of which, it is claimed, 103 were not delivered. It is also claimed that 2 bales of another lot were not delivered. These were all receipted for on the faces of the bills of lading as being destined for Shanghai but on the backs were marked for Tientsin. The latter place was approached through the Taku roadstead which was its port, some 40 or 50 miles away, and the goods for Tientsin were lightered from Taku.

Many of the bales of domestics were shipped two together, i. e., two were fastened together by means of ropes or iron bands, and called "truss packages." No special allusion was made to these in the orig-

inal bills of lading. A bill of lading which went to China, was produced by the libellants after the trial and admitted in evidence by consent of all the parties. There were entries on the back of this bill showing that 200 bales of domestics were equal to 100 packages. There was a pencil memorandum to the same effect with respect to 60 bales of domestics. The receipt on the face of the bill of lading was for 260 bales equal to 160 packages.

The bills of lading do not state that the goods were shipped on the steamer but that they were received on the dock to be transported by the steamer. When some of the goods were delivered on the dock, the steamer was not there but came subsequently. In the meantime, receipts had been given, which were mislaid before the trial but since have been found among the papers left with the original proctor for the Philippine Company, Mr. Sherman, now deceased, and admitted in evidence. They show the delivery of the goods on the dock and that upon them the bills of lading were issued. Testimony taken by the libellants from the cartmen, who carried the goods from the Providence Line to the dock, shows that they were delivered there, i. e. at pier 40, which is a covered closed pier and one-half devoted at the time to this steamer. There is nothing to indicate any loss of the goods after delivery but everything tends to show that they went on the steamship. The size, 4 feet long, 2 feet wide and 2 feet high each, and weight, 250 to 300 pounds each, of these packages are, in connection with the other testimony, persuasive evidence of their not having been removed after delivery on the dock and it clearly appears that everything on the dock was put aboard the steamer. The goods for the different ports were separated by painting the edges or sides of bales, according to a stowage plan made by the stevedore which was given to the chief officer.

One of the first ports of discharge was Manila. The steamer arrived there September 5th and left September 24th. The next port of discharge was Hong Kong. The steamer arrived there September 27th and sailed again the 29th, after discharging her cargo for that port. All the cargo discharged there was delivered to the libellants, who at this port, as well as others, were agents for the Philippine Company. There were apparently no domestics discharged there.

It appears that the said to be missing goods went aboard the steamship at New York and were not discharged at the early ports. It remains to determine whether they were subsequently delivered to the libellants or were in some way lost by the steamship, because at the end of the voyage she had no merchandise on board. There is no proof whatever that the steamship lost any of the goods and such is only attempted to be established by the claimed non-delivery. The case is a difficult one to determine upon the facts, but I am rather inclined to believe that the libellants actually received the goods either at Tientsin or at Shanghai. The supposed loss doubtless occurred by reason of the method of packing some of the goods, that is putting two bales into one package, and discharging the two bales so packed as one.

At Manila a manifest of the cargo for that port was handed to the master by the chartered agent, but this was the only port at which the ship received any document by means of which she could check the delivery. The cargo for that port was in different compartments from those which contained the bales for Tientsin and Shanghai and the latter were not in any way disturbed at Manila and the steamer, when she left there, had on board all the cargo for subsequent ports. The next port of discharge was Hong Kong, where she reported to the libellants, pursuant to the instructions of the charterer's Manila agent. There were no bales of domestics for that port and none were discharged there. The stowage of the bales destined for Shanghai and Tientsin was not disturbed.

At the completion of the discharge in Hong Kong, the ship went under the new charter and at that time she had on board all the domestics which had been shipped for Shanghai and Tientsin in the same places they had been stowed in New York by the charterer's stevedore.

This new charter constituted a demise of the vessel and subsequently the charterer was, as between it and the ship, responsible for any shortage of cargo, but there does not seem to have been any shortage in the delivery. She arrived at Shanghai the 4th of October. She there reported to the libellants, as agents of the charterer, and they took charge of the discharge. They ordered the vessel to a pontoon or float, on which the cargo was discharged and was then carried ashore by coolies by means of two bridges, where the libellants warehoused it. It was tallied on the shore end of the bridges by a ship's officer and a Chinese tallyman. The latter furnished the officer with a box divided into 20 compartments and had a similar one himself full of small bamboo sticks, five in each compartment, and as the coolies brought the packages from the pontoon, the tallyman handed to the officer one of the sticks for each separate package. Five of these sticks were placed by the officer in each compartment of his box and when it was full it indicated that 100 packages had been sent ashore. The officer would then return his full box to the tallyman, taking the latter's empty box and the process would continue, each 100 packages being noted in a memorandum book. 300 of the bales of domestics destined for Shanghai were bound together in trusses as described above, making 150 packages. These 150 packages were delivered at Shanghai, and appear to have been represented by one of the tallyman's sticks. It would seem that this caused the confusion and the apparent deficiency. The packages were apparently counted as one bale, while in the manifest they were entered as two bales and made a larger delivery at Shanghai than was intended and required a resort to the Tientsin cargo to supply the deficiency. It was not difficult to make mistakes in this respect as the separation between the two ports was not marked on particular packages but by perpendicular or horizontal lines covering a number of packages and indicating a general portion of the cargo.

When Tientsin was reached the deficiency was discovered but no notice given to the ship of it for several days although the bills of

lading reasonably required notice within 48 hours. This, however, should not be considered as a defense as the charterer had no resident agent at Tientsin and the only one to whom such a requirement would apply was the master of the vessel and he sailed with her the next day after the delivery of the last lighter load and was thereafter inaccessible, as the ship was at sea, until her arrival back at Shanghai, October 28th, when notice of the shortage was given to the master.

To summarize, it appears that the missing goods were duly delivered on the vessel in New York, remained aboard when she sailed from Manila and were, in all probability, delivered to the libellants at Shanghai, where they were acting as the charterer's agents. The evidence satisfies me, however, that the goods reached the libellants, and the mere fact that they were then acting as agents should not suffice to excuse them for their own delinquency or mistake with reference to the truss packages. If the goods actually reached their true destination, though such fact was not recognized by the libellants, it would be unjust to impose upon the ship, or the charterer, any loss occasioned through a mistake on the part of the libellants.

The libel and petition are dismissed.

IN RE H. R. LEIGHTON & CO.

(District Court, S. D. West Virginia. July 26, 1906.)

BANKRUPTCY—CORPORATION—LIABLE TO ADJUDICATION.

Where a corporation was organized to carry on a general stock, bond, grain, and brokerage business and was authorized to trade on its own behalf in stocks, bonds, grain, etc., and lease and dispose of real and personal property, it was subject to adjudication as a bankrupt corporation engaged in "trading in mercantile business."

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 17.

Persons subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*. 42 C. C. A. 4.]

Brown, Jackson & Knight, for petitioners.

Simms & Enslow, for protesting creditor Olive M. Davies.

DAYTON, District Judge (sitting specially). On January 1, 1906, Edwin E. Wilson, John H. Norton, and Wm. D. Ingalls, creditors in a total value of \$2,200 as alleged, by them, filed in this court a petition in involuntary bankruptcy, against H. R. Leighton & Co., a corporation under the laws of West Virginia. The usual subpoena to alleged bankrupt issued and was served, returnable January 13, 1906. On January 3, 1906, the original petitioners filed their supplemental petition, supported by an affidavit of one of their number, setting forth the insolvency of said corporation, an assignment by it of its assets to a trustee who had executed no bond, the ownership of property by it in several different states not reduced to possession by said trustee, and asking for the appointment of a receiver pending the selection of a trustee. By order entered the same day, Angus W.

McDonald was appointed by this court such receiver, and on January 10, 1906, he, as such, filed his petition, setting forth that he had taken possession of the property and assets of the corporation in so far as he was able to find the same; that he found at the office in Boston, Mass., numerous stocks and bonds on deposit, some claimed by customers as having been deposited as collateral, others as having been bought and paid for; that such bonds and securities were liable to great fluctuation in values; that furniture and fixtures belonging to said alleged bankrupt corporation were located in different towns and cities in Maine, New Hampshire, Vermont, Rhode Island, and Massachusetts, which should be sold at once in order to save rent, and said petitioner asks that he be authorized to sell any or all of such assets in his possession or that may come into his possession, at either public or private sale. The said corporation, by its treasurer, H. R. Leighton, filed a consent in writing to such sale and an order was, on the same day, entered by this court authorizing such sale of assets liable to deteriorate in value, and of such office furniture and fixtures, by the receiver. On January 13, 1906, the return day of the subpoena for hearing, counsel entered appearance for Olive M. Davies, a creditor, "for the purpose of resisting the bankruptcy of said corporation." On January 15, 1906, the defendant corporation, by its said treasurer, filed its written consent to be adjudged bankrupt. On January 18, 1906, at 10 o'clock, a. m., petitioners filed an amended petition which will be hereafter more particularly referred to, and at 7 o'clock, p. m., of the same day, Olive M. Davies filed a written demurrer and her petition in the cause, which will be referred to hereafter. On February 2, 1906, said McDonald, receiver, filed a second petition, in which he set forth in effect that said H. R. Leighton & Co., corporation, under a contract, had a claim against one Joseph E. Doncitte of about \$15,000 for which necessity required suit at once to be brought, and he had employed counsel and instituted such suit. He prays his action may be approved and confirmed, which by order entered by this court on the same day was done. On April 7, 1906, this court (McDowell, Judge, sitting specially) entered an order sustaining the demurrer of Olive M. Davies to petitioners' original and amended petitions, but with leave to them to file amendment thereto before April 25, 1906. Such amendment was filed on that day and on May 24, 1906, the said Olive M. Davies filed her demurrer, motion to dismiss, and answer thereto. On June 22, 1906, Jos. L. Hall and 10 other creditors, representing an aggregate indebtedness of \$3,008.93 of said corporation, filed their petition praying to be allowed to intervene and praying said H. R. Leighton & Co., corporation, be immediately adjudged bankrupt. On the same day the original petitioners filed a general replication to the answer of Olive M. Davies to their amended and supplemental petition.

The sole question presented by the record to be passed upon at this time is the contention set forth in the demurrer of Olive M. Davies that the alleged bankrupt corporation is not such a one as can be adjudicated such under the terms of the bankruptcy act. The charter of the company set forth that it was incorporated for the "purpose

of carrying on a general stock, bond, grain and brokerage business, and promoting financial enterprises; to own, manage, lease and dispose of any real or personal property essential or convenient for such business, and generally to do all things necessary or incident thereto." In the original petition it is charged said corporation had been "engaged principally in trading and mercantile pursuits, to wit, in buying and selling bonds and other securities." In the amended and supplemental petition filed January 18, 1906, the allegation is that it "was engaged principally in trading and mercantile pursuits, to wit, in buying and selling stocks, bonds and other securities," and in addition "in buying and selling grain and promoting financial enterprises, and buying and selling real and personal property essential and convenient for such business." In the amended petition filed April 25, 1906, after Judge McDowell had sustained demurrer to the first two, and which amendment was filed in accordance with the permission contained in his order, the allegation is that the corporation "was engaged principally in trading and mercantile pursuits, in buying and selling stocks, bonds and securities," and in addition "in buying and selling grain and cotton and promoting financial enterprises, and buying and selling real and personal property essential and convenient for such business." The contesting creditor, Olive M. Davies, contends in her answer, to which replication has been filed, that the corporation was simply a "bucket shop" concern, and not within the meaning of the words of the statute "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits."

For the purpose of determining this demurrer, we are to look at the allegations of this last amended petition alone, and counsel are right in asserting that upon its face it must show the jurisdiction of this court. Two preliminary observations may well be made at the threshold of this consideration: First, the corporation is consenting to, and some 14 creditors with debts aggregating over \$5,200 are asking, this adjudication as against a single creditor whose debt is alleged to be but \$270; and, second, in the language of Mr. Collier (Law & Pr. in Bankruptcy [5th Ed.] page 61):

"Each case will necessarily turn on its own facts. It is not to be doubted, however, that, in this particular, the law is to be interpreted liberally to effectuate its purpose, i. e., that all business corporations, as distinguished from public, quasi public, money-saving or lending corporations, shall be amenable to bankruptcy."

In re Surety Guaranty & Trust Co., 121 Fed. 73, 56 C. C. A. 654, cited by the contesting creditor, the Circuit Court holds a state corporation could not be adjudged a bankrupt as a "private banker," for the very obvious reason that a public corporation could not be a "private" banker, and because the business of banking came within the limits of "money saving and lending," as set forth by Mr. Collier. In re Pacific Coast Warehouse Co. (D. C.) 123 Fed. 749 (a warehouse company); In re Cameron (D. C.) 96 Fed. 756 (a fire insurance company); In re New York Building-Loan Banking Co. (D. C.) 127 Fed. 471 (a building and loan association); In re Snyder & Johnson Co. (D. C.) 133 Fed. 806 (a corporation soliciting adver-

tisements); In re United States Hotel Co., 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588 (a hotel company)—are respectively held to be corporations not amenable to the bankruptcy act. In each of these cases the companies may be called quasi public. Under the ruling in Re Surety Guaranty & Trust Co., supra, it is stated that a corporation organized to buy and "sell stock, bonds, and securities" is not amenable. Taken in consideration with the facts of that case, I think it clear the court meant to say the buying and selling of such for the public upon commission or as brokers. It certainly could not mean to include a corporation selling grain, merchandise, or other such thing and also buying stocks or bonds for the temporary investment of its surplus funds and when needing such funds selling them again. To go a step farther, if a number of persons subscribe to a fund and form a corporation and with the funds buy to-day a note, bond, or security, which to-morrow they sell at a profit and invest the proceeds in a cargo of wheat which in turn is sold and invested in a shipload of cotton to be in turn sold and the proceeds invested in bonds again, all on the sole profit account of this corporation, is it not engaged in the "trading" and "mercantile" operations contemplated by the statute? It seems to me that it is not wise to split hairs or dwell upon fine spun distinctions. This corporation was incorporated according to its charter "for the purpose of carrying on a general stock, bond, grain and brokerage business." If this charter had solely constituted a brokerage business, its relation to the public might well have reserved it from the operations of the act, but it does not limit its business to this. It allows it to trade on its own behalf in stocks, bonds, grain, to own, lease, and dispose of any real or personal property; and this amended petition, fairly construed, in my judgment charges that this was the kind of trading and mercantile business this corporation was engaged in.

Therefore the demurrer will be overruled.

In re TIFFANY.

(District Court, S. D. New York. August 15, 1906.)

1. BANKRUPTCY—DISCHARGE—GROUNDS FOR REFUSING—JUDGMENT OF STATE COURT IN SUIT BY TRUSTEE.

The judgment of a state court, in a suit brought by a bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt as fraudulent, concludes creditors, who cannot thereafter set up the same ground to defeat the bankrupt's discharge.

2. SAME—WITHHOLDING DISCHARGE TO PERMIT SUIT BY CREDITOR IN STATE COURT.

Where a state statute gives judgment creditors the right to proceed in equity to reach surplus income of the debtor in case of certain trusts, which cannot be reached by execution, but does not give such right to a trustee in bankruptcy, a court of bankruptcy may, in its discretion, when equity requires it, delay the granting of a discharge to a bankrupt and permit judgment creditors, whose judgments would be extinguished by the discharge, to institute and prosecute suits under such statute, to reach income derived by the bankrupt from a trust estate, for their own benefit.

In Bankruptcy. On motion to confirm commissioners' report recommending a discharge and application of sundry creditors to delay the same.

Benjamin Tuska, for bankrupt.

Daniel Daly, for objecting creditors.

Selden Bacon, for creditors asking delay.

L. M. Berkeley, for trustee.

HOUGH, District Judge. In April, 1903, the bankrupt was insolvent, and has by his own admission continued so to be. He was (and is) in this condition, although in receipt of an income derived from the trust estate of his father, paid to him weekly, and aggregating \$18,000 per annum. Being so insolvent he wished to marry his present wife, who insisted, not as a condition of marriage, but as a condition of expediting the union, that he give her outright a supply of household furniture and fittings. No agreement was made as to the quantity or value of such supply. On April 25, 1903, the bankrupt married, and shortly thereafter purchased, at a cost of at least \$15,000, and upon credit, the property necessary in his judgment to make good this antenuptial agreement. What he bought he instantly transferred to his wife, without the slightest intention of paying for the same out of the above-described income; it being in his expressed opinion quite impossible to pay so much out of so moderate a yearly revenue as \$18,000.

As he has never pursued any gainful vocation, his sole hope of discharging the debts thus incurred depended upon the result of an action brought against the trustees of his father's estate to compel an increase of his yearly allowance. The fruition of this hope has been denied by the courts of New York.

Certain of the tradesmen whom he had used to fulfill his antenuptial contract (or rather perhaps his conception of the same) having obtained judgments for their claims, other creditors filed a petition in bankruptcy in October, 1904. Immediately upon the filing thereof the usual injunction was issued forbidding Tiffany's creditors from proceeding further against him, and this injunction is still in force except as modified by an order of the referee herein made on the 23d of March, 1905, whereby the trustee was authorized to institute or cause to be instituted various proceedings, among others an action in his own name in the state court to set aside the above-described transfer to the bankrupt's wife, and another action in the same court by one or more of the bankrupt's judgment creditors, against the bankrupt and the trustees under his father's will, to reach as surplus income some portion of his \$18,000 per year.

The action to set aside the transfer to the wife was brought and is still pending on appeal. The evidence adduced upon the trial of that cause is on all material points identical with that offered before the referee under the objections to Tiffany's discharge. Judgment was entered at Special Term in that suit declaring that the marriage celebrated in compliance with the antenuptial agreement above recited constituted a valid consideration for the transfer, and that the same

was (on the part of the wife) without fraud or intent to hinder or delay her husband's creditors; wherefore the transaction did not amount to a secret trust for the bankrupt's use, and did make the wife a bona fide purchaser for value of the goods sought to be recovered by the trustee.

The opposition to the bankrupt's discharge is contained in objections specifying, in substance, that the household goods in question were obtained while the bankrupt was insolvent, were transferred to the wife without consideration, and were and are really held in secret trust for the bankrupt; the transaction thus amounting to a continuing concealment of property within Bankr. Act. July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428].

The special commissioner reports that it has been decided by a court of competent jurisdiction that the wife became a bona fide purchaser of the property in question more than four months before the filing of this petition, and that for a like period there has been no concealment of the wife's alleged ownership thereof; he therefore finds that the objecting creditor is concluded by the unfavorable result of the trustee's action, and overrules the specifications of the objector. In this opinion I concur. In *re Skinner*, 3 Am. Bankr. Rep. 163, 97 Fed. 190; *Rejall v. Greenhood*, 92 Fed. 945, 35 C. C. A. 97; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843. It follows that, if the application for discharge were uncomplicated by petitions from other persons entitled to be heard in this matter, the discharge would have to be granted, however repugnant to morality and honor is the conduct of the bankrupt and his wife. In *re Dauchy*, 130 Fed. 532, 65 C. C. A. 78.

But, pending the application for discharge, there has been filed the petition of Sloane & Co., a judgment creditor of Tiffany's, against whom the stay granted at the time of filing the petition herein is still operative, calling the attention of the court to the fact that there is now pending an action by certain other judgment creditors, against the bankrupt and the trustees of his father's estate brought in pursuance of the above-described order of the referee, and praying that they also be permitted to institute suit against the bankrupt and his trustees, and that to that end the original injunction be lifted as to them and the discharge be delayed for a reasonable time, inasmuch as the present discharge of the bankrupt will extinguish the judgments which are the basis both of the pending suit and the one sought to be brought by Sloane & Co.

This unsatisfactory condition is the result of congressional unwillingness to make personal dishonesty in the creation of a debt ground for refusing a discharge in bankruptcy, coupled with the decisions as to the nature of the interest of a cestui que trust in an active express trust created pursuant to the statutes of this state.

While this particular bankrupt has been privileged to assist dishonesty with matrimony, somewhat similar situations will continually arise under the bankruptcy law, until the grounds for refusing discharges are enlarged, so that the discretion of the court may be exercised in preventing knaves—both thrifty and spendthrift—availing

themselves of a relief intended for honest misfortune. The situation in respect of Tiffany's income from his father's estate depends on *Butler v. Baudoine*, 84 App. Div. 215, 82 N. Y. Supp. 773, affirmed 177 N. Y. 530, 69 N. E. 1121, holding, in substance, that under no circumstances can a trustee in bankruptcy of a cestui que trust acquire any rights (as trustee) under that trust, or to the income payable to the bankrupt therefrom; the only persons having any rights in or against even the admittedly surplus income of the cestui que trust being judgment creditors, with the result that this court cannot grant to a bankrupt what he is otherwise entitled to, i. e., his discharge, without wiping out the peculiar privileges of judgment creditors secured to them by the statutes of the state.

Such circumstances call for a careful exercise of discretionary power. In a case in the least degree doubtful I should hesitate long before denying to any man the present enjoyment of an apparent legal right, but the morals of this situation need no comment. There is no substantial difference between the direction now asked for, and that made by the Supreme Court in *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, and by Judge Archbald in *Re Brumbaugh* (D. C.) 128 Fed. 971. In both cases certain creditors of the bankrupts possessed, or alleged that they possessed, rights enforceable only in tribunals other than the court of bankruptcy, which rights would be extinguished by granting discharges, to which, so far as appears, the bankrupts were otherwise entitled; and in both cases discharges were delayed for times not shown by the reports, in order to enable the privileged creditors to proceed in the state courts against the bankrupt or his property.

It is urged by the trustee herein that Sloane & Co. should not be permitted to institute suit for their own benefit, but only upon condition that any recovery made by them should be paid in to, and distributed pro rata by, the trustee. It is, I think, true that, since a favor is asked, conditions may be annexed to it. Each case of this kind as it arises must be decided on its own facts. In this instance, without creating a precedent, I decline to give such direction, considering it for the advancement of justice that the petitioners should be unhampered by conditions other than an obligation to speed their cause.

An order may be submitted, on notice, substantially as prayed for in the moving papers of Sloane & Co.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. GREENE et al.

(Circuit Court, D. Connecticut. July 26, 1906.)

No. 527.

1. SHIPPING—CONTRACT—SERVICES OF WRECKING STEAMER—CONSTRUCTION.

Where plaintiff contracted on behalf of a wrecking company to pull a schooner lodged in the launching with a powerful steamer to M.'s satisfaction, the contract required that the pulling should be of such a character as should satisfy a reasonably prudent man in the light of the circumstances surrounding the transaction.

2. SAME.

Where, after a wrecking company had pulled a stranded schooner sufficiently to comply with a contract to pull the same to M.'s satisfaction, the schooner was not floated, and the services of the company's steamer were necessary in the subsequent endeavors which finally dislodged the schooner, the wrecking company was entitled to recover for such subsequent services on a quantum meruit.

At Law.

See 129 Fed. 969.

James D. Dewell, Jr., for plaintiff.

Canfield & Judson, for defendants.

PLATT, District Judge. This is an action at law demanding \$500 on an express contract, and \$2,165 for extra work beyond the contract on quantum meruit. The answer admits the contractual obligation, but denies all liability on quantum meruit. By stipulation it has been tried to the court without a jury, and the court therefore, from the testimony given, reaches the following:

Conclusions of Fact.

On Monday, July 23, 1902, Greene Bros. tried to launch, at their Bridgeport yard, a large four-masted schooner, named the Perry Setzer. She was about 216 feet long, 42 feet beam, 17.8 feet depth of hold, 1,392 gross tonnage, and valued at from \$65,000 to \$70,000. She stuck on the ways, as she was sliding off, at a point about 35 feet from her bow, in such a manner the she was liable to become "hogged" or "strained," and thereby seriously injured, if she remained long in that position.

Frank Miller of Bridgeport was largely interested in the schooner, as a creditor for materials furnished in her construction, and as bondsmen for Greene Bros. in this enterprise. He was present at the festivities which had been prepared in connection with the launching. Several wrecking companies were at once notified by telephone of the situation, and a representative of the plaintiff company was the first to respond. He was Thomas Shelvin, familiarly known as "Capt. Tom." He arrived in the afternoon of the same day, and, after examining the state of the schooner with one of the brothers, he met both brothers and Frank Miller at the office of the firm. Miller was requested by the firm to take charge of the matter and agreed to do so, thereby becoming jointly responsible for the wrecking work. Miller asked Capt. Tom how much of an accident it was. Capt. Tom made light of it and expressed his belief that it would be an easy matter to pull the schooner off. He explained that his company had a powerful steamer called the "William E. Chapman"; that she would cost them \$15 an hour; that in his opinion, the schooner would come off easily on the first pull; that it might take 10 hours to do it; that the apparatus to be used in connection with the steamer would be worth \$200; making a total of \$350, which in his judgment would free the schooner. Miller in response told Capt. Tom that it was an important matter; that they were all worried about the situation; that a failure in the launching would be a serious blow to the firm;

and to make a sure thing of it, he would propose that if the wrecking company would send up the steamer thoroughly equipped with appliances and men, and pull the schooner to his satisfaction, he would pay them \$500. This proposition was accepted by Capt. Tom on behalf of the plaintiff.

The steamer and appliances came on Wednesday morning, July 23d, and operations began on the noontide. This attempt was a flat failure; the sand anchor which was placed so as to afford resistance and enable the steamer to pull effectively on the schooner giving away, and therefore being useless. Work on the nighttide of Wednesday was equally futile. On the noontide of Thursday the anchor, which on Wednesday had been placed in sand alone, was reinforced by a backing cable held by rocks on a nearby island. The cable used this time was not new, and parted at the first serious strain. On the nighttide of Thursday the schooner was moved a little, but the steamer was making jumping pulls, so-called, and very soon the cable again parted and work was suspended. Up to and including the pull on this tide, the schooner had been moved several feet, perhaps four or five. On the Friday noontide a pull was made which had a substantial effect, and the schooner almost came off. At the critical moment a hawser parted, and but for that accident, she would undoubtedly have gone free. This pull was one which, in my judgment, ought to have been considered satisfactory by a reasonable man of affairs. On the Friday nighttide a large quantity of oil barrels which had been procured by the defendants were put into use as a sort of improvised pontoon, and the schooner was started a little more. On the Saturday daytide more oil barrels were added by defendants and used in the same way. On this tide some little advance was made in pulling the schooner free. The Saturday nighttide work made no gain of importance. On the Sunday daytide the schooner came off with the Chapman's help.

Defendants, at various times, induced the small tugs about the harbor to lend a helping hand, and at last sent to New Haven for larger ones, but without the help of the Chapman the other tugs would not have been able to have made the necessary pull. During the latter part of the work two cables and anchors were necessarily used, with the knowledge of and without objection from the defendants. A diver was sent down on Friday to examine the hull and bottom. This was known by defendants and consented to. On Thursday the plaintiff became aware, through Capt. Tom, that there was a strong probability that pontoons would be needed, and on Friday, the suggestion having been acquiesced in by one of the Greene brothers, but without Miller's knowledge, it ordered them prepared, which was a work of some difficulty. They were gotten out and made ready during the usual working hours of that day. On Friday, between 3 and 4 o'clock in the afternoon, an order to prepare and send them came from the defendant firm, authorized by Miller. This order was canceled soon after 9 o'clock on Saturday morning. The pontoons could have been gotten out and ready during the hours between the definite order on Friday and the definite countermand on Saturday.

A fair price for the use of the steamer, men, and appliances, is

\$150 per day. A fair price for getting the pontoons ready is \$100. The use of the diver's services was worth \$50. The use of the cables and anchors was worth \$40 per diem.

From these facts the court draws the following:

Conclusions of Law.

The contract was to pull the schooner to Miller's satisfaction for \$500. In the eye of the law that should be interpreted as meaning that the pulling should be of such a character as to satisfy a reasonably prudent man in the light of the circumstances which surrounded this transaction. It was a valuable schooner in a dangerous plight; on the other hand, the wrecking steamer and appliances were expensive; the task undertaken was more difficult than anybody expected. When the schooner was finally dislodged the services of the Chapman were needed.

I have found as a fact that the close of the noontide pull on Friday completed such a pull as a reasonable man ought to expect, in view of the conceded fact that a clean pull off was not guarantied by the plaintiff. The defendants, it will be noticed, increased their supply of oil barrels after that pull and countermanded the order for pontoons early Saturday morning. This shows that they were satisfied after the Friday noon pull that deliverance was at hand. They could have sent the Chapman away, if they had wished to do so, but they knew that she was necessary. They knew what an expensive item she was, and it is not believable that the defendants would have gone to the expense which they did, if Mr. Miller had thought that as a reasonably prudent man he could keep on calling for pulls on each tide under the original contract. Plaintiff was fortunate in having taken the hint and prepared the pontoons before the absolute order reached it. If no order had come, the work would have been wasted. It came on Friday afternoon, and there was plenty of time before it was countermanded to have made the preparations. It would be inequitable to allow the plaintiff nothing for work done in compliance with the order, and the action on quantum meruit is one which particularly appeals to and should be governed by the conscience. The schooner came off on the Sunday daytide. That makes two days for which the plaintiffs have a right to charge under the quantum meruit.

Steamer 2 days	\$300
Cables and anchors 2 days	80
Services of diver	50
Getting pontoons ready	100
	<hr/>
	\$530
Original contract	500
	<hr/>
	\$1,030

The other items in the bill of particulars are not warranted by the evidence.

Judgment may be entered for that amount.

STEWART et al v. WRIGHT.

(Circuit Court of Appeals, Eighth Circuit. June 21, 1906.)

No. 2,138.

1. EVIDENCE—SIMILAR FACTS—CONSPIRACY TO DEFRAUD.

Where, in an action to recover money alleged to have been obtained from plaintiff by means of a confidence game, it was charged that there was a conspiracy between the defendants to deprive persons of their money by fraud and deceit, evidence as to other cases of a similar character to that in which plaintiff was defrauded, in which defendants acted in concert for the same purpose, was admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 405.]

2. CORPORATIONS—TORTS OF OFFICERS—LIABILITY.

Where a banking corporation, knowing that defendant B. and his associates were engaged in a confidence game, assisted in the furtherance of the scheme, both by representing to the victims as they were brought in that B. was a man of standing, entitled to credit, and by lending B. banking facilities, with which alone he was enabled to conduct his scheme and collect drafts, etc., drawn by the victims before payment could be stopped, and the officers of the bank themselves, with knowledge that the victims were to be defrauded, drew drafts for such victims, and telegraphed to other banks to ascertain the victims' responsibility, the bank as a corporation was liable as a party to the scheme.

3. ACTION — GROUNDS — FRAUDULENT TRANSACTION — RECOVERY OF MONEY —PARTICEPS CRIMINIS—IN PARI DELICTO.

B. and his associates, who were confidence men engaged in enticing others to their city and swindling them out of their money by means of pretended foot races, induced the plaintiff to come and while there to wager money represented as belonging to B. upon the result of such a race upon promise of a percentage of the expected winnings. It was falsely represented to plaintiff that the foot race had been fixed so that B. would certainly win. It was also represented that the men with whom the wagers were made were wealthy miners, whereas in fact they were not miners, but were secretly associated with B., and were members of his band of swindlers, as were also the foot racers. B. pretended to act as stakeholder, and to secretly withdraw moneys from the stakes from time to time, and to pass them to plaintiff to be again wagered. Plaintiff was also induced to wager his own money upon the pretended foot race. Plaintiff did not win, and it was never intended by the swindlers that he should win. All of the acts and pretenses of B. and his associates were false and fraudulent, and were part of a prearranged and frequently practiced scheme to defraud. *Held* that, although the plaintiff thought that he was participating in a scheme to defraud others, that he was doing so existed not in fact, but only in his own mind, and all that he did operated solely to defraud himself; that he was not particeps criminis in any unlawful proceeding, and was not in pari delicto with the swindlers who defrauded him, and was not deprived of his right to recover his money.

4. SAME.

Plaintiff having made no attempt to enforce the contract or recover the fruits thereof, but having repudiated the same and sued to recover the money of which he was defrauded, he was not deprived of such remedy by the maxim *ex dolo malo non oritur actio*.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southwestern Division of the Western District of Missouri.

This was an action by Wright against Joseph C. Stewart, James P. Stewart, and the Exchange Bank of Webb City, a Missouri corporation, to recover the sum of \$5,100, alleged to have been obtained from him by false and fraudulent pretenses. A jury was waived, and the cause was tried by the Circuit Court, which made a general finding, and rendered judgment in favor of the plaintiff. *Wright v. Stewart* (C. C.) 130 Fed. 905.

W. R. Robertson and A. E. Spencer, for plaintiffs in error.

J. W. Halliburton (Samuel McReynolds and Hiram W. Currey, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The charge in the petition is that the defendants, Stewart and the bank, acting in combination and concert with a number of swindlers and confidence men, obtained from the plaintiff, Wright, the sum of \$5,100, and that it was accomplished by means of a pretended foot race, the result of which was secretly arranged in advance, and by inducing the plaintiff through various false pretenses to place his money temporarily in the possession of one Boatright, the leader of the swindlers, who pretended to be acting as a stakeholder in the betting, and who promised to return the money so soon as it served the temporary purpose of relieving him (Boatright) from a false and simulated embarrassment arising out of the manipulation of the stake money in his hands.

For some years there existed in Webb City, Mo., an organization styled an athletic club, the ostensible purpose of which was the promotion of athletic sports and pastimes. It was really an organized band of swindlers, some of whom masqueraded as wealthy miners, and so notorious did they become that they were commonly known in the community as the "Buckfoot gang," and their continued operations became an intolerable public scandal. The only branch of their operations with which we are concerned is the fake foot racing, so called. Their plan was to entice men of means to Webb City, and deprive them of their money by various pretexts and devices in connection with foot races, the result of which was always secretly prearranged. Complaints and protests from the victims were sometimes met by threats, with a show of force. Their operations covered a wide territory, extending from Iowa to Texas, and they had a regular staff of decoys in the field. The victims were selected with great care, and various stories were told to induce them to go to Webb City. Their vanity and sympathy were sometimes played upon, and always their cupidity and desire for ill-gotten gain. Some of them were falsely assured at the outset that they were not expected to hazard their own money upon the races, but were told that it would be well for them to take along letters of credit or drafts, to impress the others at Webb City with their responsibility and financial standing. Sometimes the scheme outlined to the intended victims was that they assist

in doing an act of justice to a foot racer of great merit who had been unfairly treated in the past, and who intended to match himself with one backed by the club, whom he could easily defeat. At other times the pretended purpose was to enable Boatright, the chief of the swindlers and the president of the club, to discipline his co-members, who were getting beyond his control, and this was to be accomplished by winning their money on a foot race, the result of which was pre-arranged, and after thus demonstrating that they were at his mercy the money should be returned. Sometimes the victim was induced to bet upon what he was led to believe was a certain and assured result of a foot race. In other instances he was to be a stakeholder, and in still others, as in the case at bar, he was, upon a promise of a percentage of the winnings, to handle and bet the money secretly furnished him by Boatright, who was to act as stakeholder, and pretended that he did not wish it known that he was doing the betting. But, however the scheme varied in its details, the ultimate purpose always in view was to beguile the victim to bring money or to arrange that drafts be honored by his home bank; to get actual possession of his money by some pretext or another when at Webb City, and in doing so to place him in such a position that to complain or make trouble for them he would have to admit his own moral obliquity. They seemed to be vaguely aware of the maxim "*in pari delicto*," and prepared to use it as a shield of defense. To induce a victim to bring letters of credit or drafts, or to arrange for the honoring of drafts by his home bank, it was represented that the advent of a stranger upon the scene, possessed, apparently, of considerable means, was essential to the consummation of the scheme. By slow, cautious, and progressive approach, and with the wiles employed by confidence men, they generally succeeded in securing the trust of the victim, and he was induced to go to Webb City with one or more of the decoys. In some instances, as in the case at bar, they were met outside of the city by Boatright, who would hand the victim several thousand dollars in currency to wager upon a race, the result of which was alleged to be not in doubt. One of the numerous conspirators would then accompany the victim to the defendant bank to see that the money was safely deposited there, and it would be suggested to him that he exhibit to the bank officials, the Stewarts, proof of his own financial resources. He would then be conducted or directed across the street to a saloon, where the subject of foot racing would be casually mentioned, and where he would be introduced to Boatright as though they had met for the first time. The members of the band would quickly gather, and they would then adjourn to a room above the saloon, represented to be the headquarters of the club. A foot race would be arranged, the betting would grow fast and furious, and large sums of money would apparently be wagered. The victim would bet the money which had been given him by Boatright, and the latter would from time to time secretly pass him sums taken from the stakes or money which had already been wagered, and the victim would in turn wager them upon the result of the proposed race. Then someone with a

quarrelsome and truculent manner would claim that he had made a bet which had not been recorded, and would demand a count of the money in the hands of Boatright in order to prove his assertion. Boatright, who is said to have been a consummate actor, would appear to be in great distress, and in fear of the vengeance of the others should they discover that he had abstracted money from the stakes and handed it to the stranger to be wagered. The victim would then be induced by Boatright's pleading to make drafts upon his own bank, which would be cashed at the defendant bank, and the money would be placed, as he supposed temporarily, in the hands of Boatright, to relieve the latter from his embarrassment. When this was done the disturbance would cease, and, if there was no chance to secure more money from the victim, the betting would be closed, the money would be quickly placed in a satchel, and deposited in a place safe from the reach of the victim—sometimes in the defendant bank. The crowd would then adjourn to the place where the pretended foot race was to be run, and the man who the victim thought would win the race would fall down or otherwise fail in his pretended endeavor. It would then be claimed that the victim had wagered his money on the race, and if he evinced a disposition to make trouble revolvers would be drawn, and he would be cowed into submission. This was but one of the various methods employed to rob the victims of their money. The details of the scheme were frequently changed to suit the exigencies of the particular case, but the result was always the same. No stranger ever won anything, and none ever escaped without being defrauded. In some cases their money was given up under circumstances almost amounting to duress. We need not further particularize the facts in Wright's case, except to say that, while protesting that he was being robbed and demanding the return of his money, he was nevertheless induced to hold one end of the string at the pretended foot race.

Was the connection of the defendants with those practices sufficiently established by the evidence? There was substantial evidence to the following effect: The Exchange Bank is a corporation organized under the laws of Missouri. The capital stock was almost wholly owned by James P. Stewart, Joseph C. Stewart, and W. C. Stewart, and they composed the board of directors of the corporation. Joseph C. Stewart was president and James P. Stewart was cashier. Both the president and the cashier knew, and had known for years, of the character of the operations of Boatright and his associates. They knew that no victim who was decoyed by them to Webb City ever escaped without loss. This was a notorious fact, and it was generally recognized in the community in which they lived. They also knew that the foot races were mere pretenses, and were a part of the scheme to defraud. The victims who were decoyed to Webb City were induced to meet the cashier soon after their arrival. They frequently made inquiries as to Boatright's standing and responsibility, and in every instance in which they did so they were informed, in substance, that Boatright was a trustworthy man, and that reliance could be

placed in what he said. This, of course, was false, and was known to be so when the recommendation was given. When the victims deposited in the bank the money Boatright had given them, and exhibited their letters of credit to the cashier, information was given by him that money could be obtained on them. In various instances telegraphic inquiries were made in the name of the bank as to the financial standing of the victims, and whether drafts drawn by them would be honored. Facilities were furnished at the bank enabling them to obtain money, and the officers knew the purpose for which it was being obtained, and that Boatright and his associates would soon get it from them. The cashier of the bank even prepared drafts and checks for the victims to sign, and instead of sending them for collection through correspondent banks, which might be by a circuitous route that would consume time, they would be sent direct to the bank upon which they were drawn, with the result that they were generally honored and paid before payment could be stopped. In one instance the stake money held by the victim, together with some of his own money, which he had been induced to place with the stakes as a guaranty of his good faith and responsibility, was handed to the cashier for safe-keeping, and when the usual climax arrived, and the victim protested that he had not wagered his money, the cashier took the side of Boatright and his party in the discussion. A suit upon a draft upon which payment had been stopped was withdrawn by the bank after a defense had been interposed asserting the criminal connection of the bank and its cashier with the swindling scheme. It was quite a common thing for members of Boatright's organization to accompany the victims on their journeys to the bank to see that they did not escape. Some of the disturbances which arose after the fraud was discovered occurred in the bank. The bank was the depository of the moneys used in the operations of Boatright and his associates. In the case at bar Wright informed the cashier of what was going on. The cashier told him that he could obtain money on his letter of credit; also that Boatright was all right. He afterwards prepared the checks for Wright's signature, and gave him the money, which was soon taken from him.

All of this can lead to but one result. It is certain that had it not been for the bank with its facilities and the aid and assistance of its controlling officers the swindling operations could not have been carried on successfully. The bank was a necessary link in the scheme to defraud. Its name, character, and influence were constantly employed to give Boatright a false standing with his victims. Its corporate instrumentalities were knowingly used in the perpetration of the fraud, and in making it difficult, if not impossible, for them to protect themselves after the discovery of the imposition practiced upon them. Without the active, affirmative assistance of the bank and its officers Boatright and his associates could not have successfully conducted their schemes for so many years. The evidence is overwhelming as to the active connection of James P. Stewart, the cashier, and we are of the opinion that it is also sufficient to uphold the finding of the

Circuit Court against Joseph C. Stewart, the president. There was evidence tending to show that he was at the bank daily; that he knew Boatright and his most prominent associates, the character of the business they were engaged in, and that the checks and drafts of their victims were being cashed by the bank for use in the foot-racing transactions. He knew of litigation that had ensued over the transactions and, notwithstanding all of this, he allowed the bank of which he was president to be actively employed in the consummation of the frauds. He admitted, in the absence of the cashier, that at one time Boatright and his party had accounts in the bank, and that there was an arrangement by which the bank charged up to those accounts the amounts of the defaulted drafts of their victims which it had cashed. There can be no explanation of this except upon the theory that the bank and its officers were aiding and assisting the others in the perpetration of their frauds. The admission referred to was distinctly one of complicity. There was also proof that, even after Boatright and his associates had ceased having open accounts in the bank, the latter was still protected by them from loss upon defaulted drafts. There was evidence tending to show these facts, and in our opinion it is sufficient.

In these fraudulent operations the bank was not a mere third party, pursuing the lawful tenor of its way and confining itself to its legitimate business. On the contrary, it was an active participant in the scheme, and its aid and assistance were most helpful. While it did not decoy the various victims to Webb City, nevertheless after their arrival it assisted in despoiling them. The cashier of the bank had charge of one important station in the scheme. As one after another of the victims, some of them doubting and hesitating, were convoyed to the bank and presented to him, he did his part by falsely vouching for the character of Boatright, and so purposely and designedly encouraged them to proceed. Thereafter the bank, through its managing officers, took advantage of the physical and mental condition of the victims, at times of distress and alarm, which its cashier had materially assisted in creating, and employed its corporate facilities in such a way that their money was transferred from their distant homes to Webb City with the knowledge that it would surely be taken from them. No other agency than a bank could have fulfilled this part in the scheme; it was peculiarly suited to the task. The respect with which a bank and its officers are generally regarded and the confidence reposed in them by the public were utilized in a cunning and effectual way. With full knowledge of the methods of the other conspirators and their designs, born of past experience and participation, the managing and controlling authority of the bank assisted in the accomplishment. Had the cashier told the truth regarding the character of Boatright; had he informed the inquiring victims of the plan that was afoot against them; had he refused to draw the checks and drafts and to cash them; had the president and cashier of the bank declined to allow it to be employed as an agency in obtaining information as to the financial worth of the victims and in bringing the money within the reach of the other conspirators to be stolen—the scheme would have been shorn of most of its potency.

In defense of the bank and its officers it is said:

"If one sees another about to fall into a pit, ordinary humanity would induce him to cry out and warn him of the danger. But the duty is of that imperfect kind, of which conscience is the only sanction." *Brannock v. Bouldin*, 4 Ired. 61.

That is true, but it does not apply to him who assists in preparing the pathway to the pit, and speeds the victim on his way. We would seem to lack perception of the true nature of things were we to be deceived or blinded by the screen of pretense which the conspirators raised to mask their operations. Courts should be as astute to discover and discern the truth as the guilty are to conceal it.

In the consideration of this case the court was not confined to what was said and done to Wright. The charge in the petition is one of conspiracy between the defendants and Boatright and his more active associates, and for proof of such a charge resort was properly had to other cases of a similar character in which concert of action appeared. The going of Wright to Webb City and his departure was but an episode in a long chapter, and it is not to be expected that in his experiences alone will be found all of the proof of the complicity of the bank and its officers.

There is no difficulty in the legal aspect of the case, so far as the bank is concerned. A wealth of ancient precedent may be found in the common law declaring an almost complete immunity of corporations from liability for the torts of their officers and agents, and its influence may also be discerned in some of the earlier decisions of this country. The rationale of the doctrine was that such intangible and impersonal beings, existing only in contemplation of law, and without intelligence and corporeal form, could be guilty of no wrong that implied an evil intent or malicious motive. But all this has been discarded for more than a half a century, and the rule now prevailing is that in respect of liability for the tortious acts of its controlling officers and agents there is no substantial difference between a corporation and a natural person, even in cases in which fraud or malicious intent in fact must be proved. While a corporation has no brain to contrive, no tongue to deceive, and no hands with which to strike, it employs in its service the brains and tongues and hands of others; and as it can only operate through natural persons, there is, as there logically should be, a correlative responsibility for the acts of those persons in the course of the corporate business and of their employment, and for any malicious and evil intent with which such acts are attended.

A few of the multitude of authorities will be sufficient to illustrate the wide range of the modern doctrine. Corporations have been held liable in these cases by attributing to them the conduct of their officers and agents: Assault and battery with a deadly weapon by a railroad company (*Railway v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146); libel by a railroad company (*Railroad v. Quigley*, 21 How. 202, 16 L. Ed. 73); fraud and deceit, assault and battery, malicious prosecution, nuisance, and libel (*National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750); fraud by a municipal corporation in reports of distilled spirits to revenue collector (*Salt Lake City v.*

Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176); fraud and deceit by a manufacturing company (*Butler v. Watkins*, 13 Wall. 457, 463, 20 L. Ed. 629); maintenance of a nuisance (*Railroad v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739); assault and battery by an express company (*Southern Ex. Co. v. Platten*, 36 C. C. A. 46, 93 Fed. 936); malicious prosecution by a manufacturing company (*Copley v. Sewing Machine Co.*, 2 Woods, 494, Fed. Cas. No. 3213); boycotting by a corporation of which the members were mercantile firms (*Hartnett v. Plumber's Supply Assn.*, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194); malicious prosecution by a savings bank (*Reed v. Home Savings Bank*, 130 Mass. 443, 39 Am. Rep. 468); false representations as to corporate stock by a manufacturing company (*Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290); false imprisonment by a national bank (*Wachsmuth v. Nat. Bank*, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278); conspiracy between a bank through its president and a merchant to defraud those of whom latter purchased goods (*Johnston Fife Hat Co. v. National Bank*, 4 Okl. 17, 44 Pac. 192). It is also well settled that a corporation cannot escape liability upon a plea that the tortious acts were ultra vires. *Railroad v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Merchants' Bank v. State Bank*, 10 Wall. 604, 645, 19 L. Ed. 1008; *County of Calhoun v. Emigrant Company*, 93 U. S. 124, 130; 23 L. Ed. 826; *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750; *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; *Railway v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 146; *Railway Co. v. Howard*, 178 U. S. 153, 160, 20 Sup. Ct. 880, 44 L. Ed. 1015; *Alexander v. Relfe*, 74 Mo. 517; *Zinc Carbonate Company v. First National Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

But it is said that Wright should be denied relief because of the maxim "*In pari delicto potior est conditio defendentis.*" It was an essential part of the scheme to defraud that the victim should be led on by degrees to place himself in such a position that he would be prevented from having recourse to the courts. And this defense, so contrived in advance, is now produced for recognition, and it is said that, the plaintiff being equally culpable with the conspirators, a court of justice should therefore leave him where it finds him. It must be admitted that when Wright left his home for Webb City he thought he was going to participate in an unlawful scheme to defraud others. But, after all, it amounted to nothing more than a mere belief on his part. That he was betting upon a foot race at Webb City was but a figment of his imagination. In reality there was no betting and no foot race, and it was not intended that there should be. It was all a pretense and a sham. He was merely a puppet, who was acting the will of the conspirators to his own undoing. The real design behind the scenes was one in which Wright did not participate except as the victim. If he was particeps criminis, it was to an offense against himself. Boatright and his associates sought Wright in his home, awakened in him a desire for wrongful gain that might other-

wise have remained dormant, inspired in his mind an unfounded idea that he was going to secure it, and then by fraud and false pretenses deprived him of his money. We are unable to agree with counsel that the victim was in equal wrong with those who despoiled him merely because, at their instance, and as a result of their wiles, he entertained a purpose which it was never intended he should consummate. To hold otherwise would be to accord too much weight to the unsubstantial, and to enable those whose active occupation was swindling to successfully avail themselves of the false position in which, as part of their predetermined scheme, they succeeded in placing others they intended to defraud. Courts of justice should not thus reward criminal ingenuity. This is not a case in which, two persons having conspired to rob an innocent third, one of the two robs the other. The pretended miners, who were members of the counterfeit athletic club, and against whose wealth Boatright falsely assumed to direct his designs, were in fact his criminal accomplices. They were confidence men, not miners. They, as well as the defendants, played their part in the scheme to defraud, the whole machinery of which was employed, not against themselves, but against their victim.

We are also of the opinion that, viewing the conduct of Wright in its most reprehensible light, nevertheless the interest and welfare of the public would be better subserved by causing the loss to fall upon those who aided and assisted in criminal practices followed as an occupation than by the punishment of the individual victim. It would be doubtful wisdom to extend encouragement to organizations of confidence men, who prey upon the public, by allowing them the use of the rule "in pari delicto" as a shield of defense, when a part of the scheme they employ is to place those they seek and then defraud in the position they rely on.

These conclusions are abundantly supported by authority. The rule which declares that when parties are in equal wrong the position of the defendant is the better, and that the courts will not allow their machinery to be used for the relief of one who has been defrauded in a corrupt or illegal transaction in which he participated, is based not upon statutory provisions, but upon general principles of public policy. It is therefore not for the sake of the defendant that the rule is enforced, but to promote the general good. And when the objection is urged by the defendant, or is suggested by the court of its own motion, two questions present themselves for consideration: Were the parties in equal wrong, or was there such fraud, deceit, oppression, or inequality as challenges the attention of a court of justice? If they appear to be in equal wrong, will nevertheless a wise regard for the general welfare be better subserved by the punishment of the defendant than by denial of relief to the complaining party? In 1 Story, Eq. Jur. § 300, it is said:

"And indeed in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in *pari delicto*, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, hardship, undue influence, or

great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offense. And, besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be."

The same doctrine is recognized by Pomeroy:

"Even when the contracting parties are in *pari delicto*, the courts may interfere from motives of public policy. 'Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him.' " 2 Pomeroy Eq. Jur. § 941.

In *Reynell v. Sprye*, 1 De G. M. & G. 660, 679, it was said:

"But where the parties to a contract against public policy, or illegal, are not in *pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or, at least, the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. Williams*, 18 Ves. 379, is one."

In *Osborne v. Williams*, 18 Ves. 379, there was an illegal contract between a father and son, by which the former obtained from the latter moneys paid him for public services. Sir William Grant, master of the rolls said:

"Courts both of law and equity have held that two parties may concur in an illegal act without being deemed to be in all respects in *pari delicto*. I consider this agreement as substantially the mere act of the father. He put up to sale a situation, which the young man would naturally be desirous of obtaining, and could obtain only upon the terms prescribed by his father."

To the same effect are *Atkinson v. Denby*, 6 H. & N. 778, 30 L. J. Ex. 361; *Smith v. Cuff*, 6 M. & Sel. 160; *Morris v. M'Culloch*, (2d Ed.) Amb. 432. In the note to this case others are cited in which relief was granted on ground of public policy though parties were in *pari delicto*. See, also, *Goldsmith v. Bruning*, 1 Eq. Ca. Ab. 89.

The precise questions now before us were presented upon similar facts to the Supreme Courts of Missouri and Arkansas. *Hobbs v. Boatright, et al.* (Mo. Sup.) 93 S. W. 934, and *Lockman v. Cobb* (Ark.) 91 S. W. 546. In the *Hobbs Case* the Missouri court affirmed a judgment against the Exchange Bank and Stewart, its cashier, upon evidence which is said by that court to be substantially the same as in the case now before us. Hobbs was one of the numerous victims of Boatright and his co-conspirators. Referring to the general rule, that court said that it "should not be applied in a case in which to withhold relief would to a greater extent offend public morals." And it put this question and answered it against the defendants:

"Will we promote good morals to say to this gang and their friends and abettors, you have so debauched and degraded your victim that the law will not touch him or hear his complaint; therefore you may go free, keep what you took from him, and look out for another victim?"

In the Arkansas case Cobb was defrauded by some of Boatright's active assistants, who seem to have engaged for the time being in business on their own account. The methods employed were like

those in the case at bar, and the same defense was urged against recovery. The Supreme Court of that state said:

"In what wrong or crime were the plaintiff and defendants in *pari delicto*? If any, it was a conspiracy by the defendants to defraud the plaintiff and to steal his money; to obtain by deceit and falsehood the money of plaintiff by inducing him to believe that a foot race was to be run, and that they were actually wagering their money, one against the other, upon it; and to induce him to believe he was betting upon a foot race. He did not participate in this conspiracy, and could not possibly have done so. * * * By fraud and deceit they caused him to make a pretended wager, and robbed him of his money, pretending that he had lost it. He might have intended to wager if he had the opportunity, but intention without any act to carry it into effect does not constitute a crime or a wrong, and he was not in *pari delicto* with the defendants."

In *Hinsdill v. White*, 34 Vt. 558, the defendant falsely and fraudulently represented to plaintiff that he had certain evidence that her son had burglarized his house, and by means thereof he induced her to pay him money for his agreement not to prosecute. Upon learning of the fraud, she sued to recover the money. The court said:

"The consideration and object of the contract and payment of the money were in contravention of law, and to this extent the parties were in equal fault; but the plaintiff was induced to enter into it and to pay the money by the false and fraudulent representations of the defendant. In such case are the parties to be regarded as in *pari delicto*, so that the law will regard them as equally reprehensible, and refuse to interfere?"

It was held:

"That when one has by fraudulent means induced another to pay him money, he cannot shield himself from paying it back by saying that both parties had an illegal end in view in the transaction."

That courts will take notice of the different degrees of culpability and act accordingly was recognized in *Harrington v. Grant*, 54 Vt. 236.

In *Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887, a physician who attended a girl during an illness represented to her father and a neighbor who had a son that the illness was due to a criminal operation; that a humane society, having learned of it, was about to institute a prosecution against the members of both families; that he could hush the matter up if they would give him \$3,000 to hand to the agent of the society. After repeated urging, they gave him the money. Some years afterwards it was learned that all of his representations were false, and that he had pocketed the money. Suit was brought for its recovery. The contention now urged upon us found favor with the trial court. It said:

"They [the plaintiffs] cannot be heard to say that he committed a fraud upon them by failing to consummate an arrangement which was in itself a fraud upon the administration of justice. The plaintiffs are the parties, who, to maintain their action, are compelled to uncover and invoke the aid of the corrupt agreement. This being the case, they cannot profit by it, either directly, as the foundation of an action, or by using it to toll the statute."

But the Supreme Court of Pennsylvania said:

"It is argued that, even if no crime was actually committed by plaintiffs, yet there was an intent to commit one when they paid the money to Blachley, and hence, even if their agent defrauded them, they cannot recover it back. As we have noticed, the intended crime was an impossible one. When conduct susceptible of two constructions is proven, the intent often determines its criminality; but an intent not carried out by an act, or which is impossible of execution by an act, is not punishable. The law takes no cognizance of an intent existing only in the mind, nor does it impose, as a penalty for such intent, immunity to him who has plundered one guilty of it."

In *Gorringer v. Read*, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692, the court set aside a conveyance executed by a woman to prevent the prosecution of her husband as for a felony. He had stolen property of small value, and it was falsely represented to her that he had committed a penitentiary offense. It was said:

"It is no doubt true, as a general proposition, that a court of equity, acting on the maxim, '*In pari delicto potior est conditio defendantis et possidentis*,' will not interpose to aid parties who are concerned in unlawful transactions or agreements; but where public policy requires relief to be given, and when the parties, though in delicto, are not in *pari delicto*—as when at the time of the transaction the complainant was under undue influence, hardship, oppression, or great inequality of condition or age existed, and acted involuntarily—the maxim does not apply."

In *re Arnold* (D. C.) 133 Fed. 789. In this case the bankrupts, by representing that they were engaged in conducting a racing stable, betting on races, etc., that they had exceptional facilities for making money by this means, and that their profits enabled them to pay large returns, secured from the public deposits of large sums of money to be used in their business. Among the depositors was the claimant. His claim was objected to on the ground that the business of the bankrupts was illegal, and he knew it. It was found, however, that many of the most material representations which induced the deposits were entirely false; that the racing was but an incidental feature of their scheme, and that they were really paying the pretended dividends out of the moneys deposited, and not out of profits made. It was contended that the bankrupts and the claimant were engaged in a gambling venture, and were in *pari delicto*. Judge Adams, now of this court, held that this view was altogether too superficial. He applied the doctrine announced by the Supreme Court of Vermont in *Hinsdill v. White*, *supra*, and allowed the claim.

In *Catts v. Phalen*, 2 How. (U. S.) 376, 11 L. Ed. 306, the defendant was employed to draw numbers from a lottery wheel. He secretly employed an outsider to purchase a lottery ticket for him, and when the drawing came off he concealed in the cuff of his coat a false ticket, with numbers corresponding to those on the ticket purchased, and then, slipping it to his fingers, he pretended to have drawn it from the wheel. He received a prize of \$12,500. Upon discovery of the fraud an action was brought to recover the money. The case was considered upon the assumption that a legislative act had declared the lottery business to be illegal, and that defense was asserted.

The Supreme Court held, however, that the money was paid to and received by the defendant on a false assertion of the fact that he had a ticket which was entitled to a prize; that the contract which the law raised between the parties was not founded on the drawing of the lottery, but on the obligation to refund the money, which had been received by falsehood and fraud, and by the assertion of a drawing which never took place. The court said that to state is to decide such a case, and it was held that the plaintiffs could recover. Many other authorities may be found in the opinion of the learned district judge before whom this case was tried. 130 Fed. 905.

The clear distinction between the relation of Wright, upon the one hand, and that of Boatright and his associates, upon the other, to the fraudulent transactions by which the former was deprived of his money is further illustrated by the aspect in which such transactions have been regarded by many of the courts. In accordance with their decisions, Boatright and his associates could have been charged with and convicted of the crime of larceny. It would seem anomalous if Wright were held to be *particeps criminis* to a larceny of his own money, and equally so if he were held to be *in pari delicto* with those who stole it. Conduct similar to that under consideration has been held to constitute larceny, even though the fraud or pretense practiced on the victim, and by which he was despoiled of his money, assumed the simulated form of a violation of the law, in which he participated. *State v. Skilbrick*, 25 Wash. 555, 66 Pac. 53, 87 Am. St. Rep. 784; *Doss v. People*, 158 Ill. 660, 41 N. E. 1093, 49 Am. St. Rep. 180; *Crum v. State*, 148 Ind. 401, 47 N. E. 833; *Johnson v. State* (Ark.) 88 S. W. 905; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372; *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2; *People v. De Graaf*, 127 Cal. 676, 60 Pac. 429; *Defrese v. State*, 50 Tenn. 53, 8 Am. Rep. 1; *Hall v. State*, 65 Tenn. 522.

It is also contended that a recovery by Wright is precluded by the maxim "*ex dolo malo non oritur actio*." This contention is in part answered by the authorities already reviewed, and by what we have said concerning the character of the transaction and Wright's connection with it. We are of the opinion that the maxim has no pertinency to a case like that before us. Its meaning is that a court will not lend its aid to one who founds his action upon an immoral or illegal act, and the test of its applicability is whether the plaintiff can make out his case otherwise than through the medium and by the aid of such an act, to which he himself was a party. Must he have the aid of the illegal transaction in order to recover? Has he founded his action upon it? Is he seeking to recover the avails or the results thereof?

Sir George Jessel thus expressed the doctrine in *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 197:

"I think that the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or

compensation for the breach of it, or contribution from the persons making the profits realized from it."

It seems to us quite obvious that this doctrine does not touch the case at bar. This action was not brought to enforce a corrupt or illegal contract, or to secure any of the fruits thereof. Wright does not so found the action. He does not ask the court to recognize the propriety of his transaction, or to award him any portion of the plunder. He proceeds, not in affirmance or reliance, but wholly by way of repudiation, and seeks merely a restoration of that which was illegally taken from him by fraud and false pretense. The rule which controls cases like the one at bar is the rule of the lottery ticket case (*Catts v. Phalen*, *supra*). It was also expressed by the Supreme Court in *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 Sup. Ct. 512, 47 L. Ed. 879, where, omitting the citations, it was said:

"The question then is, leaving on one side the averment just quoted from the answer, and assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from withdrawing from the bargain on the ground of preliminary fraud. If the withdrawal were on the ground of repentance alone, the law might, or might not, leave the parties where it found them. But a person does not become an outlaw and lose all rights by doing an illegal act. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object because he has brought about the other's consent by wrong."

The court further observed: "Cases where the action is on the illegal contract do not apply." The transaction referred to in this case appears to have been completed, and not one in which one of the parties halted and repented during its progress. When attention is directed to the character of the cases in the Supreme Court which are relied upon to support the defense *ex dolo malo*, their inapplicability we think becomes apparent. In almost every instance the illegal bargain was the vehicle in which the plaintiff desired the court to move him to judgment. He founded his action upon it, and either directly or indirectly sought its enforcement. It is this that the Supreme Court holds cannot be done. These are the cases:

Hall v. Coppel, 7 Wall. 542, 19 L. Ed. 244. The action was for damages for the breach of a contract by which plaintiff, a British consul at New Orleans, agreed to protect from seizure and confiscation certain cotton then within the lines of the confederate forces, in consideration of a part of the profits when the cotton was sold. The plaintiff issued certificates falsely certifying the cotton was "the property of a British subject." The action was founded upon the contract, the parties to which "intended to delude and defraud the United States."

In *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539, there was a corrupt contract between the consul general of the Ottoman government at the port of New York, and an American company which manufactured arms that in consideration of an agreed commission the former should use his influence with a trusted agent of his government sent over to purchase arms to induce him to make the purchases of the company. The action was upon the contract to recover the commission.

In *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, it was held that a broker who knowingly brings parties together for the purpose of wagering or gambling cannot recover for services or for losses incurred by himself.

In *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172, the same rule was applied to a case in which such losses were the consideration of promissory notes.

In *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, the plaintiff, a quasi public corporation, sued to recover on a lease by which, without authority of law, it stripped itself of property, stipulated against the performance by it of its public duties, and abdicated its corporate functions. The action was in covenant on the instrument by which this was done.

Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108, exhibits another phase of the controversy involved in the case last cited. In this case the lessor was allowed to recover from the lessee the value of the property delivered under the void lease, upon the principle that the right to a recovery of property transferred under an illegal contract is founded upon an implied promise to return or make compensation for it. The recovery was permitted, because it rested upon a disaffirmance instead of upon a reliance on the contract.

McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, was a suit by one of the parties to an illegal contract founded in fraud, and its object was the recovery of profits, to which complainant claimed to be entitled under the contract. The character of this case is clearly illustrated by the language of the court:

"In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal."

In *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706, there was a bill in equity to restrain defendants from using an alleged trade-mark and for an accounting of profits. The doctrine of the case was concisely stated as follows:

"A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine."

In other words, complainant sought a court of equity to affirmatively perpetuate and enforce a fraud.

In *Thomas v. City of Richmond*, 12 Wall. 349, 20 L. Ed. 453, a city, without authority of law and against express statutory prohibition, issued bills to circulate as currency. It was held that an action would not lie on the bills or for money had and received. This doctrine is affected by considerations of public policy in respect of corporations and their powers.

In *Harriman v. Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739, the rule in *pari delicto* was applied, not the rule *ex dolo malo*, and it was noted that the parties may not be in equal wrong when there has been fraud or oppression on the part of the defendant.

Some other matters are presented by counsel but we find nothing in them sufficient to disturb the conclusion reached.

The judgment of the Circuit Court is affirmed.

SANBORN, Circuit Judge (dissenting). The plaintiff agreed with Boatright that for 20 per cent. of their winnings he would wager Boatright's money on a fake foot race, which Boatright agreed to make certain to result in their favor, so that they could thereby defraud the miners who bet against them out of their money. The plaintiff wagered large sums of money which he knew Boatright fraudulently furnished to him from the stakes and some of his own money in the performance of this corrupt agreement. Boatright broke his contract, and fixed the race against him. The plaintiff made and performed his part of his illegal contract to defraud others. He participated in the betting for this purpose. His intent and his acts were no less criminal and fatal to his case because they proved abortive. *Rex v. De Berranger*, 3 M. & S. 72.

The result of the opinion of the majority is that the plaintiff may recover because the gambling was fraudulent, because while the plaintiff was performing his agreement to cheat others by the fraudulent device of inducing them to bet upon the fake foot race they were engaged in a like endeavor to defraud him by the same device; an endeavor in which they succeeded while he failed. It is that one who is defrauded in gaming while he is engaged in an endeavor to defraud others thereby may recover the losses he sustains. The argument is that the plaintiff was induced by fraud to make his corrupt agreement, and to perform his part of it by betting upon a fraudulent race, and that he was not gaming because the result was certain. But the same argument holds good in every case of foul play, because in every such case the losing gambler is induced to bet upon a sure thing by the fraudulent representation that the play will be fair. If this argument be sound, and if the conclusion in this case illustrates the true rule, every gambler may recover in the courts the losses he sustains upon fixed races, marked cards, or foul plays upon the ground that in such cases there is no uncertainty in the result, while in cases in which the races and plays are fair he is remediless; and henceforth the courts must, as Judge Sherwood said in *Kitchen v. Greenabaum*, 61 Mo. 115, "sit as the

arbiters of the gaming table and the umpires of the prize ring," for they must hear the evidence upon and determine the issue in every losing gambler's case, whether the race or play was foul or fair, and give judgment for or against him accordingly. A rule and practice of this nature runs counter to my views of the law, to those of more eminent judges who have preceded me, and to the established rule that no cause of action lies for fraud which induces, or damage which results from, a contract or transaction which involves the moral turpitude of the plaintiff, or his violation of a general law of public policy.

In *Babcock v. Thompson*, 20 Mass. 446, 449, 15 Am. Dec. 235, this very question was considered and determined by the Supreme Court of Massachusetts. The plaintiff brought an action to recover from the defendant money lost in gaming by foul play. The court said, by the mouth of Chief Justice Parker:

"Here is a case of gaming accompanied with cheating. Clearly, if the gaming had been fair, the law would give no remedy. The only question then is, whether the fraud will alter the case. We think it will not. If a man thus voluntarily puts himself in a condition to be cheated, through his illegal act he cheats the government, and the other person cheats him, and they must be left to settle the affair between themselves."

In *Abbe v. Marr*, 14 Cal. 210, 212, the exact case before us was presented to the Supreme Court of California, which was then composed of Chief Justice Field, afterwards Mr. Justice Field of the Supreme Court, and Judges Baldwin and Cope. The members of a gang of swindlers, by false representations and promises that they had arranged to fix a horse race so that the plaintiffs' horse would surely win, induced them to bet their horses, cows, wood, and money on this race, and then they so fixed the race that the plaintiffs lost. They brought an action directly against the members of the gang to recover back their property. The court said:

"No court of justice can listen to such a case. When the plaintiff asserts his own turpitude in this way he sends his case out of court. If in attempting, by way of reprisal or otherwise, to swindle another he becomes the victim of his own arts, it may become a question in morals or in honor which party is more culpable. Courts of law entertain no discussion on the subject, but terminate the controversy by shutting their doors in the face of the intruder."

In *Scott v. Brown & Co., L. T. R. (N. S. 1892) 782*, the purchasers of shares of stock brought an action against their brokers to recover moneys they had paid for the shares, on the ground that the brokers had sold their own shares to them instead of buying shares for them in the market, and upon the trial the fact crept out that the plaintiffs had agreed that the brokers should buy the shares on the market at a premium to start the corporation and induce the public to buy at a high rate. The Court of Appeals held that the plaintiffs could not recover on account of the fraud which the brokers had committed upon the plaintiffs because the plaintiffs themselves had authorized the purchases for the purpose of cheating the public, and it quotes the declaration of Chief Justice Cockburn in *Begbie v. Phosphate Sewage Co., L. R. 10 Q. B. 491, 499*, that "the plaintiff

cannot recover back the money, on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back." The plaintiff paid his money here in furtherance of the fraud which he had agreed to perpetrate on the miners at Webb City, for the unlawful purpose of cheating them at gaming.

In *Robeson v. French*, 53 Mass. 24, 25, 45 Am. Dec. 236, the plaintiff brought an action to recover damages for fraud in a horse trade which was made on Sunday. The court denied a recovery, and said, after citing the statute which prohibited trading on that day: "In all such cases it is a well-established principle that a court will not lend its aid to a party who founds his action on an illegal transaction."

In *Gregg v. Wyman*, 58 Mass. 322, 325, an action for damages for the abuse of a horse let for driving for pleasure on Sunday failed upon the same ground.

In *Myers v. Meinrath*, 101 Mass. 366, 370, 3 Am. Rep. 368, the plaintiff sold and delivered to the defendant a chattel in exchange for another on Sunday. He subsequently returned the chattel he had received, and then brought an action of tort for the conversion of the chattel which the defendant had retained. The court said that the plaintiff contended that he was entitled to recover because his rights did not depend at all upon the illegal transaction, and it answered:

"But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary for the plaintiff to resort to this suit to regain it. It is inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court. *Gregg v. Wyman*, 4 Cush. (Mass.) 322; *Duffy v. Gorman*, 10 Cush. (Mass.) 45. The ends of justice are found to be best secured by permitting it to be thus administered upon one of two offending parties at the instigation of the other," and a recovery was denied.

In *Haynes v. Rudd*, 102 N. Y. 372, 376, 7 N. E. 287, 55 Am. Rep. 815, the maker of a note brought an action against the payee to recover from him the amount which the maker had been obliged to pay to a bona fide holder of the note, which the defendant had induced him by threats and the inspiration of fear to make to compound a felony. The court refused to permit a recovery and said:

"While fraud, duress, and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist and cannot be enforced where the consideration of the contract thus made arises entirely upon, or is in any way affected by, the compounding of a felony."

Nor does such a right exist when the object of the fraud is to induce the victim to make and perform a contract to defraud others, or to conduct an illegal transaction in gaming, because he can do neither without himself violating the moral and the civil law, and shutting the doors of the courts against him. This conclusion is further sustained by the following rules of law and decisions of the courts.

1. *Ex dolo malo non oritur actio*. It is the settled public policy of the United States that its courts shall sustain no action, whether in

tort or on contract, which arises out of the moral turpitude of the plaintiff, or from his violation of a general law of public policy, because the maintenance of such actions promotes violations of the moral law and of the civil law by inspiring the belief that one may safely violate both, since if he loses the courts will make him whole. This rule is not conditioned nor limited by the maxim, "In pari delicto potior est conditio defendentis," nor by any requirement that the guilt of the plaintiff must be equal to that of the defendant. Such a limitation would destroy the rule, because the cases are rare, perhaps none ever arises, in which the intelligence, knowledge, and situations of the parties are such that their guilt is equal. *Hall v. Coppel*, 7 Wall. 552, 547, 558, 19 L. Ed. 244; *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453; *Oscanyan v. Arms Co.*, 103 U. S. 261, 269, 26 L. Ed. 539; *Irwin v. Williar*, 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225; *Embrey v. Jemison*, 131 U. S. 336, 345, 9 Sup. Ct. 776, 33 L. Ed. 172; *Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Pullman's Car Co. v. Transportation Co.*, 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108; *McMullen v. Hoffman*, 174 U. S. 639, 654, 658, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 295, 25 Sup. Ct. 493, 49 L. Ed. 739; *Babcock v. Thompson*, 20 Mass. 446, 449, 15 Am. Dec. 235; *Myers v. Meinrath*, 101 Mass. 366, 370, 3 Am. Rep. 368; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, 377; *Robeson v. French*, 53 Mass. 24, 25, 45 Am. Dec. 236; *Duffy v. Gorman*, 64 Mass. 45; *Frost v. Cage*, 85 Mass. 560, 562; *Gregg v. Wyman*, 58 Mass. 322, 324, 326, 327; *Pattee v. Greely*, 13 Metc. 284, 287; *Holman v. Johnson*, 1 Cowp. 341, 343, 344; *Taylor v. Chester*, L. R. 4 Q. B. 314, 315; *Begbie v. Phosphate Sewage Co.*, 10 L. R. Q. B. (1875) 491, 499; *Scott v. Brown & Co.*, L. T. R. (N. S. 1892) 782; *Chicago, etc., R. Co. v. Wabash, etc., R. Co.*, 9 C. C. A. 659, 61 Fed. 993; *Miller v. Marckle*, 21 Ill. 151; *Shaffner v. Pinchback* (Ill.) 24 N. E. 867, 868, 23 Am. St. Rep. 624; *Bryant v. Wilcox* (Mich.) 100 N. W. 918, 919, 920; *Knight v. Linzey*, 80 Mich. 396, 45 N. W. 337, 339; *Morgan v. Groff*, 5 Denio (N. Y.) 364, 365, 49 Am. Dec. 273; *Haynes v. Rudd*, 102 N. Y. 372, 376, 377, 7 N. E. 287, 55 Am. Rep. 815; *Morrison v. Bennett* (Mont.) 52 Pac. 553, 40 L. R. A. 158; *Lyon v. Strong*, 6 Vt. 219; *Shipley v. Reasoner*, 80 Iowa. 548, 552, 45 N. W. 1077; *Kitchen v. Greenabaum*, 61 Mo. 110, 115; *Williamson v. Baley*, 78 Mo. 636, 638; *Sprague v. Rooney*, 104 Mo. 349, 358, 16 S. W. 505; *Haggerty v. Storage Co.*, 143 Mo. 238, 247, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; *Green v. Corrigan*, 87 Mo. 359; *Tyler v. Larimore*, 19 Mo. App. 445, 458; *Clark on Contracts*, § 213.

2. The maintenance of actions to recover moneys or property lost or damages sustained through transactions or contracts wherein the plaintiffs are guilty of moral turpitude or of the violation of a general law of public policy is as imperatively prohibited by the foregoing rule as the maintenance of actions to enforce contracts of that nature. *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453;

Irwin v. Williar, 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225; Begbie v. Phosphate Sewage Co., L. R. 10 Q. B. 491, 499; Scott v. Brown & Co., L. T. R. (N. S. 1892) 782; Babcock v. Thompson, 20 Mass. 446, 449, 15 Am. Dec. 235; Abbe v. Marr, 14 Cal. 210, 212; Knight v. Linzey, 80 Mich. 396, 45 N. W. 337, 339, 8 L. R. A. 476; Morgan v. Groff, 5 Denio (N. Y.) 364, 365, 49 Am. Dec. 273; Myers v. Meinrath, 101 Mass. 366, 370, 3 Am. Rep. 368; Haynes v. Rudd, 102 N. Y. 372, 376, 377, 7 N. E. 287, 55 Am. Rep. 815; Bryant v. Wilcox (Mich.) 100 N. W. 919, 920; Shaffner v. Pinchback (Ill.) 24 N. E. 866, 868, 23 Am. St. Rep. 624; Inhabitants of Worcester v. Eaton, 11 Mass. 366, 377; Shipley v. Reasoner, 80 Iowa, 548, 558, 45 N. W. 1077; Robeson v. French, 53 Mass. 24, 25, 45 Am. Dec. 236; Lyon v. Strong, 6 Vt. 219; Duffy v. Gorman, 64 Mass. 45.

3. No action lies for fraudulently inducing one to engage knowingly, or for damages resulting while one is knowingly engaged, in a contract or transaction which involves his own moral turpitude and his violation of general laws of public policy, because his own wrong and his violation of law repel him from the courts. Haynes v. Rudd, 102 N. Y. 372, 376, 377, 7 N. E. 287, 55 Am. Rep. 815; Babcock v. Thompson, 20 Mass. 446, 449, 15 Am. Dec. 235; Abbe v. Marr, 14 Cal. 210, 212; Scott v. Brown & Co., L. T. R. (N. S. 1892) 782; Begbie v. Phosphate Sewage Co., L. R. 10 Q. B. 491, 499; Robeson v. French, 53 Mass. 24, 25, 45 Am. Dec. 236; Gregg v. Wyman, 58 Mass. 322, 325; Duffy v. Gorman, 64 Mass. 45.

4. The maxim, "*In pari delicto potior est conditio defendentis*" is but a corollary to the general rule "*Ex dolo malo non oritur actio*," and it neither limits nor controls it. But if the act or contract from which one's cause of action springs be in itself immoral, or a violation of the general laws of public policy, he is in *in pari delicto*, within the proper interpretation of this maxim, although his guilt may be incomparably less than that of the defendant. Thomas v. Richmond, 12 Wall. 349, 355, 20 L. Ed. 453; Smith v. Bromley, 2 Doug. 696, note; Harriman v. Northern Securities Co., 197 U. S. 244, 295, 25 Sup. Ct. 493, 49 L. Ed. 739, and authorities cited under rule 1. The test which determines whether or not a plaintiff is in *in pari delicto*, within the true meaning of this maxim, is not whether his guilt is equal to that of the defendant, but whether or not the whole transaction upon which his case is founded can be portrayed to the court without disclosing his moral turpitude or his violation of a general law of public policy. Taylor v. Chester, L. R. 4 Q. B. 314, 315; Simpson v. Bloss, 7 Taunt. 256; Gregg v. Wyman, 58 Mass. 322, 326, and authorities there cited.

The rule of law which governs this case is one of public policy. All agree that the highest and broadest public policy forbids relief to the plaintiff, or the punishment of the defendants by the maintenance of a baseless action, in violation of any settled public policy of the nation evidenced by the uniform decisions of its Supreme Court. The opinion of the majority, however, is that it is the public policy of this nation to sustain actions arising out of contracts and transactions wherein the plaintiffs have been guilty of moral

turpitude and of violation of general laws of public policy, such as those against gaming, unless the guilt of the plaintiffs is equal to that of the defendants, and even then whenever the judges who happen to try any particular case are of the opinion that the general welfare will be better subserved by the punishment of the defendant than by the denial of relief to the complaining party.

Public policy is not to be determined by the views which particular judges may entertain of the interests of the people, nor by general considerations tending to show what policy would probably be wise or unwise, because such a standard of determination might be unconsciously varied by the personal views of the judges who happen to constitute the court in each particular case. The public policy of the nation may be determined only by its Constitution, laws, and judicial decisions. *Vidal v. Girard's Exr's*, 2 How. 127, 197, 11 L. Ed. 205; *Swann v. Swann* (C. C.) 21 Fed. 299, 301; *U. S. v. Freight Ass'n*, 166 U. S. 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Hartford Fire Ins. Co., v. Chicago, Milwaukee & St. Paul Ry. Co.*, 70 Fed. 201, 202, 17 C. C. A. 62, 63, 30 L. R. A. 193; *Daniels v. Benedict*, 97 Fed. 367, 372, 38 C. C. A. 592, 597.

Nor is the question here one of the public policy of the state of Missouri. This is an action between citizens of different states. It involves a question of general law, the public policy of the nation regarding the maintenance in its courts of actions for damages resulting from transactions wherein the plaintiffs are guilty of moral turpitude, as was the plaintiff in this case in making and performing his part of the agreement to defraud his associates by betting upon a fraudulent foot race. *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 70 Fed. 201, 202, 17 C. C. A. 62, 63, 30 L. R. A. 193. Moreover, the state of Missouri has no settled public policy upon this question.

In *Kitchen v. Greenabaum*, 61 Mo. 110, 115, the Supreme Court of Missouri adopted and enforced the rules stated in this opinion. In that case the defendant by fraudulent concealment and false representations had induced the plaintiff to sell him a lottery ticket which had drawn a prize of \$600 for the paltry sum of \$10, and the court refused to sustain an action on his part for the recovery of the \$600 which the defendant had collected on the ticket. Here was a mere violation of a general law of public policy. Here the guilt of the plaintiff was incomparably less than that of the defendant, because he had participated in no fraud, and yet the court denied a recovery. The rule thus established was followed by the Supreme Court of that state in *Williamson v. Baley*, 78 Mo. 636, 638; *Green v. Corrigan*, 87 Mo. 359; *Sprague v. Rooney*, 104 Mo. 358, 16 S. W. 505; and *Haggerty v. Storage Co.*, 143 Mo. 247, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647. But in the late case of *Hobbs v. Boat-right* (Mo. Sup.) 93 S. W. 934, wherein that court followed the judgment below, it repudiated these rules, and abandoned the salutary public policy they evidence. There is, therefore, no settled public policy upon this question in the state of Missouri.

We turn, therefore, to the decisions in England which have been adopted in this country, and to the decisions of the Supreme Court and to those of other courts whose opinions are in accord with them, to learn the public policy of the nation upon this subject.

In *Holman v. Johnson*, 1 Cowp. 343, Lord Mansfield declared the public policy which has ever prevailed in England in memorable words, which have been adopted by repeated decisions of the Supreme Court of the United States in cases which have involved this question. He said:

"The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it: for where both are equally in fault, potior est conditio defendentis."

It will be noticed that the basis of this rule is not the equality of the guilt of the parties to the action. The remark upon that subject presents the maxim "*In pari delicto potior est conditio defendentis*" as a mere corollary to the fundamental rule. By the terms of the statement of Lord Mansfield it neither conditions nor controls that rule. The rule is that the courts will not aid a plaintiff to maintain an action which arises out of his moral turpitude and the violation of a general law of public policy if his act or contract is stained with wrong, although his guilt may be less than that of the defendant, and the reason for it is that the maintenance of such actions necessarily promotes violations of both the moral and the civil law. It leads men to lay the flattering unction to their souls that they may safely violate the laws of both God and man because if they lose thereby the courts will fully indemnify them. This rule of public policy has been adopted and steadily maintained by the uniform decisions of the Supreme Court. See the cases cited under rule 1, *supra*.

In *Hall v. Coppel*, 7 Wall. 558, 19 L. Ed. 244, the plaintiff, who while British vice consul had undertaken to protect cotton in the confederate lines for certain commissions, brought an action to recover them, and asserted that the illegality of the transaction had been waived by a reconvention. The Supreme Court said:

"The maxim, '*Ex dolo malo non oritur actio*' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice

of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

Note that the court did not stop to inquire whether the guilt of the plaintiff was equal to that of the defendant, but declared that "wherever the contamination reaches, it destroys." This was an action to enforce a contract in violation of a general law of public policy. But the rule applies with equal force to actions to rescind or repudiate a contract to recover money paid or property delivered, or to recover damages which arise out of a plaintiff's immoral act or his act violative of a general law of public policy.

In *Thomas v. Richmond*, 12 Wall, 349, 355, 20 L. Ed. 453, the city of Richmond had issued notes in small amounts to circulate as currency without authority so to do and in violation of the general public policy of the state of Virginia. The city had received the money therefor, and the plaintiff had purchased the notes. He brought an action in assumpsit and also on the common money counts for money had and received. His counsel contended that, although the notes themselves were void, the city received the money therefor, and ought not in conscience to retain it, and that therefore the action for money had and received could be maintained. The city had conceived and executed the unlawful scheme of making and issuing the notes and receiving the money therefor. The plaintiff was incomparably less guilty than the defendant, because he had done nothing but purchase the notes in the ordinary course of his business. But he failed to recover, and to the proposition that he was not in *pari delicto* the Supreme Court said:

"Lord Mansfield, in *Smith v. Bromley*, as long ago as 1700, laid down the doctrine, which has ever since been followed, in these words: 'If the act be in itself immoral, or a violation of the general laws of public policy, both parties are in *pari delicto*; but where the law violated is calculated for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover'" (page 355).

The Supreme Court, so far as the decisions cited or discovered indicate, has never departed from this rule.

There are two cases in which the plaintiffs had been guilty of no moral turpitude and had violated no general law of public policy wherein they were permitted to recover the value of the property they had delivered to corporations under contracts that were simply beyond the powers of those corporations. These cases are *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347, where the plaintiff recovered back an installment of 20 per cent. of the par value of stock which he had agreed to take, but which the corporation had no lawful authority to issue and did not issue, and *Pullman's Car Co. v. Transportation Co.*, 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108, in which the transportation company was permitted to recover the value of property which it had delivered under a contract beyond the powers of the corporation. But in each of these cases the Supreme

Court was careful to reiterate the fundamental rule, and to declare that it would not be disregarded and its full effect would not be minimized. In the former case it said:

"It is to be observed that the making of the illegal contract [the contract of subscription] was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud."

And in the latter case it quoted the first part of the declaration of Lord Mansfield in *Holman v. Johnson*, which closes with the words:

"The principle of public policy is this: '*Ex dolo malo non oritur actio*.' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act,"

—cited numerous authorities, and then said:

"They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where in order to maintain such recovery it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed." Page 151.

The case of *Catts v. Phalen*, 2 How. 376, 11 L. Ed. 306, cited by the majority, rests upon the defendant's false representation that he had drawn a prize ticket when he had not, and upon the fact that the plaintiffs had no need to disclose their acts, if any, in violation of the statute against lotteries in order to sustain their action. They abandoned all the other counts in their complaint, and recovered upon the count for money had and received upon the sole ground that they had been induced to pay out their money long after the lottery had been drawn by the false representation of the defendant that he had drawn out the prize ticket. This case was decided in 1844, and if it has any further or different significance it has been overruled long since by the decisions of the Supreme Court which are here cited.

In *Irwin v. Williar*, 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225, and *Embrey v. Jemison*, 131 U. S. 336, 345, 9 Sup. Ct. 776, 33 L. Ed. 172, brokers had brought actions against their principals to recover losses which they had sustained and commissions which they had earned from their purchases by direction of their principals of contracts for the future delivery of commodities which the principals intended to settle by the payment of differences between the contract prices and the market prices without the delivery of the goods. The illegal intent which alone made these purchases unlawful rested in the minds of the purchasers. The brokers could not have made them illegal by their intent, so that the guilt of the purchasers was incomparably greater than that of the brokers. But in answer to the

thought that the guilt of the brokers was unequal to that of their principals, the Supreme Court said in the former case:

"It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is participes criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."

In *Harriman v. Northern Securities Co.*, 197 U. S. 244, 295, 25 Sup. Ct. 493, 49 L. Ed. 739, the complainants, the holders of the minority of the stock of a corporation, had been driven by a dominant majority to exchange their holdings for the stock of an illegal holding company, and the court held that they could not rescind or disregard the unlawful transaction, and recover back their original stock, although they were clearly far less guilty than the majority, who conceived and forced the execution of the illegal scheme.

In *McMullen v. Hoffman*, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117, the court again reviewed the authorities at length, and refused to sustain an action by a partner for his share of the profits of an executed contract secured by the suppression of competition, in effect overruled the case of *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732, and said:

"There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject, and are known to all of us. They mean substantially the same thing, and are founded upon the same principles and reasoning. They are: '*Ex dolo malo non oritur actio*;' '*Ex pacto illicito non oritur actio*;' '*Ex turpi causa non oritur actio*.' * * * The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is '*Potior est conditio defendentis*.'" (page 654).

—and it quotes with approval the words of Eyre, Chief Justice, in *Farmer v. Russell*, 1 Bos. & P. 296, a case in which an action was brought against the carrier to recover the moneys which he had collected for the delivery of counterfeit coin, wherein he said:

"However, I incline to a new trial on another ground. It does not clearly appear that the defendant was not himself a party to the original contract, for there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, viz., that he was lending his assistance to an infamous traffic. In that case, the rule '*Melior est conditio possidentis*' will apply; for if the contract with him be stained by anything illegal, the plaintiff shall not be heard in a court of law."

These repeated opinions of the highest judicial tribunal of the nation and the decisions of the English and of the state courts in accord

with them, which have been cited above under the rules which they sustain, are more persuasive to my mind of the public policy of this nation regarding the maintenance of actions in its courts than the decisions of state and other inferior courts that are in conflict with them, the general statements of Story and Pomeroy respecting the application of the maxim "*In pari delicto*" in suits in equity, the decision *In re Arnold* (D. C.) 133 Fed. 789, which involved no moral turpitude of the claimant, the opinion of the Supreme Court of Missouri in *Hobbs v. Boatright*, which merely follows the decision under review, or the opinion of the Supreme Court of Arkansas to the same effect. Moreover, Story, at section 303 of his *Equity Jurisprudence*, says:

"In regard to gaming contracts, it would follow, a fortiori, that courts of equity ought not to interfere in their favor, but ought to afford aid to suppress them, since they are not only prohibited by statute, but may justly be pronounced to be immoral, as the practice tends to idleness, dissipation, and the ruin of families."

Pomeroy says at section 938:

"In gaming contracts, unlike usurious loans, it cannot be said that one party takes advantage of the necessities of the other, who is in *vinculis*; both act freely, and are in *pari delicto*. The general maxims therefore apply."

Further, the maxim of equity analogous to the principle which governs this case is not "*In pari delicto potior est conditio defendentis*," but "He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." A court of equity repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit. 1 Pomeroy, *Eq. Jur.* pars. 397, 398, 400; *Medicine Co. v. Wood*, 108 U. S. 218, 227, 2 Sup. Ct. 436, 27 L. Ed. 706; *Marble Co. v. Ripely*, 10 Wall. 339, 357, 19 L. Ed. 955; *Michigan Pipe Co. v. Fremont Ditch, etc., Co.*, 49 C. C. A. 324, 327, 111 Fed. 284, 287. "If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties—a *particeps doli*—while the agreement is still executory, either compel its execution or decree its cancellation, nor after it has been executed, set it aside, and thus restore the plaintiff to the property or other interests which he had fraudulently transferred." 1 Pomeroy, *Eq. Jur.* par. 401.

If the decisions of the Supreme Court have not been misapprehended, they evidence a uniform and established public policy of the nation to refuse to maintain in its courts any action which is founded in a plaintiff's immoral contract or act, or in his contract or act violative of a general law of public policy. This rule of public policy is not conditioned or limited by any inquiry into the equality of the guilt of the plaintiff and the defendant. It applies wherever the plaintiff is *particeps criminis*, whatever the degree of his guilt. It forbids the maintenance of actions to repudiate or rescind corrupt

contracts and transactions and to recover the money lost in their performance as imperatively as actions to enforce them. The plaintiff's cause of action is founded in his own moral turpitude in making and performing his part of the agreement to defraud his associate gamblers, and in a violation of the general laws of public policy against gambling, and it ought not to be maintained in a court of the United States. Its maintenance is controlled and forbidden by the principle, "Ex dolo malo non oritur actio." It is not governed or permitted by the maxim, "In pari delicto est conditio defendantis."

If, however, the view heretofore presented were mistaken and if the maxim "In pari delicto" could be lawfully applied to the decision of this case, it would still seem to me that there was no right of recovery in the plaintiff: (1) Because his contract and act to defraud the miners were immoral, and his betting was violative of a general law of public policy, and these facts place him in *pari delicto*, within the legal meaning of this maxim. *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453. (2) Because evidence of his acts of moral wrong and violation of a general law of public policy is essential to a proof of his cause of action, and this fact places him in *pari delicto*. *Taylor v. Chester*, L. R. 4 Q. B. 314, 315; *Gregg v. Wyman*, 58 Mass. 322, 326, and cases there cited. (3) Because if the court is to sit to determine whether the plaintiff or the defendants were the more guilty, the evidence appears to me to fix the heavier burden upon the former. The question is not whether the guilt of the members of the Buckfoot gang was equal to that of the plaintiff, but whether the guilt of the plaintiff was equal to that of these defendants.

The facts of other cases, the wickedness of the Buckfoot gang, and the acquaintance of the defendants with their general reputation and practices, should not be permitted to conceal the real nature of this case nor the facts it presents. It is an action of conversion by an ex-deputy sheriff of Texas, who participated in the betting, against a bank, its cashier and president, who took no part therein, to recover of them \$5,100 which the plaintiff lost, not to the defendants, but to the members of the gang, while he was performing his part of his corrupt agreement with Boatright to defraud them. All that the defendants ever had to do with this case was that the plaintiff deposited in the bank money he had received from Boatright and drafts on his local bank. The defendant bank cashed the drafts, and paid over to him their proceeds and the money he had deposited with it, and, after the plaintiff had made his agreement with Boatright, and after he knew that he was a perfidious swindler, the cashier, in answer to his suggestion to that effect, said that Boatright was all right. The plaintiff was a man of years, intelligence, and experience, when, in his own home in Texas, free from all inequalities of place or of fortune, of all threats and of all undue influence, a stranger (one of the Buckfoot gang) came to him, informed him that if he would go to Webb City, Mo., show that he had financial standing, and bet the money of Boatright under the false pretense that it was his own, on a race that Boatright had so fixed that it would surely result in his favor, and

would thereby induce the miners, who were Boatright's associates and the members of his club, to be defrauded out of their money by matching his bets, Boatright would give him 20 per cent. of the winnings they should thus fraudulently secure. The plaintiff procured a letter of credit from his local bank for \$5,000, went to Webb City, met Boatright, and agreed with him to do this thing. In performance of this agreement Boatright gave him \$3,300, and told him to match a bet on the race with one Ellis. The plaintiff deposited this \$3,300 in the defendant bank for the purpose of making a false pretense that he was betting his own money, and exhibited to the bank his letter of credit. He went to the club room, bet \$5,000 with Ellis on the foot-race, and put up \$2,500 as a forfeit in the hands of Boatright as a stakeholder. The latter then gave him \$4,000 of the stake money secretly, and he drew out of the bank on his letter of credit \$1,000 of his own money, and bet the entire \$5,000 as his own. These proceedings concluded the operations of his first day in performance of his corrupt agreement. He retired in the consciousness of duty done, considered, but was not content. He returned to the club next day. Boatright gave him \$4,000 more out of the stake money and he drew \$4,000 of his own money, wagered it all, \$100 more that he had in his pocket, and his watch, upon this race, and then asked Boatright to give him more money to bet. It was not until the latter refused this last request that he sought to withdraw his money from the stakeholder, but he nevertheless proceeded to the grounds, and held one end of the string while the race was run. His racer fell and lost. Now, the plaintiff engaged in unlawful betting in violation of a general law of public policy. The defendants did not. The plaintiff made and performed his part of a corrupt contract to defraud his gambling associates, and thereby engaged in a contract and transaction which were both *mala in se* and *mala prohibita*. The defendants made no such contract. They engaged in no such transaction. They did nothing in this case but to inform the plaintiff that Boatright was all right when he knew that he was not, and to pay him his money on his drafts in the regular course of a banking business. In this state of the case, the guilt of the plaintiff in this transaction appears to me to be incomparably greater than that of the defendants, and it does not seem to me that he acted under such circumstances of oppression, hardship, undue influence, or great inequality of condition or age as would bring his case under the exception to the rule in *pari delicto* upon which the majority rely.

The principles, rules, and authorities to which reference has now been made have forced my mind to the conclusion that the plaintiff is entitled to no relief at the hands of the courts of the United States in this case because he was guilty of the moral turpitude of making and performing his part of his contract with Boatright to defraud the miners by a fixed foot race, and because he was guilty by his betting of violating a general law of public policy, and this contract and act constitute an inseparable part of his cause of action, because it was in the performance of them that he lost his money.

There is another reason why the judgment below should be reversed. This is not an action for money had and received. The defendants have none of the money or property of the plaintiff. It is an action for damages for wrongful acts of the defendants. The only acts they performed in this case which could in any way have caused the plaintiff to lose his money were the statement of the cashier that Boatright was all right and the cashing of the drafts of the plaintiff upon his local bank. The plaintiff can recover nothing for the statement concerning Boatright, because he knew when it was made that it was false and that Boatright was a faithless rascal. He had made a contract with him to share the profits of the swindle he had agreed to perpetrate. He was not injured by that statement. The defendants violated no duty they owed to the plaintiff by cashing his drafts drawn upon his letter of credit from his local bank. The plaintiff had a right to draw his money from his local bank. If he had brought an action against that bank to recover the \$5,000 which he had on deposit there, it would have been no defense to that action that he intended to bet his money on a fixed foot race, that he was sure to lose it, and that the bank knew it. No court would listen to such a defense. The defendants cannot be lawfully cast in damages for assisting the plaintiff to draw his money from the bank when they did nothing which a court would not have done in the face of a defense that the bank knew that he was about to lose the money on a fraudulent game. A plaintiff may recover the purchase price of goods which he sells and delivers to a defendant when he knows that the latter is to use them for an unlawful purpose. *Holman v. Johnson*, 1 Cowp. 341; *Tracy v. Talmage*, 14 N. Y. 162, 170, 67 Am. Dec. 132; *Graves v. Johnson*, 179 Mass. 53, 58; 60 N. E. 383, 88 Am. St. Rep. 55; *Anheuser-Busch Brewing Ass'n v. Mason*, 44 Minn. 318, 321, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580. And the bank cannot be legally liable for damages which result to a customer from his own folly in violating the moral and the civil law because it assists him by a lawful act to procure money which he is lawfully entitled to obtain, although it divines or knows that he is about to lose it in a transaction in which it takes no part and from which it receives no benefit.

In my opinion, the judgment against the bank and its officers is wrong, and it should be reversed.

LEAR v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. July 16, 1906.)

No. 42.

1. CRIMINAL LAW—VERDICT—CONSTRUCTION.

In a prosecution for violating the national bank act (Act June 3, 1864, c. 106, 13 Stat. 101 [U. S. Comp. St. 1901, p. 3486]) the indictment contained 150 counts covering 50 transactions with reference to each of which embezzlement, abstraction, and willful misapplication were severally charged. The court directed an acquittal as to the charges

of embezzlement and charged that the first three counts involving a \$10,000 note transaction might be first considered, and, if that money was abstracted or willfully misapplied, the jury should convict defendant, and need not go further into the case. The jury on returning announced that they had found defendant guilty as indicted in the third count; but the verdict, as recorded, was that the defendant was guilty in manner and form as charged in the third count in the indictment, and not guilty as to the remaining counts. *Held*, that such verdict was not tantamount to an express finding that the facts requisite to a conviction on any of the other counts had not been shown to exist, and that there was therefore no evidence on which a finding of their existence with reference to the third count could be sustained.

2. BANKS AND BANKING—NATIONAL BANKS—ABSTRACTION AND MISAPPLICATION OF FUNDS.

In a prosecution of the president of a national bank for violating the national bank act (Act June 3, 1864, c. 106, 13 Stat. 101 [U. S. Comp. St. 1901, p. 3486]), evidence *held* sufficient to require submission to the jury of the question whether he willfully abstracted and misapplied to his own use funds of the bank to the extent of \$10,000, without the authority of the bank's board of directors.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

George S. Graham, for plaintiff in error.

Henry P. Brown, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

GRAY, Circuit Judge. The plaintiff in error, who, during the period involved, was president of the Doylestown National Bank, was tried in the District Court for the Eastern District of Pennsylvania, upon an indictment framed under section 5209 of the Revised Statutes [U. S. Comp. St. 1901, p. 3497], which is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment covered fifty transactions, and, with respect to each of them, embezzlement, abstraction and willful misapplication were severally charged. Accordingly, there were one hundred and fifty counts. The court directed the jury to acquit of embezzlement, and fifty of the counts were eliminated. The charges of abstraction and of willful misapplication were submitted, with instructions, no part of which has been assigned for error, and which, in our opinion, were not

open to valid exception. But the learned counsel of the defendant requested the learned judge to charge that, "under all the evidence in this case as now presented by the prosecution, your verdict should be for the defendant"; and the refusal of this request, the fifth specification avers was erroneous. There are four other specifications, but none of them has been pressed in argument. The first three are plainly without merit, and the fourth relates to counts upon which there was no conviction, and therefore is immaterial.

The defendant's claim of right to binding instructions went to the the whole case, and was based upon "all the evidence." His proposition was, that upon the evidence as a whole, the entire case should be withdrawn from the jury; and that, at the time the court below was required to pass upon it, this proposition could not have been properly affirmed, is indubitable. It has been suggested, however, that the ruling of the court below should now be regarded, not as of the time at which it was made, but with reference to the verdict that was subsequently rendered, and which, it is supposed, has had the effect of excluding some of the evidence from present consideration. This suggestion will be first disposed of.

At the close of his charge, the learned judge, addressing the jury, said:

"I want to say this with reference to this indictment. You need not trouble yourself reading this over, or any part of it. The first three counts of this indictment are concerned with the \$10,000 note, which was obtained in July, 1901. You will perhaps find it desirable, or convenient, to take that subject up first, and if you are satisfied, beyond a reasonable doubt, that that money was abstracted, or willfully misapplied, guided by the instructions I have given you, then there is no occasion for you to go any further into the case, because that disposes of it finally, but if you find in favor of the defendant with regard to that matter, then you will be obliged to go into this series of overdrafts, and you will have to determine concerning those, whether, with regard to any one or more of them, the offense of abstraction or willful misapplication has been committed. As I have said, it is possible for the jury to find in favor of the defendant as to some portion, and in favor of the Government as to others, or they may find in favor of the defendant as to all or in favor of the Government as to all."

Some further remarks were made in explanation of the general charge, and "the jury then retired, and on their return to the court, announced that they had found the defendant guilty as indicted in the third count"; but the verdict, as recorded, was "that the defendant, Henry Lear, is guilty in manner and form as he stands charged in the third count of the indictment, and not guilty as to the remaining counts"; and the contention appears to be, that this verdict was tantamount to an express finding that the facts requisite to a conviction upon any of the counts other than the third had not been shown to exist, and that therefore it must now be assumed that there was no evidence upon which a finding of their existence, with reference to the third count, could be sustained. We cannot accede to this contention. We would not be disposed to reject it merely because the point to which it is directed is not presented by the assignment of errors; but a conclusive answer to it is, that we are not at liberty to

indulge in conjecture respecting the grounds of a verdict, or to add to its terms by inference.

The inference we are asked to draw in this instance, is precluded, we think, by the circumstances which preceded and attended the rendition of the verdict; but if this were not so, it could not legitimately affect our decision of the question before us. If there was no evidence to sustain the conviction upon the third count, it of course should not be permitted to stand; but if there was, it is not within the province of this court to inquire, or by deduction to surmise, how the whole or any part of that evidence was dealt with by the jury.

The count as to which there was a verdict of guilty, is as follows:

"Count 3. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present, that heretofore, to wit, upon the sixteenth day of July, in the year of our Lord one thousand nine hundred and one, the said Henry Lear, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, to wit: at the borough of Doylestown, in the county of Bucks, and state of Pennsylvania, being then and there president of a certain national banking association, a body corporate, then and there known and designated as the Doylestown National Bank, in the borough of Doylestown, in the county of Bucks and state of Pennsylvania, which said national banking association had been theretofore created, organized and established under and by virtue of the acts of Congress in such case made and provided, and was then existing and doing a banking business at the borough of Doylestown, state of Pennsylvania, in the district aforesaid, did then and there unlawfully, knowingly, and fraudulently, and with intent in him, the said Henry Lear, to injure and defraud the said banking association, and without the knowledge and consent of the said banking association, its board of directors and committees, willfully misapply certain of the moneys, funds and credits of the said banking association, for the use, benefit and advantage of him, the said Henry Lear, and for the use, benefit and advantage of a person and persons other than the said banking association, the name and names of the said person and persons being to the grand inquest unknown, to wit: the sum of, and of the value of ten thousand dollars, then and there belonging to and being the property of the said banking association, in the manner and by the means following, that is to say, that he, the said Henry Lear, being then and there president as aforesaid, and by virtue of the official relation of the said Henry Lear, as president of the said banking association, and by virtue of the power of control, direction and management which the said Henry Lear possessed over the moneys, funds and credits of the said banking association, did then and there, pay and cause to be paid to the said Henry Lear, and to a person and persons to the grand inquest unknown, upon and pursuant to the direction and authorization contained in a certain draft of the said banking association drawn upon the First National Bank of Philadelphia to the order of the said Henry Lear, and signed by George P. Brock, cashier of the said Doylestown National Bank, the said banking association, from and out of the moneys, funds and credits then and there belonging to, and being the property of the said banking association, and without the knowledge and consent of the said banking association, its board of directors, and committees, the sum of and of the value of ten thousand dollars, a more particular description of the said moneys, funds and credits so paid and caused to be paid being to the grand inquest unknown; which said draft was then and there in printing and writing dated the sixteenth day of July, A. D. 1901, authorizing and directing the said First National Bank of Philadelphia to pay to the order of the said Henry Lear the sum of ten thousand dollars of the moneys, funds, and credits of the Doylestown National Bank, the banking association aforesaid. Which said sum, so paid and caused to be

paid as aforesaid, was then and there in excess of all amounts which the said Henry Lear was then and there lawfully entitled to draw and have paid out of the moneys, funds and credits of the said banking association; that on said date, when said draft was paid and caused to be paid as aforesaid, the said Henry Lear, then and there had no moneys, funds and credits with the said banking association; that there was not then and there due and owing to the said Henry Lear from the said banking association any moneys, funds and credits whatever, that the repayment of the said sum to the said banking association was not then and there in any way or manner secured; all of which he, the said Henry Lear, then and there well knew, and that the said sum was then and there willfully, wrongfully and unlawfully appropriated and converted to the use, benefit and advantage of the said Henry Lear, and to the use, benefit and advantage of a person and persons other than the said banking association, the name and names of the said person and persons being to the grand inquest unknown, and was thereby wholly lost to the said banking association; with intent in him, the said Henry Lear, to injure and defraud the said banking association; contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

That upon July 16th, 1901, the defendant, being then the president of the Doylestown National Bank, did obtain the draft for \$10,000 described in this count, and did apply the proceeds thereof to his own use is not denied. But it is insisted that there was no sufficient proof that it was obtained without the knowledge and consent of the board of directors of the bank, and by virtue of the defendant's official relation, and power of control, direction and management over its moneys, funds and credits, or that in obtaining it he intended to injure and defraud the bank. Whether the board of directors had knowledge of the transaction, was a question of fact which the jury must be presumed to have negatively decided; and that there was evidence to warrant that decision, the record does not permit us to doubt. It is argued, however, that the transaction was one of loan, made by the cashier in the bona fide exercise of his authority to lend the moneys of the bank in the intervals between the meetings of the board of directors, and therefore the action of the cashier was the action of the board and constituted a business transaction between the plaintiff in error and the bank, which, whether wise or unwise, it was within the lawful competence of the parties to effect. It is true that there was testimony tending to show that the cashier was clothed with such authority, and made such loans and discounts as are ordinarily made by a bank in the course of its business, in the intervals between the sessions of its board, and that the loans thus made were reported at its next meeting for confirmation. There was also testimony tending to show that this transaction with the president of the bank, by which he received \$10,000 of the bank's money, upon his unsecured demand note, was included in the aggregate of loans reported by the cashier to the board of directors. It was not in evidence, however, that the members of the board understood the transaction, or had their attention specifically called to it, either by the cashier or by the defendant, who was president of the board. That loans made by the cashier in the regular course of business, and in the customary way, by virtue of the authority thus reposed in him, may be, and generally are, lawful transactions between the bank and those thus obtaining the loan of its funds,

is not to be denied. But their lawfulness depends upon the bona fides with which they are made. If the defendant had applied to the board of directors, of which he was a member, for a loan of \$10,000, upon his demand note, without security, making a full and true statement of his indebtedness to the bank, the purpose of the loan and the prospect of repaying it, it is conceivable that such loan might have been made, and lawfully made. The board of directors, acting within the scope of its authority for the time being, was the bank itself, and without other evidence of fraud or imposition, the transaction would be a lawful one, without regard to its wisdom or unwisdom. In such case, the opportunity for fraud and imposition would have been small, and the authority of the board of directors plenary. It is manifest that the authority delegated to the cashier by the board, for making loans and discounts in the interval between the sessions of the board, was one restricted by its nature and purpose, and that its exercise outside of the ordinary and routine business of the bank, was not contemplated. Such an exercise of authority would more easily lend itself to the accomplishment of fraud, than would action by the board of directors.

From the evidence disclosed in the record, it appears that one Brock, cashier of the Doylestown National Bank, on July 16th, 1901, permitted the defendant to obtain the draft of the bank for \$10,000 upon the First National Bank of Philadelphia, payable to his, the defendant's, order; that he caused this draft to be given the defendant upon his demand note for that sum, without security; that at the time the draft was so given, defendant, to the knowledge of the cashier, was indebted to the bank in the sum of \$29,098.89, of which \$12,924.83 was overdraft; that the capital of the bank was \$105,000 and that the defendant was its president. There is no evidence to show that the cashier reported to the board of directors that defendant had obtained this money upon his unsecured note, or otherwise, or that the president, who was a member of the board, ever so informed them. Brock had been cashier less than a year, and under all the circumstances, it would not be an unfair inference that the cashier yielded to the dominating influence and control which naturally attached to the office of president, who, as such, was his superior officer, and, in the language of the indictment, "by virtue of the power, control, direction and management which the said Henry Lear possessed over the moneys, funds and credits of the said banking association, did, then and there, pay and cause to be paid to the said Henry Lear * * * from and out of the moneys, funds and credits of the said banking association, and without the knowledge and consent of the said banking association, its board of directors and committees, the sum and value of \$10,000."

We cannot say that the jury, in consideration of all the facts and circumstances of the case, were not justified in finding that this was not such a transaction as came within the ordinary scope of the authority delegated to the cashier, nor a bona fide loan of the funds of the bank to the defendant, but on the contrary, was a misapplication made by the defendant of the funds in the bank, for his own use,

effected by means of his authority and control, as president, over the affairs of the bank and its subordinate officers. It was not an ordinary loan, effected in the usual way in which such loans are made to ordinary customers of the banking association. It was a handing over of \$10,000 of the bank's funds, without security, by the cashier, on the demand of his superior officer, whom he knew at that time to be indebted to the bank in a sum exceeding \$29,000, part of which were overdrafts, of which there is testimony tending to show that the directors were not cognizant. Nor could it have escaped the notice of the cashier, that the natural course of the president of the bank, if he honestly desired to obtain such a loan, would have been to have obtained the same directly through the action of the board of directors, of which he, the president, was a member and presiding officer. Yet it is not denied that the cashier made no report to the board of directors, calling their attention to the so-called loan and the peculiar circumstances attending it, or that the defendant, as president of the board, or otherwise, never informed them of what had been done. That it was regularly entered in the books of the bank as a loan, did not necessarily mean notice to the directors; and there is the testimony of these officers themselves, that they had no notice in this way or otherwise.

It is hard to conceive why no report and no explanation was made by the cashier to the board of directors, of this extraordinary transaction, and the jury may well have been unable, when taken in connection with other circumstances surrounding it, to reconcile the cashier's silence with good faith on his part. Touching upon the reasons which may have influenced the defendant in the first place, in obtaining this sum in the way described, without the express consent of the board of directors, and afterwards in refraining from informing them of the fact, there was in evidence before the jury a correspondence between the comptroller of the currency and the board of directors of the bank. On May 15th, 1901, the comptroller had written to the defendant, as president of the bank, calling his attention to the fact that his indebtedness to the bank was excessive and should be reduced within the limits prescribed by law. That the aggregate of that indebtedness was \$26,381.21, including an overdraft of \$11,481.21 of long standing, and a note of \$4,000 past due since January 15th, 1900. To this letter the defendant and the board of directors replied, under date of May 22d, 1901, that since the report referred to by the comptroller, the loan to Henry Lear had been reduced to the extent of \$5,000 during the week in which the letter was written; that the overdraft chargeable to him had been cleaned up and secured, and that the past due note of \$4,000 had been taken up and interest paid thereon. This letter was signed by Henry Lear and all the directors, save one. Yet, on July 16th, when the \$10,000 draft was obtained from the cashier on his demand note, his indebtedness to the bank amounted to \$29,098.89, and Edward P. Moxey, an expert accountant and bank examiner, called as a witness by the government, testified as follows:

"Q. I show you copy of letter of May 22, 1901, from Henry Lear and the other directors of the Doylestown National Bank, to the Comptroller of the Currency, and call your attention to the statement in that letter: 'The loan to Henry Lear has been reduced to the extent of \$5,000 during the present week, and will be rapidly reduced hereafter. The overdraft chargeable to him has been cleaned up, and is secured. The past due note of \$4,000 has been taken up and interest paid thereon.' From an examination of the books of the bank, are you able to state whether or not the overdraft chargeable to Mr. Lear's account on that date had been cleaned up and secured?

"A. It had not.

"Q. What was his overdraft at that time, May 22? 1901?

"A. His overdraft at that time was: His personal account, \$3,963.28, and his attorney account, \$7,820.48; a total of \$11,783.76.

"Q. How long did that overdraft continue to that account?

"A. That overdraft continued until February 10, 1902, when it had gradually increased until it amounted to \$17,157.27, and on that day the overdrafts in both accounts, H. Lear and H. Lear, attorney, was entered paid. That is the date that the demand loan of \$20,000 went in the bank.

"Q. It is stated in this letter also that 'past due note of \$4,000 has been taken up and interest paid thereon.' Do you find any entry at or about that date showing this past due note of \$4,000 had been taken up?

"A. On that date a note of \$4,000 and No. 310 was entered paid, and on that date a new note, No. 229, due August 1, 1901, for \$4,000, went in the bank.

"Q. It states here, 'The loan to Henry Lear has been reduced to the extent of \$5,000 during the present week'; that is, the week ending May 22, 1901. Do you find by the books there had been a payment of \$5,000 during that week, as stated by this letter?

"A. No, sir."

From what has been already said, we think it will be apparent that the evidence, tending to show that the money obtained upon this demand note of July 16th, 1901, was obtained without the knowledge of the board of directors, and with the connivance of the cashier, tends also to show that it was obtained by the defendant willfully and with intention to defraud the bank and convert the same to his own use. It is not sufficient to suggest that in this, as in most cases of the kind, there was a floating intention to repay the money thus obtained. It is probable that this is true. But the jury were warranted upon the evidence, in finding that the money was obtained without regard to the security of the bank, and with the intent on the part of the defendant, that the bank should, without its knowledge or consent, take the risk of his (the defendant) being able to return the money so obtained. Such a finding sufficiently supports the averment of a misapplication of the funds of the bank without its knowledge or consent, and with intent to injure or defraud the same. We cannot agree with the contention of counsel for the plaintiff in error, that an officer of a bank cannot "misapply" its funds, in the sense of the statute, unless he has direct control or custody of such funds. The defendant in this case was the head officer of the bank, and there is nothing to show that as such he did not possess the power, prestige and authority attaching to his office. All other officials were his subordinates, and the inference was a fair and natural one from the facts proved, that "by virtue of his official relation to the bank," he had "such control, direction and power of management as to direct an application of the

funds in such a manner and under such circumstances as to constitute the offense of willful misapplication." *U. S. v. Northway*, 120 U. S. 332, 7 Sup. Ct. 580, 30 L. Ed. 664. The word "misapply," as used in the statute, does not necessarily mean that the officer in charge should have physical possession of the funds misapplied. It is sufficient if he have such "control, direction and power of management as to direct an application" of the same.

We have so far confined our attention to the evidence bearing solely upon this transaction of the draft of \$10,000 obtained by the defendant as described in the third count of the indictment, because the gravamen of the contention made by counsel for the plaintiff in error, is that the evidence in this respect was insufficient to warrant the jury in finding the defendant guilty on the third count, and that the evidence in regard to the other alleged overdrafts and misapplications of money, extending through two years and relating to 50 separate transactions, was before the jury, but could not have been considered by them in connection with the charge in the third count, of which they found him guilty. This argument is founded upon the finding of the jury, under the circumstances related at the outset of this opinion, that the defendant was guilty on the third count, but not guilty as to all the other counts. This being so, it is argued, with much ingenuity by the learned counsel for plaintiff in error, that these other transactions, consisting of overdrafts and alleged illegal loans from the bank, upon which the other counts in the indictment were founded, and the evidence in relation thereto, could not be considered by the jury in connection with the charge contained in the third count. We have already, and as we think sufficiently, considered and answered this contention, and refer to it again only that we may reiterate our opinion, that the learned trial judge could not have properly done otherwise than refuse to charge as requested by defendant, that "under all the evidence in this case, as now presented for the prosecution, your verdict should be for the defendant." It is perfectly clear that all the evidence relating to all the counts, was properly submitted to the jury, and we cannot now inquire as to how this evidence was applied to the different counts. If, from all the evidence so submitted, the jury has found the defendant guilty of the third count alone, we cannot disturb that verdict, even though it is recorded as not guilty on all the other counts. The alleged error is as to what was done by the trial judge before the case was submitted to the jury, to wit, that he refused to give peremptory instructions in favor of the defendant. If, as we have said, it be clear that the trial judge could not properly have done otherwise, the assignment of error in relation thereto cannot be made, notwithstanding that fact, to cover an alleged error by the jury, in dealing with the evidence properly submitted to them, even if that were a permissible subject of inquiry. We have, however, taken pains to examine all the evidence bearing directly upon the charge contained in the third count, and have, as above stated, found it sufficient to warrant the verdict of the jury.

The argument for plaintiff in error has turned upon the alleged error in the refusal of the court to give binding instructions to the

jury in favor of the defendant. The exceptions to certain portions of the charge contained in the other assignments of error, have, as we have already said, not been urged, and if urged could not have been sustained. The charge as a whole was exceedingly fair to the defendant, and gave him the benefit of any favorable construction that could be placed upon his conduct.

We are compelled, therefore, to the conclusion that the judgment below should be affirmed.

ARCHBALD, District Judge (concurring). The request of the defendant for binding instructions went to the whole case, and so to every part of it. It was not necessary to specify or repeat it as to each of the hundred different counts of the indictment. It is therefore available at this time upon the question of the sufficiency of the evidence to sustain a conviction on the third count, as to which alone there was a verdict of guilty. Aside from this, and without any such request, under the authority of *Twining v. United States* (C. C. A.) 141 Fed. 41, and the cases there cited, we would have the right, and it would be our duty, to look into the record, and to reverse, if the proper evidence was not found there. The difficulty with the case is that the jury declared the defendant guilty on a count, as to which the evidence was the least conclusive. This is probably attributable to the somewhat questionable instruction that, if they were satisfied that there was a willful misapplication of the funds of the bank by the \$10,000 loan of July, 1901, this disposed of the whole case, and they need not go into anything which occurred thereafter, and to the entry, upon the return of a conviction as to the count which covers this, of not guilty as to the rest. This did not take out of the case, however, as contended, the evidence of subsequent transactions, whatever may be the seeming inconsistency in declaring them innocent, while holding otherwise as to the original, upon which they are merely cumulative. They could still be resorted to for the purpose and intent of the defendant, as manifested by his repeated diversion of the funds of the bank for his own benefit, regardless of the risk in which it was being thus involved.

That the defendant was guilty of a serious misapplication of the funds of the bank, within the meaning of the law, when he obtained the loan in question, on his own unsecured individual note, there can be but one opinion. The only question is whether he was chargeable with the delinquency as president, and whether there was evidence of a fraudulent or willfully injurious intent. But that it was calculated to work injury is clear, and he had no right to impose upon the bank the danger of loss which it unmistakably involved. It is true that the financial credit of the defendant at the time is not shown; and, as president of the bank, it may be assumed that he was a person of some reputed means. Nor did he fail until fully two years later. But he was already heavily indebted to the bank; a material portion of the indebtedness being in the shape of overdrafts or forced loans which he had been apparently unable to take up. He was also engaged in stock speculations, the ultimate cause of his downfall, from

which the transaction cannot be detached; the \$10,000 obtained being admittedly for the purpose of making good his margins, on pressing calls from his brokers. It is in the willingness to put the bank at this peril that the intent to injure or defraud appears. There did not have to be a direct mental purpose to that effect. No doubt he intended to repay. But, on the question of intent, a person is rightly held to the natural and probable results of what he does. A reckless act, moreover, is always regarded as the equivalent of a willful one, and that at least was here. The possibility of injury was apparent on the face of the transaction, notwithstanding which the interests of the institution of which he was the trusted head were put aside, and his own made paramount, in utter disregard of the outcome. This fully justified the imputation of a wrongful intent, whatever there may have been in fact.

It was necessary to show, however, that the misapplication of the funds of the bank so made was ascribable to the defendant as president, with regard to which it is confidently affirmed that there was no proof. The loan, as it is said, was obtained in the ordinary way, of the cashier, who in the interim between board meetings was intrusted with full authority to discount paper, and was subsequently submitted to the directors, by whom it was passed. This is undoubtedly a turning point in the case. The knowledge of the directors is strenuously denied, but is not vital. The defendant's position would, no doubt, be materially strengthened if this was established. He was not precluded, simply because he was president, from borrowing from the bank in the ordinary way with the approval of the governing board, and a conviction for misapplication of money obtained with such sanction, even though there was nothing but his own obligation to secure it, would be difficult to sustain. But the knowledge of the directors was disputed, and the jury may have found against it, which makes it of no particular moment here. The case thus comes down to whether there was any evidence that it was by means of his official relation that the money was secured. Upon that it is said that the defendant, although president, took no particular direction in the affairs of the bank, as might be implied, and shared no authority with the cashier to act for the directors between boards; and that there was nothing to show that by virtue of his office he constrained the cashier into making the loan, but, on the contrary, that he got it just as any one else would. But the case is not altogether so. It fails to regard several things. It will hardly be contended, for instance, that, if one unconnected with the bank had asked for a loan under similar circumstances, it would have gone through. It may possibly be that a customer of large and unquestioned means would have been able to get a loan of \$10,000, for the purpose of stock speculation, on his own individual and unsecured note, even in the face of overdrafts and obligations of the magnitude and long standing that there were here. But not by any means the ordinary man, nor this defendant, aside from his official relation. In view of this, it is the natural, if not the inevitable, conclusion that it was out of favor to and in regard for his position as president, and so by virtue of it within the meaning of

the law, as the defendant had good reason to believe, that he got the money as he did. It is so remarkable and inexplicable upon any other basis that an inference to that effect was clearly warranted, and that is all that we need to know. Apart from this it is a question whether an officer of a national bank, directly or indirectly dealing with its funds can ever put the relation aside. But, without passing upon that, it is enough that in any degree it enters into it, of which there was sufficient evidence here.

I therefore concur that the judgment should be affirmed.

LONG v. FARMERS' STATE BANK.

(Circuit Court of Appeals, Eighth Circuit. June 25, 1906.)

No. 2,381.

1. COURTS—CIRCUIT COURT OF APPEALS—ERROR TO DISTRICT COURT—WRIT OF ERROR—ISSUANCE—TESTE.

Judiciary Act May 8, 1792, c. 36, § 9, 1 Stat. 278, made it the duty of the clerk of the Supreme Court to transmit to the clerks of the several courts the form of a writ of error as approved by two justices of the Supreme Court. The form adopted prescribed that the writ should be issued in the name of the President, attested by the Chief Justice and the clerk of the Supreme Court, Rev. St. § 1004 [U. S. Comp. St. 1901, p. 713], declared that such writs of error may also be issued as well by the clerks of the Circuit Courts, under the seals thereof, as by the clerk of the Supreme Court. *Held*, that a writ of error sued out of the United States Circuit Court of Appeals to a United States District Court should run in the name of the President and be attested by the Chief Justice of the Supreme Court and by the clerk of the Circuit Court.

2. SAME—DEFECTS—AMENDMENT.

That a writ of error was attested by the judge of the Federal District Court and by the District Court clerk was a defect which was amendable, as provided by Rev. St. § 1005 [U. S. Comp. St. 1901, p. 714].

3. WRIT OF ERROR—MOTION TO DISMISS—TIME.

Where a motion to dismiss a writ of error was not filed until within two days of the time when the cause was set down for hearing, and after defendant had filed a brief taking issue on the assignment of errors, the motion was too late.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3149-3154.]

4. INSURANCE—ASSIGNMENT OF POLICIES.

A debtor agreed with his bank to carry \$7,000 insurance on his stock as a protection of the bank's claim against him; the contract providing that the debtor assigned thereby such amount of insurance to the bank as collateral security for his indebtedness to the bank. *Held*, that such instrument did not constitute an assignment of the policies in presenti, but was at most an executory agreement to create a lien on the fund to arise in case of loss and collection from the insurance company.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 483.]

5. BANKRUPTCY—PREFERENCES—TRANSFERS—TIME.

Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], declares that acts of bankruptcy shall consist of the bank-

rupt's having (2) transferred, while insolvent, any portion of his property with intent to prefer the transferee. Subsection "b" declares that a petition may be filed against an insolvent, who has committed an act of bankruptcy, within four months after the commission of such act, the time to expire four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted, or if not, from the date when the beneficiary takes notorious, exclusive, and continued possession of the property, unless the creditors have received actual notice of the transfer. Section 60 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) provides that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, made a transfer of any of his property, the effect of which is to enable a creditor to obtain a greater percentage of his debt, and that, where the preference consists in a transfer, the period of four months shall not expire until four months from the date of registering, if registration is required. *Held*, that where there had been no effective transfer of certain insurance money to a bankrupt's creditor until the money was turned over by the bankrupt to the creditor, which was within four months prior to the filing of a bankruptcy petition, the amount so paid constituted a voidable preference.

In Error to the District Court of the United States for the Southern District of Iowa.

E. D. Perry (J. R. Plummer, W. A. Spurrier, and E. C. Mills, on the brief), for plaintiff in error.

William M. Jackson, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The defendant in error has filed a motion to dismiss the writ of error on the ground that it does not bear the teste of the proper officers. While the writ runs in the name of the President of the United States, it is attested by "the Honorable Smith McPherson, Judge of the District Court," and by "Wm. C. McArthur, Clerk of the District Court." By the ninth section of the original judiciary act it was made the duty of the clerk of the Supreme Court to transmit to the clerks of the several courts the form of a writ of error as approved by two Justices of the Supreme Court. The form thus adopted prescribed that the writ should be issued in the name of the President of the United States and have the teste of the Chief Justice and the clerk of the Supreme Court. This was followed by the act of Congress approved May 8, 1792 (1 Stat. 278, c. 36, § 9), now section 1004, Rev. St. [U. S. Comp. St. 1901, p. 713], which prescribes that such writs of error may also be issued "as well by the clerks of the Circuit Courts, under the seals thereof, as by the clerk of the Supreme Court." As this is the only statute applicable, it is uniformly ruled in the federal jurisdiction that writs of error must issue in the name of the President of the United States, attested by the Chief Justice of the Supreme Court and the clerk of the Circuit Court. *Bondurant v. Watson*, 103 U. S. 278, 26 L. Ed. 447; *Ex parte Ralston*, 119 U. S. 613, 615, 7 Sup. Ct. 317, 30 L. Ed. 506; *Cotter v. Alabama G. S. R. Co.*, 61 Fed 747, 10 C. C. A. 35.

Notwithstanding the irregularity of the writ in question the mo-

tion should not prevail: (1) Because such defect is amendable under section 1005, Rev. St. U. S. [U. S. Comp. St. 1901, p. 714]. *Texas & Pacific Railway Company v. Kirk*, 111 U. S. 486, 4 Sup. Ct. 500, 28 L. Ed. 481; *Miller v. Texas*, 153 U. S. 537, 14 Sup. Ct. 874, 38 L. Ed. 812; *Cotter v. Alabama G. S. R. Co.*, supra. (2) Because the motion to dismiss comes too late. It was not filed until within two days of the time this cause was set down for hearing, and after the defendant in error had filed brief taking issue on the assignment of errors. In *McDonogh v. Millaudon et al.*, 3 How. 693, 707, 11 L. Ed. 787, 794, Mr. Justice Catron, after adverting to the length of time the case had been in the Supreme Court before the motion to dismiss for a like infirmity in the writ of error, said:

"If errors had been assigned by the plaintiff here, and joined by the defendant, no motion to dismiss for such a cause could be heard; and as no formal errors are usually assigned in this court, and none were assigned in this cause, we think the delay to make the motion is equal to a joinder in error, even if the clerk of the Supreme Court of Louisiana had no authority to issue the writ," etc.

The motion to dismiss is therefore denied.

Passing to the merits of the case, we find that the controversy grows out of the following state of facts: On the 31st day of December, 1903, Thomas F. Wells, doing a small mercantile business at Clearfield, Iowa, being indebted to the defendant in error, the Farmers' State Bank of said town, signed and delivered to said bank the following instrument of writing:

"For the purpose of securing financial assistance and credit of the Farmers' State Bank of Clearfield, Iowa, and as collateral security for overdraft and two promissory notes dated this 31st day of December, 1903, one for \$700.00 and the other for \$4,000.00, bearing 8 per cent. per annum interest from date and due in 6 months and 3 months, respectively, I agree with aforesaid bank to dispose of my stock of goods at earliest conveniences and pay to aforesaid bank the proceeds from such sale, sufficient to satisfy my indebtedness to it.

"I further agree to carry in the aggregate \$7,000.00 insurance on aforesaid stock of goods in my possession in building on lot 3, block 14, original town of Clearfield, Iowa, as protection for aforesaid claims, and assign by these presents aforesaid amount of insurance to the Farmers' State Bank as collateral security for the aforesaid indebtedness, said insurance, or amount sufficient to liquidate my indebtedness to aforesaid bank, to be applied for this purpose in case of loss by fire.

"The aforesaid T. F. Wells hereby agrees not to accept settlement for loss for an amount less than sufficient to satisfy claim of the Farmers' State Bank without the approval of the latter; the aforesaid Farmers' State Bank granting the aforesaid T. F. Wells the right to settle with insurance companies in case of loss, as its agent."

Though not affirmatively shown, it may be inferred that at that time Wells had taken out on his stock of goods fire insurance to the amount of about \$7,000. It does not appear that the bank thereafter extended any further credit to Wells. The actual possession of the insurance policies remained thereafter with Wells. On June 22, 1904, the entire stock of goods so insured was destroyed by fire, whereby said Wells was rendered insolvent. On the 28th day of June, 1904, he compromised his claim of loss against the insurance company at

\$5,075, which sum he collected and paid over to said bank in liquidation of his indebtedness to it. Within four months thereafter, to wit, October 13, 1904, three petitions in involuntary bankruptcy were filed against Wells in the United States District Court for the Southern District of Iowa. Pending these petitions in involuntary bankruptcy he filed a voluntary petition, on which he was adjudged a bankrupt October 28, 1904. After the election and qualification of the plaintiff in error as trustee in bankruptcy he instituted suit against said bank to recover the sum so paid to it by the insolvent, on the ground of it being a voidable preference under the bankrupt act. On the assumption that the alleged assignment took effect and became operative on the 13th day of December, 1903, the District Court directed the jury to return a verdict for the bank, which being done the court dismissed the petition. To reverse this action of the court the plaintiff prosecutes this writ of error.

The first question to be considered is, what is the legal import of the alleged contract between Wells and the bank? Reduced to its practical sense it is this: Wells agreed to carry \$7,000 insurance on the stock of goods as a protection of the claim of the bank against him, "and assign by these presents the aforesaid amount of insurance to the Farmers' State Bank as collateral security for the aforesaid indebtedness." It does not purport to assign the policies of insurance, but agrees to assign an amount as collateral security sufficient to liquidate the indebtedness to the bank, "to be applied for this purpose in case of loss by fire." By the last paragraph it was clearly contemplated by the parties that Wells should retain possession of the policy, and in case of loss he should make the proofs, settle with and collect from the insurance company, and pay over so much of the amount collected as would be sufficient to liquidate the debt to the bank, with authority to compromise with the insurance company, but at a sum not less than the amount of the bank's claim against him. Clearly this did not constitute an assignment of the policies in *præsenti*. This contract was no more than the personal agreement or undertaking of Wells that he would keep the property insured, and in case of loss he would collect and pay over to the bank sufficient to liquidate the debt. The contract conveyed nothing. At most it was but an executory agreement to create a lien upon a fund to arise in case of loss and collection made from the insurance company, when for the first time an equitable lien on the fund would attach. In other words, its effect was a direction to pay in case of loss. Such an agreement, while enforceable *inter partes*, was not binding upon either the insurer or those claiming an interest under the insured without notice of such lien. *Ellis et al. v. Kreutzinger et al.*, 27 Mo. 311, *loc. cit.* 314, 72 Am. Dec. 270.

In *Christmas v. Russell*, 14 Wall. 69, 84, 20 L. Ed. 762, 764, Mr. Justice Swayne, speaking for the court, said:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indis-

pensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund holder is bound from the time of notice."

In the later case of *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623, the court expressed this same principle as follows:

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. * * * But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund pro tanto, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor."

There is no proof in this case tending to show that either the insurance company or any creditor of the insured had any notice of this agreement. On the other hand, if the view be tenable that the agreement as between Wells and the bank created an equitable lien upon the fund when collected from the insurance company, the question arises, when did this lien become operative in view of the provisions of the bankrupt act? Was it on the 13th day of December, 1903, the date of the alleged contract for transfer, or on the 28th day of June, 1904, the date of the payment of the money? At the former date Wells was solvent. At the latter date he was insolvent. This question is to be solved alone by the provisions of the bankrupt act. Section 3 of the act declares that:

"Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."

Subsection "b" of said section provides that:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment." Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

Section 60 of the act declares that a person shall be deemed to have given a preference if, being insolvent—

"He has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in the transfer, such period of four months shall not expire until four months after the date of the recording or registering of the trans-

fer, if by law such recording or registering is required." 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

And such transfer is made voidable at the suit of the trustee to recover the property so transferred or its value. Said provisions of sections 3 and 60 are to be read together. When so read there can be no permissible question but that the date of the preference referred to in section 60 is the same as that referred to in section 3b, which, as applied to the facts of this case, is the date when the transferee takes possession of the property, unless the instrument under which the claim is made antedated the four months' period and was recorded prior thereto, if authorized to be recorded under the local statute, or if not so entitled then from the date the beneficiary takes notorious, exclusive possession, unless the creditors of the bankrupt had actual notice of the alleged contract. There is no pretense made in this case of any such disclosure. There was, therefore, no effective transfer of this property under the bankrupt act until June 28, 1904, when the money was turned over by the insolvent to the bank; and this for the palpable reason that that was the first time the bank took any possession of the property or gave any recognizable notice to any creditor of the bankrupt of its asserted title or lien. This we hold is so both upon reason and the weight of authority.

In *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, a debtor, more than a year prior to the filing of the petition in bankruptcy, gave to a creditor an irrevocable power of attorney to confess judgment upon a promissory note after its maturity. Within four months before the filing of the petition in bankruptcy against the debtor, the creditor obtained such a judgment and caused execution to issue thereon. The debtor having failed within five days before the sale under the execution to discharge the judgment or file a voluntary petition in bankruptcy, the court held that the judgment and execution constituted a preference by the debtor within the meaning of the bankrupt act. While this is not on the same parallel as the case at bar, it is in point as to the view entertained by the Supreme Court that such contracts are executory in character and become operative only as of the date of their fulfillment. The meat of the decision is found in this postulate:

"The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact."

In *Re Klingaman* (D. C.) 101 Fed. 691, more than four months prior to the proceedings in bankruptcy the debtor entered into a written agreement with a creditor, to the effect that the property in question and the policies of insurance thereunder were pledged and hypothecated to the creditor as collateral security for the payment of the debt, and that he held the same subject to the demand of the creditor, with authority to the latter to take possession and dispose of the same at his discretion, for his security or reimbursement. The creditor, however, did not take possession, under the agreement, of the pledge and hypothecation until within the four months' limitation. Judge Shiras, in a forceful discussion of the question involved, held that the

transfer, or the creation of the lien, whichever it might be, under the bankrupt act, did not become effective until the beneficiary took notorious possession of the property; that sections 3 and 60 were in perfect harmony, and should be read together; and the written agreement not being of a character required to be recorded, and there being no notorious, continuous possession taken until within the four months' period, the transfer was voidable as a preference. "In other words," he said, "the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice [of the transfer] to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt."

In *Johnson v. Huff, etc., Company*, 133 Fed. 704, 66 C. C. A. 534, A. had a contract with a railroad company to furnish board to a track gang. He entered into an arrangement with a supply concern whereby it was to extend him credit, and in turn A. gave the supply house an order on the railroad company to pay to it any sums due from the railroad to him, with the agreement between A. and the house that the latter was not to present the order unless A. failed to keep up his payments. Accordingly the order was not presented for over a year, and only within one day before the contractor, being insolvent, filed his petition in bankruptcy. The court held that the order did not operate to create an equitable assignment as of the date when given, but became effective as a transfer only when presented to the railroad company; and therefore it constituted a preference within the meaning of the bankrupt act.

In *English v. Ross* (D. C.) 140 Fed. 630, 636, 637, deeds of real estate were given by the debtor to a creditor as collateral security for a debt, which deeds were for property situate within the state of Pennsylvania, and under the statutes of the state were not required to be recorded. Although the deeds were made more than four months before the declared bankruptcy of the debtor, they were not recorded until within the four months, whereby notice was first given to the creditors. Judge Archbald followed the decision above cited, and held that the late amendment to section 60b of the bankrupt act was intended to bring the section into practical accord with section 3, cls. "a," "b."

This view of the statute was taken in *Matthews v. Hardt* (Sup.) 80 N. Y. Supp. 462, 469. In that case a corporation entered into an agreement with a creditor whereby it created what the court held to be a valid equitable lien upon the property for the security of its debt. This agreement was oral, and was not of the character required to be recorded under the local statute. The lien was created more than five months before the declared bankruptcy, but within four months the creditor took possession thereunder. The court held that

the date of the act was that of taking notorious and exclusive possession, inasmuch as no notice was given to creditors in any other manner.

It is to be conceded to the defendant in error that the decision in *Re Wittenberg Veneer & Panel Company* (D. C.) 108 Fed. 593, by Judge Seaman, is not in accord with the foregoing view. The only fact which differentiates that case from the one at bar consists in the policy of insurance (claimed to have been pledged as collateral security) being left in the interim in the custody of the insurance agent, to be cared for and renewed from time to time, instead of being left in the possession of and collected by the debtor, as here, out of which facts the learned judge worked out an equitable lien upon the proceeds of the policy in favor of the creditor. This, it seems to us, loses sight of the imperative mandate of the bankrupt act which avoids such transfers unless publicity of the contract be given for the protection of the other creditors. It runs counter to the obvious policy of the bankrupt act to secure an equal participation pro tanto in the insolvent estate by inhibiting any act of his essential to consummate a transfer of his property to any one creditor within the four months' period, except where such claimant to the preference has, prior to the four months' limitation, put on record the instrument evidencing the preference where such recording is authorized, or where notice is given to creditors of such lien.

Deciding the case presented, our conclusion is that the judgment of the District Court must be reversed, and the cause is remanded, with directions to vacate the judgment and grant a new trial.

MOORE v. BEISEKER et al.*

(Circuit Court of Appeals, Eighth Circuit. July 9, 1906.)

No. 2,387.

1. VENDOR AND PURCHASER — OPTION CONTRACT—CONSIDERATION—CONSTRUCTION.

Defendants agreed in consideration of \$500 to sell to plaintiff an option for 30 days to purchase certain land aggregating about 11,000 acres for \$76,180, or at the rate of \$6.75 per acre for the land conveyed, "for said consideration and price of \$76,180, more or less, being with the said \$500 at the rate of \$6.75 per acre, payable one-third in cash in 30 days from the date of the contract; the balance to be secured by mortgage on the land. Within 30 days plaintiff notified defendant's agent of his acceptance, and directed him to pay the \$500 to defendants "as part of the purchase price," after which defendants received and retained such sum without intimating that they held it as a forfeit for plaintiff's failure to pay the one-third of the price within thirty days, because of defendants' failure to furnish abstracts for all the lands described. *Held*, that the \$500 paid was not a mere consideration for the option, but that after notice of plaintiff's acceptance it was held by defendants as a part of the purchase price of the land.

2. SAME—EXPIRATION OF CONTRACT.

A contract for the sale of a large tract of land required payment of one-third in cash in 30 days from the date of the contract, balance to be

*Rehearing denied September 4, 1906.

secured by mortgage on the lands. The contract also bound the vendors within 30 days from the date of the contract to convey the lands to plaintiff and to deliver to him complete abstracts of title which he was to have 10 days to examine, and that if it was found that the title was defective as to any of the lands they should be excepted and the price reduced at the rate of \$6.75 per acre. Plaintiff notified defendants of his acceptance of the offer, and they received the initial guaranty payment as a part of the purchase price, but failed to tender the abstracts within the 30 days thereafter, treating the contract as in existence, and during the succeeding period of nine months furnished abstracts showing title to about 8,000 acres of land. *Held*, that plaintiff's failure to tender one-third of the purchase price within 30 days from the execution of the contract, as provided thereby, did not operate to terminate it.

3. SAME—OBJECTIONS—WAIVER.

Where a contract for the sale of land required the vendors to deliver to the vendee complete abstracts of title, the vendee to have 10 days therefrom in which to examine the same, and that within 30 days from the date of the contract the land should be conveyed and the vendee should pay one-third of the price, but abstracts were not delivered, and the vendors were not in position to make title within 30 days and after a period of nine months, during which title was cleared to a portion of the land, the parties met to convey such portion, and the only reason for the vendors' refusal to proceed was their insistence that the vendee should pay back interest on the purchase price, they thereby waived the right to claim that the contract was terminated by the vendee's failure to tender one-third of the price within 30 days from the execution of the contract.

4. SAME—INTEREST.

A contract for the sale of land executed November 21, 1901, provided for payment of the price; one-third cash in 30 days from the date of the contract, and the balance in three notes dated December 21, 1901, due December 21, 1902, 1903, 1904, with interest, etc., secured by mortgage on the land. The vendors for a period of nine months after the execution of the contract were unable to make title when the parties met September 12, 1902, for the purpose of closing up the transaction and conveying so much of the land as to which the vendors had title. *Held*, that the vendors were not entitled to interest on the purchase money from December 21, 1901, and that the tender of notes for the unpaid portion of the price bearing interest from September 1, 1902, constituted a full compliance with the vendees' obligation.

5. SAME—CONTRACT—RESCISSION—BREACH—NOTICE.

The vendee, being unable to obtain title to lands purchased as agreed, wrote the vendors: "You are hereby notified that I rescind said contract and declare the same to be no longer in force." This language was however followed by a statement that the vendee demanded return of the guaranty payment made on the contract, and notified the vendors that he would hold them responsible for all damages sustained on account of their refusal to carry out and perform the contract. *Held*, that such letter was a mere notice that the vendee intended to treat the contract as broken for the purpose of further dealings between the defendants, and did not amount to a rescission.

6. SAME—TENDER.

Where pending performance of a contract for the sale of land, the vendee notified the vendors of a variance in the description of the tract between the abstracts furnished and the contract, but the vendors made no reply to such objection, the vendee was entitled to accept the abstracts as correct, and hence the vendors were not entitled to object to a tender in conformity with the abstracts because it included lands different from those described in the contract.

7. SAME.

Where, after tender of performance of a contract for the sale of lands by the vendee, the vendors notified him that if, on a certain day, he carried out the terms of the purchase required of him, they would convey in the manner specified in the contract the lands described or referred to in the vendee's tender, the vendors thereby conceded that the tender made was as to the lands properly described therein.

In Error to the Circuit Court of the United States for the District of North Dakota.

As this case went off on demurrer to the petition, it will be necessary to set out the substance of the petition, which is unusually long.

The plaintiff in error (hereinafter for convenience designated the plaintiff), a citizen of the state of Iowa, entered into a written contract with the defendants in error (hereinafter designated the defendants), citizens of the state of North Dakota, on the 21st day of November, 1901. By said contract the defendants agreed, in consideration of the sum of \$500, to sell to the plaintiff the right for thirty days therefrom to purchase certain lands in McLean county, N. D., aggregating about 11,000 acres, for the price of \$76,180, or at the rate of \$6.75 per acre for the land conveyed, said lands to be conveyed by good and sufficient conveyance, clear of incumbrances, for said consideration and price of \$76,180, more or less; being with said \$500, at the rate of \$6.75 per acre, payable as follows: (1) One-third cash in 30 days from the date of the contract; and (2) the balance in three promissory notes of the plaintiff, each for one-third of said balance, dated December 21, 1901, due on or before December 21, 1902, 1903 and 1904, with interest at 6 per cent. from date, payable annually, the notes to be secured by first mortgage on the lands purchased, or mortgages on different portions, as the defendants might desire, payments to be made at the National Bank of Commerce of Minneapolis, Minn.

The contract provided that the lands should be as good as average good farming lands in said county; that said \$500 should be paid by the plaintiff at the execution of the contract to one Eugene D. Case, of Minneapolis, Minn., to be held by him until such time, within said 30 days, as he might determine whether or not said lands were of said quality. Should he determine them to be of such quality, or should fail to notify the parties in writing within said 30 days that the lands were not of the required quality, or should the plaintiff decide under any circumstances to purchase the land under the agreement, then said \$500 was to be immediately paid by said Case to the defendants. Should the said Case determine that said lands were not of the requisite quality, he was to notify the parties thereof within said time, when the \$500 should be repaid to the plaintiff, and the agreement should end. On the payment by the plaintiff of the cash payment and delivery of the notes and mortgage or mortgages provided for, within 30 days from the date of the contract, the defendants were to convey or cause to be conveyed to plaintiff said lands by good and sufficient conveyance; and they were to deliver to the plaintiff complete abstracts of title to said lands, who should have 10 days in which to examine the same after delivery; and should it be found that any of the lands were not owned or controlled by the defendants, or the title to any of them should prove to be otherwise defective, such lands were to be excepted from the lands to be conveyed, and the purchase price reduced at the rate of \$6.75 per acre for every acre so excepted, according to the defendants the right to substitute for the lands so excepted, or add to the first above described at the same price per acre, other lands in said county owned or controlled by them, subject to the same conditions, the total consideration being increased or decreased at the rate of \$6.75 per acre.

The petition alleged the payment of the \$500 by depositing the same with said Case, and that the plaintiff did accept said lands as coming up to the required quality, by letters written to the defendants and said Case, dated December 14, 1901, which letters are filed as exhibits to the petition;

the petition alleging that thereby the plaintiff notified them that he would take the land contracted for; that he was ready to close the deal as soon as the abstracts were examined according to the contract. The letter to Case directed him to pay the \$500, to apply on the purchase price of the land,—the receipt of which letters were duly acknowledged. It is further averred that the defendants failed and neglected to furnish abstracts to any of the lands until long after the expiration of the 30 days; and that by consent the defendants finally furnished abstracts to a large portion of the land (describing the same), designating the lands described as Exhibit A, on August 3, 1902, and the lands described in Exhibit A-1 on August 24, 1902, and that, notwithstanding the abstracts had not been furnished within the time required, the plaintiff accepted title to all said lands described in both said exhibits, and notified the defendants in writing thereof August 12, 1902, as to the lands described in Exhibit A and on August 29, 1902, as to the lands described in Exhibit A-1. On August 1, 1902, the defendants, through their duly authorized agent, said Case, wrote to the plaintiff, sending him abstracts to a large number and descriptions of land, and therein made the request and proposal as follows: "Will you kindly advise me as promptly as may be as to how many abstracts you deem perfect, as we would like to close up the deal for this and the last lot, and make arrangements for extension of the remainder, so that we may bring such action as seems necessary." (Having reference to actions to perfect title.)

This letter was received by the plaintiff on August 2, 1902. The said Case further wrote to plaintiff on August 2, 1902, that on that day he had sent by express to plaintiff a package of abstracts with lists, exhibits and letter of explanation, inclosing an omitted page of the letter in said package, with a request to insert the same in the letter of explanation. In this letter he further stated that he expected Mr. Helmich would be home the next day, when they would get to hard work on the remaining abstracts, but expressed a desire to settle up on those thus forwarded if the plaintiff was agreeable thereto. On receipt of said letters, on August 12, 1902, the plaintiff consented to the modification and change of said original contract as proposed in said letters from said Case, and advised him of the examination and acceptance of the abstracts of title to the lands described in said Exhibit A, covering about 4,500 acres, and in said letter said: "In accordance with your suggestion in your letter I am ready to close the purchase of the above-described land and to close the purchase of the other land as fast as the titles are acceptable. The titles to these to be submitted as fast as they are ready, and the deal consummated as fast as titles are perfected, and all titles to all the lands in my contract to be perfected and all the lands to be delivered to me according to the terms of my contract by December 10th next."

On August 25, 1902, said Case acknowledged receipt of the above letter, and stated that Mr. Beiseker thought that they should close for at least 8,000 acres then; that if the plaintiff was unable to accept those titles then, they could not be made any more perfect, that delay would not help matters, and that they must be accepted or rejected in their then condition, stating that Mr. Helmich was returning the abstracts with his opinion, as to those titles, and requesting a decision as to whether they would be accepted or rejected.

On August 29, 1902, the plaintiff wrote to Case in reply, advising him of the receipt and approval of the abstracts for the land contained in Exhibit A-1, being about 4,300 acres, stating that: "This list with the list included in my letter to you of the 12th instant contains all the lands for which abstracts have been submitted, making a total as shown by the abstracts of 8,829.08 acres. * * * These titles are accepted of course with the understanding that all papers submitted relating to the title, and not yet recorded, are to be placed on record and the abstracts continued to date to show them. This being in accordance with your statement; the object being to save time in closing the deal on what lands are now ready, as it will no doubt take some time to get these papers all recorded, and the

abstracts continued. * * * In accordance with your request, I am now ready to close the purchase of the above lands as stated in my letter of the 12th instant, the abstracts on the balance of the lands to be submitted as fast as titles are in shape, and the deal closed on the rest of the lands from time to time between now and December 10th. * * * I trust you will be able to get the papers ready at once, as we want to get to selling this land this fall, and it should be on the market now. I see no reason for any serious delay now in closing on the land on which the titles have been approved." In this letter the plaintiff asked the favor of sending the deeds to the First National Bank of Cherokee, with the notes, mortgages, etc., as it would save a trip to Minneapolis, and suggesting that he would come if insisted on but would like to have three or four days' notice, and inquiring if his wife would have to sign the mortgages, and whether or not the signature of an attorney in fact would be sufficient, stating that he had such power; suggesting that if the papers were sent to Cherokee his wife would sign if necessary, but that it would be quite inconvenient for her to go to Minneapolis. The letter closed with a request for an acknowledgment of its receipt, and to advise him when he might expect the papers to be ready.

On September 8, 1902, Case wrote the plaintiff as follows: "There seems to be some misunderstanding on the part of Beiseker and Davidson, as to the matter of interest on the notes and mortgages for the balance purchase money on the McLean county lands. Inasmuch as it is almost impossible to adjust the matter by correspondence I wish you would wire me tomorrow whether you will come to Minneapolis immediately and what day you can be here and I will wire both Beiseker and Davidson to be here to meet you and close up the whole matter. Come as soon as you can while they are home, as I may not be able to get them together after this week. Have been out of the city or would have written you earlier."

On September 9, 1902, the plaintiff replied, expressing his surprise as to any misunderstanding in regard to interest, setting forth at some length the reasons why this interest should not be required, recapitulating the causes of the delay and the extension of time at the request of the defendants, until the present time; suggesting the loss of the season's sales on the lands, and that they had been a damage to him; that the delay was not his fault; that the time had been extended as stated in a former letter in order to get the deal closed on what was ready, so that the land might be put upon the market at once; that he could see no reason for coming to Minneapolis to adjust the matter respecting this interest, as there was nothing to adjust, but that he would come when the deeds were there and the matters all ready for final settlement; and asking for an immediate settlement; that he be advised when they would be ready; and that his letter in regard to his wife joining in the mortgage should be answered. In reply to this letter Case, on September 10, 1902, wrote as follows: "Your favor of the 9th received. Taking everything you say in consideration, I still wish that you would come to Minneapolis as soon as possible, and close up the deal for the land for which the abstracts have been accepted, also please bring the abstracts along so that we may finally check up the whole matter. Mr. Beiseker will be here to-night and if you come up tomorrow night I will have him wait for you, and you can then close, as deed is executed for all lands as stated. In regard to the mortgages, we will have them drawn here, and you can take them back with you for signature by your wife; and the delivery of the papers will be a mere matter of detail. If you can be here Friday morning, kindly wire me, and I will arrange accordingly."

On September 11, 1902, Case wired the plaintiff from Minneapolis as follows: "Beiseker here; you must come to-night. Bring abstracts and all papers connected with the matter."

The petition further alleges that after the letter of August 12, 1902, in which the plaintiff consented to the extension of time requested in the letter of Case of August 2, 1902, the defendants, through their said agent Case, consented thereto by thereafter forwarding additional abstracts to the land

described in Exhibit A-1, and writing said letter of August 25, 1902, above set forth. Pursuant to said request from Case the plaintiff went to Minneapolis September 12, 1902, where he met Beiseker, and was then ready, willing, and able to carry out and perform the contract on his part as to said lands in Exhibits A and A-1; and it was thereby agreed between the parties, to close up said deal in like manner as to the other lands as fast as the titles were accepted. The petition then alleges that on the 18th day of September, 1902, the plaintiff tendered defendants \$19,423.53 in cash, and the three notes for \$13,242.62 each, due on or before December 1, 1902, 1903, and 1904, respectively, dated September 1, 1902, drawing interest at the rate of 6 per cent. per annum from their date, together with mortgage on the lands conveyed by Exhibits A and A-1; that the amount so tendered was one-third of the purchase price, according to the contract, of the lands described in said exhibits, without interest, and less the \$500 mentioned in said contract which had been paid to said Case and by him to the defendants—the plaintiff claiming that said \$500 was a part of said cash payment on the contract. Said tender was made in writing and by actually producing and offering said cash in legal tender and said notes and mortgages to said Beiseker in the city of Minneapolis, Minn., copies of said tender and exhibits being attached to the petition. The petition avers that “the said defendant Beiseker then and there refused to carry out said contract as to any part of the said lands described therein, unless plaintiff would agree to pay interest on the said purchase price from December 21, 1901.”

On September 27, 1902, the plaintiff served upon the defendants written notice that he had elected, because of such refusal, to hold said defendants liable for damages, which notice was filed as an exhibit.

On October 3, 1902, the defendants wrote a counter letter to the plaintiff, in which they claimed that they had not broken the contract, and that the plaintiff had; and that they were willing to proceed to carry out the contract as they understood it. The petition alleges that under said offer “the defendants orally insisted upon and required this plaintiff to pay interest upon the said purchase price of the said lands at the rate of 6 per cent. per annum from the 21st day of December, 1901, notwithstanding that the defendants had failed to furnish this plaintiff with the abstracts of title called for by said contract for the lands described in Exhibits A and A-1 until August 3, and August 24, 1902, nor any title thereto; that the said written demand for a compliance with said contract by this plaintiff upon such terms was and is a further refusal of the tender made by this plaintiff to said defendants,” and that the same constituted a refusal to carry out said contract.

The petition then alleges that as to the lands not covered by Exhibits A and A-1 abstracts were furnished which were defective and were returned for correction, and were never afterwards redelivered to the plaintiff. That during all of the time said lands were in the possession and under the control of defendants, were uncultivated prairie lands, having no rental value, and no rents being received therefrom. Then follow the allegations respecting damages, setting forth the items thereof; and a prayer for judgment for \$34,428.52. To this petition the defendants demurred on the ground “that said complaint does not state facts sufficient to constitute a cause of action.” The demurrer was sustained, and the plaintiff, declining to plead further, judgment was entered by the court dismissing the petition and adjudging the costs against the plaintiff. To reverse this judgment the plaintiff prosecutes a writ of error.

A. R. Molyneux and E. C. Herrick (Herrick & Herrick, on the brief), for plaintiff in error.

Guy C. H. Corliss (Robert G. Morrison, on the brief), for defendants in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

It is to be conceded to the contention of counsel for defendants that the contract between the parties, in its inception, was an optional contract, whereby the defendants agreed to sell the lands to the plaintiff on the conditions named, which option ran for a period of 30 days. It may also be conceded that the \$500 deposited with Eugene D. Case was in the nature of a consideration for the purchase of the option; and that looking alone to the face of the contract and what, at the time of its execution, was in the contemplation of the parties an obligation on the part of the defendants to convey, did not become operative until the plaintiff complied or offered to comply with the requirement to pay one-third of the purchase money within the specified time. It may further be conceded, that as time was made the essence of the contract, if not waived, the said offer of performance should be made within 30 days; and further, that at any time during the existence of the mere option the plaintiff might have retired therefrom, forfeiting only the \$500 to the defendants. This case, however, very fitly illustrates in practice the difference between a mere theory and actual facts. Let us see precisely what was the status of the \$500 put up with Case. The first thing to be ascertained was whether or not the lands proposed to be sold were of the quality designated or required. Case was agreed upon to act as arbiter in this matter. If he decided and reported that the lands complied with the requirements, the plaintiff was then to say whether the deal should proceed further. Or, if of his own initiative the plaintiff became satisfied with the lands, he could give notice thereof. If he then declined to proceed further the \$500 would become forfeited to the defendants. If he gave notice of his acceptance and the defendants declined to go further the \$500 should be returned to the plaintiff. It is upon this hypothesis that defendant's counsel insists that the \$500 was only the consideration for the purchase of the option; and that until within the 30-days' period, he made tender of the one-third purchase price for the lands contemplated to be sold, the option lapsed, and the plaintiff has no standing in court.

There are two objections to this contention: In the first place, it is to be observed that on the acceptance by the plaintiff of the lands as satisfactory the \$500 might become and be considered a part of the purchase price. This appears in the fact that in the computation of the full acreage at \$6.75 per acre it was estimated at \$76,680; while the consideration recited in the contract is \$76,180, or \$500 less in one aspect, and in the other as "*\$76,180 more or less, being with said \$500 (italics ours) at the rate of \$6.75 per acre.*" Not only did the plaintiff, on December 14, 1901, within the prescribed 30 days, notify the defendants that he would take the lands as satisfactory, and was ready to close the deal as soon as the abstracts were furnished and examined, but in his letter of the same date to Mr. Case, the stakeholder and representative in this matter of the defendants, he said: "You may pay them (the defendants) the \$500

now in your hands to apply upon the *purchase price of the lands.*" (Italics ours.) Thus were the defendants distinctly advised that in consenting to have the \$500 handed over to them by Case, it was the purpose of the plaintiff to have it applied as a part payment of the purchase money for the land, and not as a payment for a mere option to purchase.

This \$500 was thereafter retained, not only without an intimation from the defendants that they held it as a forfeit on the option contract, but the whole subsequent correspondence and course of dealings between the parties, extending over a period of about nine months, show beyond the possibility of a reasonable cavil that the defendants treated and regarded the transaction thereafter as in full force, executory in effect, and that there was no default on the part of the plaintiff. On the contrary, the only obstacle that arose in the way of a final execution and closure of the contract for the sale was the inability on the part of the vendors to furnish the required abstracts showing title.

The entire discussion, therefore, able and learned as it is, respecting the quality and effect of a mere contract of option to purchase, is quite academic as applied to a situation like this, where both parties have treated the \$500 put up as a guaranty, or, if you please, as the consideration for the option, after notice of acceptance by the purchaser, as being held by the vendors as part of the purchase price of the land. There has never been any rule of construction of contracts more instinct with the spirit of justice and practical sense than that which declares that where the provisions of a contract become the subject of controversy between the parties, the practical interpretation placed thereon by their acts, conduct and declarations is of controlling force. This for the reason that the interest of each leads him to a construction most favorable to himself, and when differences have become serious and beyond amicable adjustment, it is the better arbiter. So in *Long-Bell Lumber Company v. Stump*, 86 Fed. 574, 30 C. C. A. 264, this court said:

"Courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties. The most satisfactory test of ascertaining the true meaning of a contract is by putting ourselves 'in the place of the contracting parties when it was made, and then considering, in view of all the facts and circumstances surrounding them at the time it was made, what the parties intended by the terms of their agreement.' And when this intention is made clear by the course of their subsequent dealing and action thereon, it must prevail in the interpretation of the instrument, regardless of inapt expressions or careless recitations."

Why should the court be asked to hold that after the expiration of the 30-days limit fixed in the original contract, the contract had spent its force and was at an end, when the parties themselves for months thereafter did not so regard it? Why should the defendants now be heard to say that the plaintiff had defaulted in exercising the optional right for failure to make tender of the first payment within 30 days after the date of the original contract, when during all the

succeeding months they held the \$500 as a payment on the purchase price of the land and were trying to complete their abstracts, and asking for time, the furnishing of which was a condition precedent to the obligation of the plaintiff to pay the one-third of the purchase money? In recognition of the fact that the contract was operative in accordance with the provisions therein, "that should it be found that any of said lands are not owned or controlled by said parties of the first part, or the title to any of them prove to be otherwise defective, such lands shall be excepted from the lands to be conveyed, and the purchase price hereinbefore mentioned shall be reduced at the rate of \$6.75 per acre for every acre so excepted," when the defendants discovered that they could not make title to all the lands they requested the plaintiff to accept the title to such of them as were shown to be clear by the abstracts and close up the deal pro tanto. Each party thereupon consented to a separation, not of a dead but of a recognized, subsisting contract, obligatory upon both, whereby the one-third of the purchase money for the acres thus accepted was to be paid and deeds and mortgages exchanged. Not one word of objection was uttered—no bone of contention arose between the parties—until the question of the back interest was broached. According to the facts recited in the petition, the only objection ever made to the final estimate and closure of the purchase came from the demand of the defendants when the parties approached the juncture for the exchange of title papers and payment of the one-third of the purchase money, respecting the deferred payments bearing interest from the 1st of December, 1901.

In *Kansas Union Life Insurance Company v. Burman* (C. C. A.) 141 Fed. 835, where an insurance agent for the insurance company, under a salary contract and for certain commissions, sent in his resignation to the company specifying certain grounds therefor, which did not include the objection that the insurance company had failed to renew its license in the state where the agent was operating under the contract, and in his suit to recover damages for a breach of the contract of employment he assigned, *inter alia*, such failure to renew the license as a ground of recovery, it was held that he was estopped from alleging such ground as the cause of his resignation. The court said:

"It is a wholesome rule of law, instinct with fair play, expressed by Mr. Justice Swayne, in *Railway Company v. McCarthy*, 96 U. S. 267, 24 L. Ed. 693, that: 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.' This principle has been applied in the following instances: *Davis v. Wakelee*, 156 U. S. 690, 15 Sup. Ct. 555, 39 L. Ed. 578, where a bankrupt obtained his discharge, claiming that the judgment against him was not affected by it, it was held that he could not, in a subsequent action on the judgment, deny its validity. In *Davis, etc., Company v. Dix* (C. C.) 64 Fed. 411, where it was held that the purchasers of a creamery repudiating the contract on the ground of fraudulent representations, could not thereafter set up an interpolation in the contract. In *Harriman v. Meyer*, 45 Ark. 40, where it was held that the defense that a

tender was not made in ready money was not admissible where the prior objection was to inadequacy of price. In *Wallace v. Minneapolis Elevator Company*, 37 Minn. 465, 35 N. W. 269, where it was held that a bailee refusing to deliver wheat because claimed by another, could not afterwards refuse on the ground that the charges were not paid. In *Harris v. Chipman*, 9 Utah, 105, 33 Pac. 243, where it was held that a plaintiff rejecting title for want of administrator's bond, could not be heard to object afterwards that letters of administration were not under seal. In *Ballou v. Sherwood*, 32 Neb. 689, 40 N. W. 796, where it was held that title objected to because of pending litigation, the purchaser could not afterwards object for want of seal on the deed. In *Frenzer v. Dufrene*, 58 Neb. 436, 78 N. W. 720, where it was held that where a party alleged his wife's recalcitrance as a reason for not executing a contract, he could not afterwards be heard to allege other reasons."

From the inception of the dealings between the parties they recognized that as a condition precedent to the right of the vendors to demand, and the obligation of the vendee to make, payment of the one-third of the purchase price, the defendants should furnish the plaintiff with the required abstracts showing title in the vendors to the land. Accordingly abstracts were furnished from time to time as the defendants were able to clear the title. In the first instance it was evidently the mind of the defendants that their title was in such condition that the deal could be brought to a final conclusion within 30 days. Discovering that this expectation could not be realized, they retained \$500 as part of the purchase price, and by mutual consent sent in abstracts as they could. The plaintiff, growing impatient over the delay, made complaint and insisted upon closing up the matter. Whereupon the defendants recognizing their inability to perfect title to more than 8,829.08 acres, it was mutually agreed to complete the transfer to that, leaving the residue in abeyance. In view of these actions—the construction placed upon the transaction by the parties—it is made manifest that the contention now put forth for them by astute counsel is an entire after-thought.

The extreme position is now taken in argument by counsel for the defendants that the 10-days period fixed in the contract for examination of the abstracts limits the time for compliance by the plaintiff; and not having made tender within that time, as the abstracts were furnished, the right of action is gone. The provision in question was inserted in the contract for the purpose of allowing the plaintiff a reasonable opportunity to examine or have examined the title, and the right of the defendants to withdraw if the abstracts were longer detained. Having in view that the abstracts would be timely furnished by the defendants, it was then assumed that the deal could be closed within thirty days. But as the abstracts were not furnished within 30 days, the defendants holding the \$500 without offering to return it, and both parties being anxious not to lose the sale and purchase, they waived the time limit for completion; and in the very nature of the situation, a reasonable time would be accorded in contemplation of law, having regard to the situation of the parties, in which to conclude the drawing of the deeds of conveyance and the mortgages and to make the payment. At no time

thereafter, although recognizing the contract as in force, were the defendants in position to insist upon the 10-days limit, as they had not furnished the abstracts to all the lands. When the defendants reached the limit of their ability to tender title to more than 8,829.08 acres, by common consent the parties fixed upon another time for the final act of performance. Why, therefore, should the court be asked to rule that the time first agreed upon should control? It was a matter in the keeping of the parties, which they could alter at will. If any consideration were essential to its support, ample is presented in subserving the wishes and interests of the defendants in consummating the sale so long deferred by them, whereby they would be entitled to hold the \$500 already received and obtain the balance. When the parties by mutual designation finally met, September 12, 1902, to close up the matter, the only insistence of the defendants was as to the back interest. They assigned no other reason for refusal to proceed. Now that litigation has supervened, they should be heard to make no other excuses.

Were the defendants entitled to the interest demanded? If they were, this action must fail; if they were not, their demurrer was not well taken. Interest is allowed either by virtue of a contract, express or implied, to pay it, or as damages for the wrongful detention of what is due to another. The interest here claimed is based upon the literal terms of the original contract. Interest based on a contract "is recoverable strictly as interest only during the continuance of the contract and as provided by its terms, before breach and not after." 16 American & English Enc. of Law, p. 999. As it was contemplated by both parties in entering into the original contract that the sale would be consummated within 30 days therefrom, the provision respecting the deferred payments bearing interest from the 1st of December, 1901, was consented to and was reasonable. Had the contract been so completed the plaintiff would have been let into possession of the land and been in position to put in on the market, and thereby he would have enjoyed the use—the equivalent of the interest. But for about nine months he was kept out of the possession, solely by reason of the default of the defendants. He was thus deprived of the use and any benefit he might derive by selling on a favorable market. The law will not reward their delinquency by exacting interest from the indulgent party. See 1 Warvelle on Vendors, p. 193; Worrall v. Munn, 38 N. Y. 142, 144.

The further technical objection is made in behalf of the defendants that the amount of money tendered in payment of the one-third purchase money on the 8,829.08 acres was insufficient. This is predicated of the fact that included in the sum tendered was the \$500 placed with Case; the contention being that the \$500, if a payment on the purchase price, was apportionable to the whole body of the land; i. e., the 11,000 acres. It would seem to be the natural and reasonable thing that where, on a contract of purchase of property, it was agreed that one-third of the consideration shall be paid in cash at the time of delivery, and notes given for the deferred payments, and \$500 is paid as earnest money, when the parties come to consummate the bargain the \$500 in cash already in the hands of the vendor should be treated

as part of the entire cash payment. The contention respecting the application of the \$500 is remarkable in view of the admission made by the defendants in their letter of September 30, 1902, to the plaintiff, in which they proposed (on the terms of course of the demand for back interest) to carry out the contract as to the 8,829.08 acres that "the titles to the remaining lands therein described have proved to be defective, and are therefore by the terms of said contract excepted from the lands to be conveyed." Upon what permissible ground, founded in reason and good conscience, can the defendants demand to retain that portion of the \$500 that bears equal relation to the undivided lands?

Keeping in mind the fact that the \$500 had been paid as a part of the purchase price of the land, when it was announced by the defendants that they were unable to make title to over 8,829.08 acres, and it was thereupon agreed to close the deal on the acceptance thereof by the purchaser, the natural and reasonable intendment would be that the \$500 already received should be deemed a part of the first cash payment to be made. Any other view would be impracticable. No apportionment could be predicated of the number of the remaining acres, for the palpable reason that it was then impossible to know whether the vendors would ever be able to perfect title to the whole or any lesser part; and until such title should be obtained the defendants would not be entitled to hold a dollar of the five hundred. The practical business sense of the situation, therefore, was, when the vendors announced their ability to declare title to only 8,829.08 acres, and the parties consented to close on that, to regard the \$500 already received as part of the cash payment then to be made. No such objection was made to the tender in the letter of defendants of September 30, 1902. It was conceived afterwards, in searching for some loophole of escape from liability. The formal tender of the money, notes, and mortgages was made by the plaintiff in about two weeks after the final rupture, which was a reasonable time under the attendant circumstances, and was less than 30 days after it was agreed to accept the title to less than the quantity of land originally contracted for. The notes tendered bore interest from the 1st day of September, 1902, which, in all conscience, was as much as the defendants could claim. Criticism is made by defendants' counsel of the following language employed by the plaintiff in his letter of September 27, 1902, to the defendants:

"You are hereby notified that I rescind said contract and declare the same to be no longer in force."

This must be read and understood, however, in its connection; for it was followed up by saying:

"And I hereby demand the payment to me of the \$500 paid by me on said contract, and shall also hold you responsible for all damages sustained by me on account of your refusal to carry out and perform said contract."

From which it is evident that the words "rescind" and "no longer in force" were used in no other sense than to indicate that the con-

tract was broken and at an end for the purpose of further dealings with the defendants; and that, therefore, the plaintiff would hold them liable for damages.

Finally, contention is made on behalf of the defendants that this action should fail, because in his tender the plaintiff included some lands different from those described in the original contract. In the letter of August 29, 1902, addressed by the plaintiff to Mr. Case, attention was called to the fact that in the abstracts sent there were some variances in certain sections from the lands described in the contract, with the suggestion that the error might be in the description by the abstractor or it might be an error in the list in the contract. "Please see which is correct when deed is made." The suggestion was also made that as to one quarter section described in the contract he understood from parties who had examined the land for him that that section was government land. "You submit an abstract on the N. W. $\frac{1}{4}$ of 17, 144, 83, which is not in my contract, so suppose the description in the contract is an error and was intended for range 83 instead of 82;" followed by a distinct statement that "these titles are accepted" with the understanding that titles not yet recorded were to be placed on record and the abstracts continued to date; with the further statement that "in accordance with your request I am now ready to close the purchase of the above lands, the abstracts on the balance of the lands to be submitted as fast as titles are in shape, and the deal closed on the rest of the lands."

As, under the contract, the right was reserved to the defendants to substitute other lands of equal value; and as they made no reply, or objection to the discrepancy, the plaintiff had the right to accept the abstracts sent as correct, and if there was any objection to the plaintiff's acceptance it was the duty of the defendants to say so when the parties met to close up the deal. More than all this, after the receipt of the plaintiff's formal tender, accompanied with a description of the lands, the defendants in their letter of September 30, 1902, only imputed to the plaintiff a failure to comply because he had "already declared that you [he] do not intend to take advantage of said contract and purchase thereunder;" and then said:

"You are hereby notified that if you, on or before October 20, 1902, carry out and perform the terms, conditions and portions of said contract to be by you performed in case of the purchase of the said lands by you, we will convey or cause to be conveyed to you, in manner specified in said contract, the lands herein described, the titles to which have been accepted by you, being the same lands described or referred to in your alleged tender to Thomas L. Beiseker on September 18, 1902, and will in all respects carry out and perform our part of said contract."

They thus, in effect, conceded that the tender made was as to the lands properly described in the tender, without one word of objection or suggestion on their part of any variances or noncompliance on the plaintiff's part in respect of the description of the lands. To such a situation applies with pungent force the rule of estoppel, that he who is silent when he should speak shall not be heard to speak when he should be silent.

It results that the judgment of the Circuit Court on the demurrer is reversed, and the cause is remanded with directions to overrule the demurrer, and for further proceedings in conformity with this opinion.

RICHI v. VICTORIA COPPER MINING CO.

(Circuit Court of Appeals, Sixth Circuit. July 10, 1906.)

No. 1,526.

1. DESCENT AND DISTRIBUTION—REAL PROPERTY—TITLE OF DISTRIBUTEES.

Where intestate died, leaving surviving him a widow and father, but no issue, the widow took a life estate in the decedent's lands, and the father took the remainder after the widow's death, under the express provisions of Comp. Laws Mich. 1857, pp. 858, 859.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 145.]

2. REMAINDERS—RECOVERY OF LAND—ADVERSE POSSESSION—LIMITATIONS—ACCRUAL OF RIGHT OF ACTION.

Comp. Laws Mich. 1897, § 9716, subd. 2, declares that, when a person claims as heir of one who died seised of land, his right of action to recover the land shall be deemed to have accrued at the time of such death, unless there is a tenancy by curtesy or other estate intervening, in which case his right shall be deemed to have accrued when such intermediate estate shall expire. *Held*, that where the father of the deceased owner of certain land was only entitled to the same in remainder after the termination of the widow's life estate, his right of action to recover the land did not accrue until the widow's death, and hence adverse possession prior to that time could not affect his title.

3. DEEDS—COVENANTS—SUBSEQUENT TITLE—PROBATE DECREE.

Where a widow conveyed all her right, title, and interest in certain land derived from her deceased husband, in which she had a life estate, by a deed containing no covenants of warranty, any rights which she subsequently acquired under probate decree vesting in her the land in controversy in fee did not accrue to her grantee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 398, 330; vol. 19, Cent. Dig. Estoppel, § 109.]

4. COURTS—PROBATE COURTS—JURISDICTION—QUESTIONS OF TITLE.

A court of probate, as a part of the administration of an intestate's estate, while entitled to order the possession of certain land turned over to the widow, had no jurisdiction to adjudicate in respect to the extent of the widow's title or the validity of the titles and interests of other parties.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 479.]

5. ADMINISTRATORS—PETITION FOR DISTRIBUTION—NOTICE.

Under Comp. Laws Mich. 1897, § 9448, requiring notice of hearing on a petition for distribution, an order of a probate court, declaring that certain land of which an intestate died seised should be delivered to the widow, granted without proof of notice and the appointment of a time for hearing, was void.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1281.]

6. DEEDS—ESTATE CONVEYED.

Where a widow conveyed all her rights, title, and interest in and to certain land which she derived from her deceased husband's estate, the deed was satisfied by a life estate, as well as an estate in fee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 395-398.]

7. ADVERSE POSSESSION—NOTICE.

Occupation by defendants of land to which the plaintiff made no claim did not charge plaintiff with notice that defendants made any hostile claim to plaintiff's adjoining land, and did not put plaintiff on inquiry in respect to the nature of defendants' possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 129-131.]

8. TRIAL—INSTRUCTIONS—BONA FIDES OF PLAINTIFF'S CLAIMS.

In ejectment to recover certain land to which defendants claimed title by adverse possession, the court charged that at some time nearly all the timber had been cut off the southwest quarter and the northwest quarter of the section; that the property had been taken off whenever defendants needed it in the operation of their mine without asking the people (referring to plaintiff) who pretended to own eight-twentieths thereof anything about that, in fact, seeming to have ignored absolutely, from the beginning, that plaintiffs ever had any right there; that plaintiffs had not paid taxes, had not looked after the land, but had allowed it to rest dormant, etc. *Held*, that such instruction was an objectionable reference to the good faith of plaintiff's claim to the land.

9. ADVERSE POSSESSION—TENANTS IN COMMON—INSTRUCTIONS.

Where, in ejectment to recover certain land, plaintiff and defendant were tenants in common, and defendant claimed title by adverse possession, an instruction that it was not necessary that the occupation by defendant, in order to be adverse, should be such that a mere stranger passing by would see the possession and appreciate that some one was in possession claiming title to the whole section, but that it was only necessary that the possession was such that those in the neighborhood, and in a position to know what was going on, appreciated that defendants had possession, and claimed exclusive right to the whole property, was erroneous.

10. SAME—TENANCY IN COMMON—BURDEN OF PROOF.

Where defendant claimed by adverse possession the entire title to land which it had previously owned in common with plaintiff, who had been in rightful possession, the burden was on defendant to prove that its possession was accompanied by tortious and disloyal acts to plaintiff, which were open, continued, and notorious, so as to preclude all doubt as to the character of the holding or the want of plaintiff's knowledge that the same was adverse.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 656.]

11. SAME—HOSTILE POSSESSION—EVIDENCE.

Defendant previously owned certain wild, unfenced lands, in common with plaintiff. Defendant permitted the land to be pastured without plaintiff's consent, and employed a caretaker to look after the premises. No particular thing was done by him, however, and during subsequent years, the land was assessed as nonresident, which could lawfully be done only when there was no occupancy of the premises. Defendant paid taxes for some years and bid off the land or purchased from others at tax sales for other years. *Held*, that such acts were insufficient to establish defendant's claim of title as against his cotenant by adverse possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 503.]

In Error to the Circuit Court of the United States for the Western District of Michigan.

D. H. Ball, for plaintiff in error.

C. D. Hanchett and A. F. Rees, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

SEVERENS, Circuit Judge. This is an action in ejectment. The plaintiff sought to recover the possession of an undivided eight-twentieths of two quarter sections of land in Ontonagon county in the northern peninsula of Michigan; that is to say, the N. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 30 in township 50 N. of range 39 W. The defendant pleaded the general issue, and gave notice of a special defense under the statute of limitations of that state. The cause was tried before a jury and the result was a verdict and judgment for the defendant. The plaintiff made out a clear title to the eight-twentieths of the land in question, and established his right to recover unless he was barred by the statute of limitations. It appears from the record that one Samuel H. Broughton owned this undivided interest in the land at the time of his death which occurred about December 3, 1860. He died intestate. He had no issue but he left surviving, his widow, Sarah N. Broughton, and his father, Shebuel H. Broughton. By the statutes of Michigan then in force (Comp. Laws 1857, pp. 858, 859), the widow took a life estate in the lands of the decedent and the father took the remainder after the death of the widow; the statute being as follows:

"2. If he shall leave no issue, his estate shall descend to his widow during her natural life time, and after her decease to his father."

The plaintiff has the title of the father derived by mesne conveyance from him. The widow became administratrix of the husband's estate, as is to be inferred from what follows, and at the close of her administration in March, 1867, the judge of probate of Ontonagon county, upon her petition, made an order reciting that it satisfactorily appeared that the deceased left no father, and assigning to her the eight-twentieths of the above-mentioned quarter sections of section 30, and other described lands, "to have and to hold the same unto herself and to her heirs and assigns forever." A certified copy of this order was offered in evidence by the defendant at the trial and was admitted by the court over the objection of the plaintiff that there was nothing to show that the probate court had jurisdiction, by notice or otherwise, to make the order; and further, that it did not purport to be made upon notice, nor did it recite any notice. The facts stated in this objection sufficiently appear. The widow on or about October 10, 1866, conveyed "all her right, title and interest" in the eight-twentieths of these quarter sections to the Victoria Mining Company, but this deed, we infer, was never recorded. The company at that time acquired from other parties a partial interest in the other twelve-twentieths, and on September 19, 1869, acquired the remaining interest in said twelve-twentieths. Such title as the Victoria Mining Company had in the two quarter sections was acquired in 1890 by G. Winthrop Coffin on an execution sale upon a judgment obtained by him against that company. The Victoria Copper Mining Company, the defendant in this suit, in January, 1899, acquired through the

mesne conveyance the title of Coffin, and thereupon assumed full and visible possession thereof. From these recitals it is apparent that the whole stress of the controversy lies in the contention that the defendant has acquired the title to the eight-twentieths, which is the object of the suit, by adverse possession maintained through 15 consecutive years, that being the period prescribed by the Michigan statute of limitations. Act March 30, 1863, now section 9714, Comp. Laws 1897. The title of Shebuel H. Broughton, which the plaintiff has, entitled him to the possession in 1881, and no cause of action accrued to him until that time. Section 9716, Comp. Laws 1897. Adverse possession prior to that time by any one would not affect his title. But, in fact, there had been no adverse possession. The conveyance by Mrs. Broughton of all her "right, title and interest," which was her life estate, to the Victoria Mining Company gave the company it having already acquired the other twelve-twentieths, the right to exclusive possession while she lived.

It is claimed by the defendant that the order of the probate court gave to Mrs. Broughton and to her grantees color of title, which would extend the possession of some part of the land to the limits of the lands described in the order. It is to be noticed her grant was in 1866 and was a grant of her right, title, and interest, which was of life estate only; and further that the order of the probate court was made in 1867. It was the deed of Mrs. Broughton which supplied such color of title as there was. We do not perceive that the order of the probate court, if valid for any purpose, has any bearing upon the question of adverse possession. Moreover, though made upon an entirely false assumption, it was not an adjudication which conferred any rights upon her former grantee, there being no covenant of warranty. It would have been a proper order to make in the distribution of the estate, for Mrs. Broughton was entitled to have the possession turned over to her. But it was beyond the power of the probate court to adjudicate in respect to the extent of her title and the validity of the titles and interests of other parties. That power belongs to courts of general jurisdiction. The probate court distributes and assigns the property of the intestate to those apparently entitled to the possession, but it does not by its orders originate or establish any muniment of title to the real estate in the distributees. As was said by Judge Cooley in *Dickison v. Reynolds*, 48 Mich. 158, 12 N. W. 24, when the estate has been fully administered "the assignment is a matter of course and a mere formality." And undoubtedly this is so unless there are adversary proceedings in the nature of a plenary suit for which the statute provides in some cases. The titles of Mrs. Broughton and of the decedent's father vested immediately upon the death of the decedent. There was nothing for the probate court to decide. The assignment was, in effect, nothing more than awarding Mrs. Broughton the possession. But it is unnecessary to pursue the discussion upon this aspect of the case. Section 9448 requires that notice of the hearing upon a petition for distribution shall be given. And if the order asked seriously involves the ultimate

rights of property, it would be contrary to fundamental principles that notice should not be required. In this instance there is no proof that any order appointing a time for hearing was made, and no proof that any notice of the application was given. We are of opinion that the order, especially in the absence of such showing, was a nullity.

In order to give color of title the deed or other medium of transfer must purport to convey the estate to which the possession by the grantee is conformable. *Campau v. Campau*, 44 Mich. 31, 5 N. W. 1062, where Marston, C. J., said:

"It is also well settled that the possession of an occupant is co-extensive with his claim and color of title. If in possession of a part under color of title to the whole tract, his constructive possession extends to the whole; if under color of title to an undivided interest, his constructive possession covers the whole to the extent of such interest; if without color of title, the possession is not extended by construction, beyond the boundaries of the occupied portion. The constructive possession of premises will be co-extensive in interest with the title which gave rise to and created it, and in like manner the actual possession may be limited by the title of the occupant. The actual possession of a tenant in common will not be presumed adverse to that of his co-tenants, and his constructive possession in like manner will be limited to his interest as tenant in common."

But there was nothing in Mrs. Broughton's deed which indicated the extent of the interest intended to be transferred. Its terms would have been satisfied by a life estate as well as by an estate in fee. We now proceed to consider the special questions raised by the plaintiff's exceptions.

Before taking up the assignments of error in detail, it is necessary to state more particularly the facts on which the questions arise. The quarter sections which are the object of the suit touched each other at a point. The northeast quarter and the southwest quarter had, for some time previous to the events with which the suit is concerned, been owned by the Victoria Mining Company. The locality was in a wild uncultivated region of forest and open spaces. The Ontonagon river runs around on other sections to the east and south. Counsel for defendant correctly described the premises as "wild, rough mining and mineral land. The nearest neighbors were the ferryman on the river, the Walsh homestead, no other neighbors nearer than Rockland, four miles away." The Walsh homestead was on the section next east, No. 29. The Victoria Mining Company had located a mining plant on the southwest quarter of the section, but it had never been operated to any extent and had fallen into disuse, and those who had occupied there had removed to other parts. Agents of the mining company occasionally visited the place to see that the property was not being injured, and there was evidence tending to show that they engaged Walsh to look after the premises, and as compensation authorized him to pasture his cattle thereon. There were open tracts on the land where there had been partial clearings. There was no enclosure of any part of the section or anything to prevent cattle turned on any part from going off into adjoining territory, or to prevent cattle coming in from outside and pasturing these clearings. There was also evidence that at one time a prospective

purchaser went there and pumped the water out of the mine, and in doing this cut some timber on the section, on what parts is not clear. The mining company paid the taxes on the whole section some of the years and purchased it at tax sales or from purchasers at tax sales for other years. During the seven years from and including 1892 and 1898 the lands were assessed as nonresident, which imports that they were unoccupied. Neither Shebuel H. Broughton nor his grantees have, at any time, exercised acts of ownership over the land except by grants of the eight-twentieths undivided interest heretofore stated. Inasmuch as the plaintiff's predecessors in title were the owners of the eight-twentieths undivided interest, and were therefore tenants in common with those whose title the defendant has acquired, the nature of the adverse possession, which the defendant is bound to make out in order to bar the covenant, is not the same as in the case where there is no such relation, a distinction which it is important to bear in mind. *Newell v. Woodruff*, 30 Conn. 492; *Foulke v. Bond*, 41 N. J. Law, 527.

The general proposition is not doubted that when a grantee takes actual possession of a part of a tract of land which the grant purports to convey to him under a claim of title to the whole derived from the grant, such partial possession will by construction extend to the limits of the grant. But the court below, in its instructions to the jury, told them that "the evidence indicates that it (that is, the mining company) had a mine on a portion of this section, but not on these quarters, but if it had a mine on any portion of this section and claimed the whole section, then its possession of that mining site, with the claim that was asserted to the whole of that section, would extend to the whole section." This was erroneous. If a man finds another in the occupation of some part of his land, he is bound to inquire under what claim of right the other assumes to dispossess him, and the answer to this inquiry necessarily informs him that the other party claims title to the whole tract covered by the hostile grant. But the occupation by another of land to which the first makes no claim does not charge the latter with notice that the other makes any hostile claim or put him upon inquiry in respect to the nature of the other's claim. There is no possession adverse to him. *Coal Creek Mining Co. v. Heck*, 15 Lea (Tenn.) 497. If the mining company was in the occupation of the mine on the southwest quarter of the section, it was so under an independent grant from other parties, which, being looked up, would give no hint that a party occupying within its limits was also claiming the adjoining land. No doubt cases may arise where land along the margin of the granted land has been occupied under a claim that it was covered by the grant, but which is shown not to be so. Such cases present a difficulty which must be solved upon the special facts. But here no such question arises. There is only a proximity of parcels which were the subjects of independent grants.

The court in dealing with the question of adverse possession said to the jury:

"Now, at some time, it is not shown just when, nearly all of the timber has been cut off; all the timber has been cut off the southeast quarter and the northwest quarter, and they have gone in there and taken this property off whenever they needed it in their operation at the mine; they have not seemed to have asked the people who pretend to own the eight-twentieths anything about that, and, in fact, they seem to have been ignored absolutely from the beginning; and they, so far as this testimony is concerned, seem to have ignored the fact that they ever had any right up there; they haven't paid the taxes; they haven't looked after it; they have just allowed it to rest dormant."

It should be observed in passing that this language was unfortunate. It is more than possible that the jury might have understood the court's estimation of the plaintiff's claim as the pretense of a claim. To so stigmatize a case by the court in a charge to the jury is liable to have an influence upon their judgment greater perhaps than the court always realizes. And it seems to us that the tenor of the language used in this summing up of facts was not quite justifiable in view of the facts presented by the evidence. We do not, however, decide that there was reversible error in these remarks to the jury. The court did not therein lay down any rule of law, but was summing up the facts, and elsewhere stated to the jury that they should find the facts, "irrespective of anything the judge may have said during the trial, or anything he may have said to you in the charge."

The court in instructing the jury upon the requisites of the adverse possession which the defendant must prove said:

"Now, it is not necessary that the occupation should be such that a mere stranger passing by would see the possession and would appreciate that somebody was in possession there claiming the title to the whole section; it is only necessary that the possession was such that those in the neighborhood, and who were in a position to know what was going on, appreciated that the defendants had possession and claimed the exclusive right to the whole of the property."

Admitting that this instruction might have been proper if the parties had been strangers, it was not so upon the relation of tenants in common which the court conceded to have existed. It was necessary that the other tenant in common should have had notice that his co-tenant was asserting a hostile claim of title to the whole estate. It was not sufficient that the other tenant should be in the actual possession and doing those things which might seem to others proper to one owning the entire interest. Such possession would be the right of a tenant in common as regards strangers, and would have all the appearances to them of an occupation by one having the entire ownership. *Campau v. Campau*, 44 Mich. 31, 5 N. W. 1062; *Marble v. Price*, 54 Mich. 466, 20 N. W. 531; *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957. And in *Gower v. Quinlan*, 40 Mich. 575 it was held that a tenant in common could not maintain ejectment against his co-tenant who was in the actual possession of the whole and exercising acts of ownership if he has done nothing inconsistent with the rights of his co-tenant. And in *McClung v. Ross*, 5 Wheat. 116, 124, 5 L. Ed. 46, Chief Justice Marshall said:

"A silent possession accompanied by no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession."

In the present case the Victoria Mining Company from 1866 to 1881 owned twelve-twentieths of the estate in fee and the other eight-twentieths for the life of Mrs. Broughton, and the possession whether actual or constructive was lawful and conformable to its title. In 1881, the right of Shebuel H. Broughton to the possession of the eight-twentieths accrued. Having been before in the rightful possession of the whole, the continuance of that possession would not be adverse to the co-tenant, unless it was accompanied by tortious and disloyal acts of the tenant, which must be open, continued, and notorious so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the co-tenant. *Zeller's Lessee v. Eckert*, 4 How. 289, 11 L. Ed. 979. And the burden of proof of these conditions was on the defendant.

Several assignments of error involve the general question whether the court should have directed a verdict for the plaintiff upon the ground that there was no sufficient evidence of such an adverse possession as would bar the action of a tenant in common. If we eliminate the supposed effect of the possession of the mine site on the southwest quarter to extend constructively to the whole section, which seems to have been relied upon by the court below, there is not much left to support the requisite adverse possession. There was one occasion, perhaps more, when timber was cut on the land in question. But there was no continuity, and it is well known that in a new country such acts are common trespasses. There is evidence that the Victoria Mining Company authorized Walsh to let his cattle run over the whole section. But there was no enclosure, and the running of cattle at large is no uncommon thing in such a country, and would scarcely suggest that it was done by the special authorization or license of the owners of the land. Under the laws of Michigan, the merely passing over and cropping these wild, unfenced lands without the consent of the owners was not a trespass, and would convey no hint that the owner of the cattle was claiming the land on which they pastured, or setting up title in any one else. It is said that the Victoria Mining Company and its successors employed Walsh to look after the premises. But no particular thing done by him on these quarter sections is shown. If this be not literally true, it is substantially so. During some of the time the company paid the taxes. During other years, from 1892 to 1898, they were assessed as nonresident by the supervisor of the township which can lawfully be done only when there is no occupancy of the premises. The company bid off the land for taxes. But the allowing of the taxes to go unpaid and then bidding them in are not acts of ownership, but more often indicative of a purpose to acquire a new title.

But it remains to be said that the doing of all these things by a tenant in common is not inconsistent with his character as such, unless accompanied by some open denial of the right of the co-tenant or such

conduct as clearly and unequivocally shows that the joint tenancy is repudiated by him. Acts done which are consistent with his possession for both himself and his co-tenant will not be held to be done in denial of the joint tenancy. We think it would be an unwarrantable deprivation of the property of a tenant in common to permit it to be divested by such vague, indefinite, and inconsequential acts of his co-tenant as were shown by the proof in this case, and that the court erred in not instructing the jury to find for the plaintiff.

The judgment will be reversed, and a new trial awarded.

MARYLAND CASUALTY CO. v. FINCH et al.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1906.)

No. 2,375.

1. INSURANCE—EXEMPTIONS—CYCLONE.

Where a policy insuring against loss from the accidental discharge or leakage from an automatic sprinkler system, exempted insurer from liability for loss caused by earthquakes or cyclones, or by blasting or explosions of any kind, or by the fall or collapse of any building or buildings or part thereof, the term "cyclone" should be construed in its popular sense as referring to any character of a wind storm distinguished by its concentrated force and violence, so resistless as to make it especially destructive to buildings in its narrow pathway, and was not limited to a storm proved to have been characterized by high winds rotating about a center of low atmospheric pressure, which center moved with greater or less velocity.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1127.]

2. SAME—CONTRACTS OF INSURANCE.

Where ambiguous words or terms are employed, they are to be construed strongly against the insurer; but such contracts, like other contracts, are to be construed and applied according to the ordinary meaning of the terms employed, in consonance with their popular sense.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 292, 295.]

3. SAME—"CYCLONE."

Accordingly, in construing the word "cyclone" in said policy, in order to ascertain the sense in which it was employed, the rule of "*noscitur a sociis*" may be applied. So, where the policy excepts from liability injury "resulting from or caused by earthquakes, or cyclones, or blasting, or explosives of any kind," etc., *held*, that from its associates the conclusion is warranted that it was not the purpose to apply the insurance policy to a violent windstorm, which, like an earthquake, blasting, or explosive, from without, was calculated to so jar or topple the building as to dislodge the automatic sprinkler, whereby the house was flooded and the injury done.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1127.]

4. TRIAL—INSTRUCTIONS.

In giving instructions to a jury, the court should avoid the employment of terms and definitions of a purely technical, scientific character, calculated to confuse the minds of the triors of the facts, where the questions to be submitted are well susceptible of presentation in plain, practical terms, easy of comprehension and application.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 512.]

In Error to the Circuit Court of the United States for the District of Minnesota.

James D. Armstrong, for plaintiff in error.

P. J. McLaughlin (W. P. Warner and R. L. Kennedy, on the brief), for defendants in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The Maryland Casualty Company, plaintiff in error (hereinafter for convenience designated the defendant), issued its policy of insurance to the defendants in error (hereinafter for convenience designated the plaintiffs), for a term of one year beginning the 7th day of June, 1904, and ending June 7, 1905, whereby the defendant insured the plaintiffs—

“Against direct loss or damage to property owned by the assured and described in the said schedule and also for loss from liability of the assured for damage to merchandise held in trust or on commission or sold but not delivered by being removed, situate on that part of the premises occupied by the assured as described in said schedule, and caused, during the term of this insurance, by the accidental discharge or leakage of water from the automatic sprinkler system now erected in or upon the building occupied wholly or partly by the assured; * * * but the total aggregate liability of this company hereunder shall in no event exceed \$25,000.”

The policy, however, was made subject to certain specified conditions. The ninth condition, which is the subject-matter of this controversy, is as follows:

“This policy does not cover loss or damage resulting from any leakage occurring at any point outside of the inner surface of the cellar floor or walls; nor resulting from the explosion, rupture, collapse or leakage of steam boilers or steam pipes; nor resulting from any interruption of business or stoppage of any work or plant; nor resulting from freezing; nor resulting from fire or violation of law; nor resulting from or caused by the willful act of the assured, nor by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder; nor resulting from or caused by invasion, insurrection, riot, civil war, or commotion or military or usurped power, or by order of any civil authority; nor resulting from or caused by earthquakes or cyclones or by blasting or explosions of any kind, or by the fall or collapse of any building or buildings, or part thereof.”

On the 20th day of August, 1904, between 8 and 9 o'clock p. m. the city of St. Paul was visited by a windstorm which did injury to the plaintiffs' building, breaking the pipes of the automatic sprinkler, whereby the goods in the store were flooded by the freed water, doing damage to an extent of over \$25,000. For the recovery of this alleged loss suit on the policy against the defendant was brought. To this action the defendant interposed the principal defense that said injury resulted from a cyclone, and was therefore excepted from the operation of the contract of insurance. On trial to a jury the plaintiffs obtained a verdict in the sum of \$26,225, for which judgment was rendered, to reverse which the defendant prosecutes this writ of error.

The controlling question presented for determination is whether or not the wind storm occasioning said loss was a cyclone within the

meaning of the policy. A brief summary of the work of that storm will disclose its character. The cloud which contained its fury was first observed by Professor Weithrecht, the head of the Mechanics Arts High School of the city of St. Paul, who was at his cottage at Lake Minnetonka about 35 miles from St. Paul. He testified that between 8 and 9 o'clock p. m. of August 20, 1904, his attention was directed to the threatening clouds, which he described as a "great large cloudy mass, balloon in shape, and coming down to a decided point at the bottom, as observed from the lake, to the southeast of the portion we were occupying." It moved down the lake towards St. Paul, and was apparently moving with the wind, and without evidence of revolution; "it was an oblong balloon, decidedly oblong, with a pendant." He testified that it struck his house, broke a large pane of glass 36 to 40 inches square, removed the frame work of the screens, driving one with such force against a table as to punch a hole in it. It blew down the chimney of his house, and a maple tree 18 inches in diameter, taking off the whole top and carrying it 60 feet diagonally across the cottage without striking the roof. It blew in the windows and took off the roof of an adjoining cottage; turned a large barn around at an angle of 45 degrees, taking off the roof and scattering the contents. When it reached the vicinity of the city of St. Paul it carried out spans of the steel and iron bridge spanning the Mississippi river, precipitating them to a considerable distance; and did great damage to trees and houses on an island in the river. It struck the city at the north bank of the river; and its general course, with some eccentric divergencies, was from southwest to northeast, covering a pathway of 300 feet or more in its sweep. Near the river the destructive force of the storm made its first impression upon the city. It blew from a railroad track and overturned box-cars. It wrecked the Empire Theater and demolished the Tivoli Concert Hall, killing some people therein. In its pathway through the city it smashed windows of various sizes and strength; blew down signs, and took off cornices from buildings, scattering their fragments in large quantities over the streets. At Third street it raised and dropped a skylight 50 feet square which covered the open court of the Pioneer Press Building; blew in its windows on the Fourth street side, creating some consternation among the inmates of the building. It unroofed the Davidson Block at the corner of Fourth and Jackson streets. It leveled to the ground the freight depot of the Chicago, Milwaukee & St. Paul Railway. At Smith Park it broke, blew down, and uprooted a large number of trees. It carried off the top of the brick building occupied by a wagon company; the roof of which, after being blown off, dropped back on the remaining building. At another place in the vortex of its pathway it took out a section of the wall of a brick building. On the next street it wrecked into fragments a frame church building. In Lafayette Park chimneys were toppled over, some buildings were demolished, and trees in and about the park were broken and uprooted. It is true that the evidence tended to show that most of the trees about the park were comparatively

young, and those blown down were easily restored in place by the park commissioner. On the hill further on the destruction to houses and property was marked. In places, sidewalks were lifted up on either side of the street and tumbled in mass in the center of the street, showing the eccentric motion of the wind. One sidewalk was lifted into the air, carried over a stone-wall fence, and deposited a hundred feet or so in a yard. Telephone and telegraph poles of great size and strength were blown down, broken off, and twisted in different directions. One house, as shown by a photograph in evidence, was blown diagonally around, entirely off of one corner. Some of the trees, broken or twisted off and uprooted, were of large size and apparent great strength. While it is to be conceded that the direction in which the trees fell was generally in that of the storm, yet as evidence of its concentric motion, trees standing in opposite positions fell with their tops together. The limbs of trees had the appearance of being twisted off.

As indisputable proof of the effect wrought by this narrowly confined windstorm, the street, park, telegraph and telephone inspectors and repairers were all out as early as the light of the next morning would admit to look after the injury done on their respective lines and beats. So piled up were some of the streets with debris, trees interlaced, with tangled telephone and telegraph poles, that at places the inspectors were unable to drive through the streets, according to their testimony. This storm was traced some 20 miles or more beyond the city, and its energy and violence were marked in the throwing down of fences, the breaking of trees, and demolition of or injury to buildings. As a circumstance indicating its alarming character, and as evidence of the impression it made upon their minds, newspaper men in their respective offices were thrown into excitement, and as soon as the storm sufficiently abated reporters went out in the night and early the next morning to observe its work of desolation; and so impressed were they with its character that all the newspapers of the city, perhaps with one exception, the next day in their issues described the city as swept by a cyclone of great violence. Conceding, the criticism of plaintiffs' counsel that newspaper reporters may be given to sensational exaggeration, the fact remains that the storm was of such a character that notwithstanding what may be assumed to be their city pride to have the outside world understand that their beautiful city was immune from things that maketh afraid, they did publish the alarming impressions made upon them by the storm.

Superadded to all this is the testimony and the report of Mr. Oliver, in charge of the Weather Bureau at the city of St. Paul. After an examination of the work of this storm in the city he sent in his report to the Department at Washington. In his official report he stated that a heavy rain began during the morning before, attended with thunder; that it was clear early in the forenoon but at 10 a. m. it became cloudy; at 7:45 p. m. a thunder storm began without any noticeable premonition except that the air was quite sultry; that the clouds were of a yellowish tinge; and it assumed proportions of a

severe storm at 9:45 p. m. The wind blew at a rate of 90 miles per hour from the northwest; and at 9:52 p. m. the anemometer and wind vane support were blown down, which ended further registration of the direction and velocity of the wind. The receiver and cover of the rain gauge were blown away. The storm which was about $2\frac{1}{2}$ miles in length and about 300 feet in width entered the city from the southwest, destroying two spans of the high bridge, crossing Harriet Island, on which are located the public baths; it did much damage to shade trees and parts of the building. He then stated the damage to the Tivoli Hall and Empire Theater, as heretofore stated. His report continued as follows:

"The storm then moved in a northeasterly direction across the business portion of the city doing damage to business blocks, breaking glass, unroofing buildings, uprooting and breaking shade trees in two of the public parks and along the streets; some dwellings and school houses and churches in the line of the storm were either entirely destroyed or greatly damaged.

"The distribution of the debris along the path of the storm and the direction of the uprooted trees especially in the parks clearly showed the presence of a whirl. The wind in passing evidently rose above some portions of the city in its path doing slight damage, then descending to the earth with its besom of destruction.

"There was some hail about the size of a pea from 9:48 p. m. to 9:52 p. m. The lightning was constant and vivid. The estimated value of the property destroyed is \$500,000. The following persons were killed: Hocauson. Louis F., 586 Brunson Street, killed at Tivoli. Kventon, Geo., 579 Toronto Avenue, killed at Tivoli. Robinson, Viola, killed at House of Good Shepherd. * * *

"The barometer did not indicate any inordinate disturbance of the air during the afternoon and evening, but at about the time the storm struck, it fell very suddenly; the barograph indicating a fall of from .75 to .24 in a very few minutes."

He then proceeded to give the readings of the barograph and the examination of the anemometer after the storm; and stated that the last register which the wind gauge made was 160 miles an hour. He had been upon like duty at various places in Texas, and at Vicksburg, and at Louisville, Ky., and had given constant attention to the subject of meteorology, and had observed many wind storms; that the velocity of this windstorm was the highest he ever saw. In respect of his examination of the condition of the city after the storm, he testified that the debris along its path lay in all directions, and that trees were uprooted and blown over, and on the northeast side of Lafayette Park they were pointed southwest and on the southwest side they were pointed northeast.

The plaintiff's building, which was a large structure of great strength, the evidence shows, was stricken with such violence by the storm that strong windows on the sides of it were blown in. It blew down the tower from the building, dislocated and ruptured a pipe in the automatic sprinkler attached thereto, and carried away two skylights out of the west end, and ruptured a pipe of the sprinkler beneath. The wind blew through the windows, dislodged, with such force as to lift from the racks, boxes of goods and lay them on the floor, breaking the sprinkler pipe which lay in front, thus flooding

the floor with the discharged water, causing the damage claimed. The evidence in rebuttal was principally directed to an effort to minimize the extent of the destruction to property, and to show that the trees blown down about the park and elsewhere were small, and that some of the buildings destroyed were in a more or less dilapidated condition; that buildings of stone and brick structure of great strength were not materially injured. But the evidence shows, without any material contradiction, that trees 18 inches in diameter were destroyed, and that buildings of ordinary strength, serviceable for human habitation and for business, were demolished and others greatly injured. At the conclusion of the evidence the defendant made request for an instructed verdict, which was refused.

In its charge to the jury, the court, touching the issue as to whether the storm in question was a cyclone, made the following declaration:

"Now, I don't think that anybody would say that a cyclone was a gentle storm, on the contrary I think a cyclone would be said by anybody to be, and is usually known, and is usually understood as being, a very severe and destructive storm. It is a storm characterized by certain peculiarities and characteristics, marking it as a cyclone. If we look into the dictionaries we find that this word is derived from the Greek, the noun being kuklos, a circle, and the verb being kukloein, to move in a circle, or to move around, or to whirl around. I not only think that a cyclone has the characteristics of moving in a circle in the minds of the lexicographers and scientists, but it also has that characteristic according to the usual and ordinary and common acceptation of the term. And the atmosphere not only moves in a circle in a cyclone, but this circularly moving atmosphere also has progressive motion, of greater or less velocity, usually of a very considerable velocity, and sometimes going to the extent perhaps of 20, or 30 miles, or more, per hour in its onward movement. So that I think, boiling it all down, we can define a cyclone as being a violent and destructive storm of greater or less extent, sometimes its path covering only a narrow strip, and at other times covering a vast and wide strip, characterized by high winds rotating about the center of low atmospheric pressure, and this center moving onward, with greater or less velocity, sometimes at a very great velocity, at others at only an ordinary rate. I think the principal force of the wind in a cyclone is in the circular motion.

"Now, the scientists seem to distinguish between a cyclone and a tornado. Both are characterized by high winds rotating about a center of low atmospheric pressure. In the cyclone, according to scientists, the area of the rotating wind is much greater than that of the tornado, this area in the cyclone being sometimes many miles in diameter, and sometimes even hundreds and thousands in diameter; whereas, in a tornado the diameter of this area is smaller, being often, and I think I may say usually, only a few hundred or a thousand feet. But I think under the usual and ordinary acceptation of the terms, cyclone, in its usual and ordinary acceptation, and tornado, in its usual and ordinary acceptation, are synonymous; a tornado being a small cyclone. And if it was a cyclone at all, why then the word cyclone of this policy covers it. The distinguishing characteristic of the cyclone or tornado is that of high winds rotating about a center of low atmospheric pressure, and this center moving with greater or less velocity across the country. Now that seems to me to be what a cyclone is, and I so charge you."

Further on the court said:

"I don't think there can be any question that this was a severe, violent, and destructive storm, counsel for the plaintiff has stated so much himself; but that, gentlemen, is not enough—to establish a violent and destructive storm—that is not enough. It must also be shown that this storm had the

peculiar characteristics of a cyclone, that it was what we would call a whirling storm, and that it came within the definition I have given you of a cyclone. If you believe from the evidence that it was a cyclone that ends the case."

Finally, the court said:

"Of course you can have cyclones of varying strengths. I think a cyclone must be a violent and destructive storm, but it can be of various degrees of violence and destructiveness; it must be a violent and destructive storm and it must be in addition characterized by high winds rotating about a center of low atmospheric pressure and this center moving onward with greater or less velocity. It could be a cyclone without being an extremely severe cyclone."

Reduced to its ultimate analysis, before the jury were authorized to find for the defendant on this issue they were required to find from the evidence that this wind storm, no matter how terrific and destructive, must have possessed the distinctive quality of moving in a circle, rotating about a center of low atmospheric pressure, this center moving onward across the country; that it must be a "whirling storm." As this storm occurred in a night of intense darkness, driving people who might be out doors under cover, and forbidding those within doors to venture out, exactly how the defendant was to meet by evidence the requirements of the given phenomena and characteristics imposed by the charge, is not apparent. It is quite inconceivable, in view of the evidence in this case, that the jury should not have returned a verdict for the defendant except for the fact that the storm was not seen with the eye to fix on it the peculiar characteristics indicated by the technical charge of the court. In the very nature of the situation, the character of the storm could only be judged of, after it ceased, by observing its effect. In the effects were furnished at least persuasive evidence that this storm, in its origin and ravages, possessed the essential "whirling" movement.

Looking alone to the derivative of the word "cyclone" and its technical import, in the conception of meteorologists and scientists, it may be conceded that one of its characteristics is the presence of a circular or gyratory motion, evidenced by a twisting effect. Looking to the dictionary definitions, which are not, in many instances, reliable sign boards for legal construction of contracts, they are substantially as follows:

Century Dictionary: "Any atmospheric movement, gentle or rapid, general or local, on land or at sea, in which the wind blows spirally around and in towards the center."

Standard Dictionary (1895): "An atmospheric disturbance extending over an area of 100 to 500 miles in diameter, characterized by decrease of barometric pressure toward center and by winds directed spirally inward; in some features opposed to anticyclone."

New English Dictionary: "Meteorol. A system of winds rotating around a center of minimum barometric pressure, the center and whole system having itself a motion of translation, which is sometimes arrested, when the cyclone becomes for a time stationary."

Webster's International Dictionary: "A violent storm, often of vast extent, characterized by high winds rotating about a calm center of low atmos-

pheric pressure. This center moves onward, often with a velocity of 20 or 30 miles an hour."

Volume 5, *Encyclopædia Americana*, gives a brief résumé of the origin of cyclones, which is by no means helpful.

Turning to the discussions of scientific men or meteorologists, it will appear that the movement of all winds is more or less circular, and that cyclones in their technical sense are not usually harmful, and are not destructive until they assume the quality of a tornado, denominated by them as "the child of the cyclone."

While it is to be conceded that where an insurance contract is so drawn as to be ambiguous and susceptible of different constructions, so that men of average intelligence might reasonably attach different meanings thereto, the court will apply that construction to it which is most favorable to the assured, yet "the rule is especially well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 462, 14 Sup. Ct. 379, 38 L. Ed. 231.

It will be observed that in the ninth paragraph, excepting the insurer from liability, it does not cover loss or damage resulting from freezing or fire, "nor resulting from nor caused by earthquakes or cyclones or by blasting or explosions of any kind, or by the fall or collapse of any building or buildings, or part thereof." Applying the rule *noscitur a sociis* in searching out what must have been in the mind of the parties in the employment of the word "cyclone," there cannot be any reasonable doubt that it was the purpose not to apply the insurance to loss or damage resulting from violent causes arising outside of the building where the automatic sprinkler was installed, such as blasting, or explosions, or earthquakes, or cyclones. It excluded injuries from blasting or explosions because it was well known that such external force is well calculated to so shake the building as would probably disturb and dislodge the sprinkler and cause the water to escape therefrom. It excepted earthquakes because of the known fact that they were calculated to jar the building, and probably dislodge the sprinkler and turn loose the flood of water. In the same connection occurs the word "cyclone." Inasmuch as it is common knowledge that wind storms of abnormal force or violence may so shake or topple a building as to effectually disturb an automatic sprinkler in place therein, the inquiry naturally arises, why should the parties to this contract be held to have had in mind that unless the windstorm possessed the peculiar quality of a circular, twisting motion in its sweep, so as to bring it within the technical or scientific derivation of the word "cyclone," it should not come within the compass of this exception from the policy?

It is a conceded fact among etymologists, as well as matter of common learning, that words have their development and enlargement, so that in time they are used and understood among the people

if not in an entirely different sense, yet so as to express and comprehend a broader application than was implied in their origin. And, therefore, they undergo in lexicography the changes attached to them in common parlance. The law in its flexibility, constantly adjusting and adapting itself to new conditions as they arise, declares that words and phrases employed in business transactions in ordinary dealings among men, shall be deemed to have been employed in their popular sense and acceptance, unless it clearly appears that they were intended to be used in their technical or more restricted sense. It is hardly to be presumed that the average merchantman and insurance agent who make these insurance contracts ever heard of the Greek word from which the term "cyclone" is claimed to have been derived, or that they possess any technical knowledge, or had in mind the characteristic of "high winds rotating about a center of low atmospheric pressure, and this center moving onward." But they do know the common history of the day, that in states west of the Mississippi river, like Missouri, Kansas, Nebraska, Iowa, and Minnesota, there are what are popularly known as "cyclones," occurring in the spring or summer months, recognized as windstorms of great velocity and destructive violence, as distinguished from ordinary windstorms known as furious or noisy gales, but not attended with extraordinary destruction of life and property. They do know that in such regions windstorms are designated as "cyclones," which, passing through a narrow strip of country, more or less confined, with such resistless force as to twist, break, and uproot trees, unroof and turn over houses, and destroy property in their march, more or less eccentric in their movements. It is not too much to say that this designation is one of common acceptance among the people.

Scientific writers, like Mr. John Elfleth Watkins, in *The Technical World* of February, 1905, while speaking rather derisively, bears testimony to the fact of this designation of the term "cyclone" among the people. He said:

"A roaring, snapping, death-sowing funnel cloud looms up in the sky, descends to earth, ploughs through life and property for a mile or two, ascends into the air whence it came, and passes off. Ten to one the newspapers will state that a 'cyclone' visited the affected region. It all results from our eternal, inveterate habit of sticking to wrong names—for example, 'locust' for cicada, 'buffalo' for bison, and other misused terms that might be cited."

Had the policy employed the words "violent wind storm" it would in practical application have been inexpressive and vague. Had it added the word "destructive" it might have been too narrow for the assured and too liberal for the insurer. But in the use of the more generic term "cyclone," in its up to date significance, it clearly enough expressed and included that character of wind storm distinguished by its concentrated force and violence, so resistless as to make it especially destructive in its narrow pathway to property like buildings.

Under the construction contended for by the learned counsel for plaintiffs, and as expressed in the charge of the court, had this wind-

storm come, like an avalanche of mighty waters, against the plaintiffs' building and crushed it like an eggshell, as it did buildings of lesser strength, yet, the insurance company should be held for damages, unless it should be shown that, "in addition, it was characterized by high winds rotating about a center of low atmospheric pressure, and this center moving onward with greater or less velocity," etc. The spirit of the common law is the instinct of practical sense. Courts are most apt to approximate absolute justice in construing a controverted term in a business contract, like the one under review, by giving to it a practical comprehensible application, rather than one so technical and theoretical as only to obscure and mystify. "For the letter killeth, but the spirit giveth life." The failure to observe this, in seeking to solve the import of the term "cyclone," as employed in the ninth condition of the insurance contract, doubtless furnished the jury the only conceivable pretext for finding the issue for the plaintiffs. Reversing the situation: Had the policy contract insured against loss resulting from a cyclone, the insurance company defending on the ground that the windstorm in question was not a cyclone, can it be imagined that the same jury would not have found the issue for the plaintiffs, had they not been confused, or felt coerced, by the charge of the court imposing the necessity of direct proof of the presence in the wind of the technical qualities of a meteorological definition?

There being no disputable evidence, on which reasonable minds ought to differ, as to the windstorm being of the popular conception of a cyclone, as that term was employed in the policy, the court should have granted the request of the defendant for a directed verdict. The judgment of the Circuit Court is therefore reversed, and the cause is remanded, with directions to grant a new trial.

CHICAGO, M. & ST. P. RY. CO. v. CLARKSON.

(Circuit Court of Appeals, Eighth Circuit. July 19, 1906.)

No. 2351.

1. RAILROADS—PEDESTRIANS—DEATH AT CROSSING—NEGLIGENCE.

Where, at the time plaintiff's intestate attempted to cross defendant's railroad track by crossing in front of a flat car being pushed over a crossing in front of an engine, the night was so dark that deceased could not see the flat car, and the switchman if he had stationed himself at the forward end of the car would not have seen deceased, the switchman's failure to station himself with his lantern at the end of the car instead of near the middle thereof, did not establish negligence on defendant's part in failing to have a man with a lighted lantern "upon the forward end of the car."

2. SAME—PRESENCE OF FLAGMAN.

Where intestate, a railroad engineer who was killed at a crossing, had knowledge that switching was habitually conducted over the crossing at about the time of the accident and was going on at the time and that no flagman was kept at that place, defendant was not guilty of negligence in failing to have a flagman at the crossing to warn pedestrians that the train was approaching.

3. SAME—CARE REQUIRED—KNOWLEDGE OF DANGER.

Where intestate, a railroad man of long experience and observation, had habitually passed the crossing where he was killed, and was familiar with defendant's habit in switching cars over the crossing, and at the time of the accident the headlight of the engine could have been distinctly seen for some distance if intestate had looked therefor, he was legally charged with having seen the same.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1026.]

4. EVIDENCE—ADMISSIONS—RES GESTÆ—EFFECT.

Statements by intestate immediately after he was run over by defendant's train, that it was his own fault, that he saw the switch engine and thought he would have time to get over in front of it, but that he did not see the flat car that struck him, were competent against his administrator, in an action against the railroad company for his death, and it was error to charge that the jury should give but little heed to such admissions, and that plaintiff was in no event to be bound thereby.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 372-376.]

5. RAILROADS—NEGLIGENCE—EVIDENCE.

In an action for the death of plaintiff's intestate at a crossing, evidence of defendant's negligence held insufficient to sustain a verdict for plaintiff.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This is an action by the legal representative of James F. Clarkson to recover damages for his accidental death alleged to have been caused by the negligence of the plaintiff in error (hereinafter for convenience designated as the defendant). The accident occurred at a street crossing in the city of Cedar Rapids, Iowa, on the evening of October 24, 1902. The plaintiff below recovered judgment in the sum of \$2,000.

As the decision of the case turns upon a correct understanding of the evidence, it is necessary to give a summary of the essential facts. The deceased was a man 63 years old, in possession of all his faculties and power of locomotion. For fifteen years he had been a railroad engineer on the Chicago, Rock Island & Pacific Railway; and had worked in its shops at Cedar Rapids for five or six years just preceding the accident; said shops were near to the switching tracks in question. Daily he passed over the place where he met his fate, and was familiar with the situation and the custom and methods of the defendant railroad company in conducting its business at the place of the accident, which occurred at the intersection of the railroad tracks and Fifth street. At this point were eight railroad tracks used by the defendant for switching purposes, and was near to the western limits of the switch yard. Fifth street terminated just north of this crossing in the adjoining block, where there were some warehouses. While in a sense this was a public street crossing, there is little ground for reasonable controversy that it was a publicly recognized fact that this crossing was practically given up to the use of the railroad company. Vehicles rarely used it, and then for the purpose of hauling goods from the freight house, which customarily was reached by other avenues of access. There were no sidewalks at this crossing; but in the center of the street were laid planks about 16 feet long. Pedestrians who used this crossing were principally employes of the railroad companies in going to and fro in the day time to the shops to the north.

The evidence shows that the switching of cars over this crossing was conducted at all times; that at the time of the accident, between 6 and 7 o'clock p. m., it was customary for the switch engine of the defendant to be engaged in moving cars—box and flat—about the yards and over said crossing. At about 6 p. m. of the day in question the yardmaster sent the switching crew

with the engine to the water tank, some 600 feet to the east, over said crossing, to return to the west end of the track No. 2 to get two flat cars—one on the west and the other on the east side of the crossing. The evidence on behalf of the plaintiff below was substantially as follows: In an application made for continuance, sworn to by one of plaintiff's attorneys, it was stated what the absent witness, McGinn, would testify if present. To avoid the granting of a continuance counsel for the defendant admitted that if the witness were present he would testify as stated in the affidavit. This statement was that McGinn was one of the two switchmen working with said switch engine at the time of the accident; that he made the coupling between the engine and the flat car which passed over Clarkson just before the accident; that he did not see the deceased, and got off the car as soon as he heard the noise, within a few seconds or a minute or so after the injury, and helped to pick Clarkson up; that as he did so Clarkson said in his presence and hearing that he saw the headlight of the engine, but did not see the flat car, and thought he had time to get across. The following was contained in his statement, which was admitted in evidence over the defendant's objection: "The proper place for me at the time that the car was put in motion and moved towards and over Fifth street was at the front end of the car which hit Clarkson, with my lantern lighted." He said it was after sunset, and dark at the time of the accident. It is noticeable that in this affidavit care is taken not to state the position occupied by McGinn when thus on the car with his lantern.

The plaintiff below then introduced Jerry Funda as a witness, age 26 years, a switchman in the employ of the Chicago, Rock Island & Pacific Railway Company, who, at the time of the accident was in the employ of the defendant, and belonged to the switching crew of the engine in question. After going down to the water tank the engine returned without any cars attached. As the engine went west over Fifth street he dropped off at the crossing and tried to open the knuckle on the flat car which stood on track No. 2—the track in question—15 or 20 feet west of the crossing. He went to the west end of the car. He had a lighted lantern with him as it was then after dark. The knuckle on that car would not open. It was a flat car, with no sides or ends, and a level floor. The floor would come below his shoulders—he was five feet six inches high. When he found he could not open the knuckle, he went down the track to the east two car lengths where the other flat car stood, and opened the knuckle on the west end thereof. When he started to go east to open the knuckle the engine was just coming in on that track, but had not yet reached the car standing west of the street. He heard the engine bump against the car and couple on, when he was closer to the second car than to the one to which the engine coupled. He opened the knuckle, and at that time the engine and car were coming towards him. The length of the car was 34 to 36 feet. He did not see or hear anything of Clarkson, and did not see anybody around the crossing until after the accident. McGinn was on top of the car. The night was dark and he could tell where McGinn was by his lantern, and the light was shining on him from the headlight of the engine, which was heading towards him. His judgment was that McGinn was about the center of the car; he walked to the head end of it, by which time the head end of the car must have been over the crossing. When the engine came up to the car McGinn was on the footboard of the engine. When he first noticed him he was standing in the center of the car, about the middle, with his lantern, and the car was about the middle of the crossing, moving. He saw him walk on towards the east end of the car. Up to that time he had not heard any outcry or anything wrong. The engineer said he had run over somebody, and McGinn jumped off the car and they walked up there. The engine was then about over the crossing; that is, clearing the planks. Clarkson was found under the tender east of the planks of the crossing between 15 and 25 feet. His body was lying between the rails. After they got him from under the tender Clarkson said: "Boys, it is all my fault. I have been railroading for a good many years. I saw that headlight, but I did not see the car. I thought I had time to get across, but I got caught before I got over. I did not notice the first car." The

witness testified that the headlight was shining brightly at the time; that when he heard the engine couple onto the flat car and looked back he could see the east end of the flat car ahead of the engine, and he could see the reflection of the light down on the east end of the car. He further testified that when the engine was working at this crossing he would couple the cars at the head end; that cars being switched would always be ahead of the engine at that end of the yards; that the work was being done in the usual manner that evening.

On cross-examination he testified that in walking across the street and going 65 or 70 feet from the crossing to the east car he had a lighted lantern in his hand. He had no difficulty in seeing the flat car McGinn was on. He could see it plainly. In his judgment the headlight would strike about the center of the car. He looked around when he heard the engine couple to the flat car. He testified that a man in that line of business would notice that sound a good many car lengths away. He heard the bell ringing at the time and it continued to ring; that there was no other engine or car moving on any other track at that place. He saw McGinn give the engineer the signal to come ahead when he saw him on the car moving the lantern up and down. He further testified that when he looked back at the car he was right in front of the headlight, and, notwithstanding that fact, he could see the floor of the flat car and McGinn on top of it, and could see the lantern in his hand.

James E. Gallagher, a machinist working for the Chicago, Rock Island & Pacific Railway Company, testified that he was about 200 feet away at the time of the injury; he did not see Clarkson or any one else going towards the crossing; he was not paying any attention to the engine. The first that he heard was some one exclaim "Oh, my!" He looked towards the crossing, and the engine was then about on the plank part of the crossing; that the engine was stopped just east of the crossing. Clarkson lay between 15 and 30 feet east of the plank crossing when they took him from under the engine. On cross-examination, he testified that he remembered seeing the engine moving, pushing the flat car ahead of it; that he was some distance from it; that it was light enough for him to see the flat car by the light of the switch engine, which shone down upon the flat car. When he heard the outcry he looked and saw the switch engine and the flat car, the flat car was past the crossing; that he must have seen the flat car from the side as he could not see it ahead of the engine. It was dark, but he could see it was a flat car.

William J. Monroe, a roundhouse foreman for the Rock Island Company, testified that at the time of the accident he was coming from work, up Fifth street, and heard an unusual noise, and came up to the crossing and saw the men standing around something and discovered that it was Clarkson; that when he noticed there was something wrong he was 100 to 200 feet away; he was not there when Clarkson was taken out; when he got there Clarkson was partly unconscious, but revived later; that he recognized him and said: "I saw the switch engine coming to the crossing and thought I would have time to get over in front of it, but I did not see the flat car, and it struck me"—that he saw the headlight on the engine and thought he had time to get across ahead of it. He testified that most of the people using that crossing were railroad employes, who were in the habit of crossing there morning, noon, and night. He also testified that the switching at that end of the yards was mostly done by the engine pushing in or backing out with the cars ahead of the engine; that Clarkson was in the habit of crossing there four times a day; that Clarkson was a special storekeeper and tool caretaker in the roundhouse.

The wife of the deceased testified that her husband lived until the 26th day of October; that in going to and from the place where he worked he would cross the place in question every morning, noon, and night.

This was practically all the evidence on the part of the plaintiff except as to the earning capacity and age of the deceased.

On behalf of the defendant, George B. Tuthill, the night yardmaster, who directed the crew to take the switch engine down to the water tank as here-

tofore stated, testified that the crew went on duty at 6 o'clock that evening. When they came back from the tank he saw the engine about 150 feet from it; that was about 6:10 or 6:15 p. m., when he directed the crew to go ahead and get the said two cars. There were no other cars there or anything to obstruct the view of Fifth street within the line of the tracks; that there was nothing to obstruct the view of a man coming from the north going south after he passed the transfer track, as to anything that might be upon the main line or any of the tracks. He saw the flat car on track No. 2 east of the Fifth street crossing when he was walking towards the office, and looked over to the one on the west side of the crossing and saw them make the coupling to the flat car. He saw Funda drop off on the Fifth street crossing, and McGinn stayed on the engine to throw the switch, and when he threw it he stepped on the forward footboard of the engine; and when the coupling was made he stepped right up on the flat car and let the brake off and turned around and signaled the engineer to come ahead. McGinn was near the center of the car when he gave the signal and walked toward the head end. The east end of the car was about 20 feet from the plank of the crossing when the coupling was made, and the car was standing still. The engineer did not start the engine until McGinn signaled with the lantern, at which time he was in the center of the car walking toward the front end; that the car and the engine began moving as soon as the signal was given. The car was the standard flat car, the floors of which are between four feet and four feet four inches from the ties. That he had made experiments to see how much of the flat car would be in the rays of the headlight when the car was coupled onto the front of the engine; that when the engine and the car were 47 inches apart the rays struck the ground eight feet ahead of the coupler; that he could see cars on No. 4 track east of the crossing 150 to 165 feet. He testified that when he heard of the accident he hastened to the scene and the first thing that Clarkson said was: "Don't hurt me any more boys. don't hurt me any more;" when they straightened him around and moved the engine off of him he said: "I do not know what I was thinking of. I saw your headlight and heard your bell, but I tried to get across ahead." That Monroe came up afterwards. He further testified that the engine would always have cars ahead of it in switching at that end of the yards, as they seldom made flying switches. On cross-examination he stated that there was a lighted lantern in the hand of McGinn who was on the car; that the car had only 15 or 20 feet to go to reach the planking after the engine touched it.

This witness on cross-examination was compelled by the court, over the objection of the defendant, to answer the question if it was not the duty of McGinn to be on the east end of the car with his lantern. The witness answered that in case of a box car the switchman could hang onto a ladder on the front end; in case of a flat car it is not safe for a man to stand on the extreme front end; he is supposed to stand on the car where he can holler at or whistle or see anybody that might be in front of the car; that they did not require a man to place himself in danger. The further question was asked by counsel for plaintiff, over the objection of defendant's counsel, as follows: "Q. Where you are shoving a flat car or intending to shove a flat car across a public street in a city at night, should there be a man on or near the front end of that car before it passes over the street with a lighted lantern?" The witness answered: "A. There is supposed to be a man on the car with a lighted lantern in his hand." He further testified that the headlight on the engine had been cleaned that day and shone brightly; the reflector caused it to throw out a funnel shaped stream of light ahead. With a flat car coupled to the head of the engine a small portion of the car would not be under the rays of the headlight. A great majority of it would be in the light, and the light would extend ahead of the engine 400 or 500 feet. He further testified that a man on top of the car being pushed over the crossing would ordinarily stand in the center of the car; and that if he stood near the front he would be in danger of being jerked off the car in case of a violent signal to stop or slack; that when he last saw McGinn before the accident he was standing about the proper and usual place for a man to stand.

Albert Hensing, the engineer in charge of the switch engine in question, testified that the accident occurred about 6:18 p. m.; that after the signal was given by McGinn the car moved about as fast as a man could walk; that McGinn got on top of the flat car, and coming in sight of him gave the signal to come ahead; he had started to go towards the front end when he came in sight of the engineer and kept giving him the signal to come ahead; he did not move the engine until after he received the signal to come ahead; he could see the flat car down ahead which he was going to pick up on the east side of Fifth street; he could not see any one approaching Fifth street crossing from the north side of the track; he heard no outcry or moaning as the flat car passed over the crossing; he first heard that after the cab passed the crossing; he stopped and found Clarkson lying by the north rail between the rails, part of his left foot lying outside of the north rail had been cut off just above the ankle; he was lying about six feet east of the plank in the crossing; there were no signs that he had been rolled, or pushed, or dragged; there was blood on the rail, indicating that the wheel had gone over his ankle at that place; when they removed him McGinn and Funda were present, and also the fireman, and no others at that time; Clarkson said he saw the headlight, but did not see the car, that he did not know what he was thinking about, and it was his fault. That after he was removed from the engine Monroe came there and said to Clarkson: "Dad, do not talk so much." He did not talk any more after that. On cross-examination he said that the east end of the car when he started to go ahead was about 20 feet from the west end of the crossing; that when he started he could see most of the plank crossing on No. 2 track from where he sat; that McGinn stood sideways holding the lantern so he could see it; he noticed no jolting of the car or engine as he passed over the crossing; he had cleaned the headlight of the engine that morning and it was bright.

Robert Yates, locomotive fireman, testified that the night of the accident he came across through the tracks and found his way around the turntable, where there is a pit about four feet deep; he could see cars on the transfer track 50 or 100 feet away; he saw the lights down at the point of the accident and went down where the parties were; that when he got there they had Clarkson out from under the engine and Clarkson said: "I do not know what I was thinking about. I saw the headlight but did not see the car."

The defendant then introduced a number of witnesses, among them citizens of the town who made the experiments with the engine and flat car at the same place under like conditions, with the results hereinbefore stated, respecting the light showing the flat car. The evidence without contradiction showed that at the time of this accident there was an arc light about a block away, which threw some light upon this crossing. At the close of the evidence the defendant made request to the court for a directed verdict for the defendant, which, being refused, several requests were made for instructions which were denied; but, under the view taken of the merits of this case, it is not necessary to set out the refused instructions or the charge of the court in detail.

J. C. Cook (H. Loomis, on the brief), for plaintiff in error.

F. F. Dawley (N. M. Hubbard, Jr., and C. E. Wheeler, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the facts as above, delivered the opinion of the court.

In the light of the foregoing facts let us examine the acts of negligence imputed by the petition to the railroad company: (1) In failing to ring the bell or to give other warning to people about the crossing of the approach of the car. There was not only an entire

absence of evidence to sustain this allegation, but the evidence was uncontradicted that the bell was ringing. (2) In leaving said flat car standing within the limits of said Fifth street and so close to the usual traveled way of said street that when the engine was coupled onto the car, it was pushed over said traveled way without time or opportunity for persons using said traveled way to escape injury therefrom. There is no evidence in the record to support this charge. On the contrary, the evidence is clear that the end of the flat car, toward the street crossing, stood 15 or 20 feet from the south side of the street when coupled on to the engine. The "bump" of the impact in coupling the engine on the car was heard by the switchman, Funda, 100 feet away. The car did not move after this coupling until McGinn mounted to the top of the car with a lighted lantern and gave the signal to the engineer, and when it did move it was only at the pace of an ordinary walk, thus affording ample time and opportunity for any pedestrian approaching the crossing to observe the movement and avoid collision. (3) In running said car at an excessively high and dangerous speed over said crossing under the circumstances, it being after dark and no flagman being maintained at said crossing, said car being pushed ahead of said engine; in failing to have a flagman at said crossing to give warning of the approach of said car; and in failing to have any man or lantern upon the forward end of said flat car to warn persons using said street crossing of the approach of said car.

These allegations will be considered together, as they involve the same principles of law. The trial court, from its charge to the jury, seems to have entertained the view of plaintiff's counsel, that the failure of the defendant at the time of the accident to have a watchman stationed at the crossing, and to have a man with a lighted lantern "upon the forward end of the car," might be regarded as negligence per se. This is a misconception not unusual both of the office of such precautions and the reason for such rule or requirements. Hence, its arbitrary application, despite the facts of the particular case demonstrating its inapplicability. Whenever the reason for a rule does not apply to the particular instance it ceases to exist. If a city ordinance for instance requires the ringing of a bell or sounding of a whistle on the engine approaching a crossing where a person is injured, the omission to observe the ordinance in this respect is wholly immaterial, if as a matter of fact the party injured had notice of the approach of the engine; for the reason that the only purpose of such warning is to give notice of the approach of the car. *Denver City Tramway Company v. Norton* (C. C. A.) 141 Fed. 600, 607, loc. cit. So in respect of the duty to keep a flagman at such crossing, the purpose of which is to give warning to persons attempting to effect a crossing of the approach of cars. If the person in fact is aware of the approach, or there are other facts existing at the time and place which are equivalent to the presence of such watchman, his absence is wholly immaterial. Likewise in respect of a requirement that a light should be maintained at such cross-

ing; yet, if in fact there are present other lights of equal efficiency the absence of the particular light is of no consequence.

The only end to be subserved by the presence of a person at the forward end of the car is that he might observe the approach of a person at the crossing, and, by giving warning, possibly avoid a collision. But under the plaintiff's contention that the night was so dark that the deceased himself could not see the flat car, the switchman, if at the forward end thereof, would not have seen him; and, therefore, his presence or his absence under such conditions was quite immaterial. The presence of a lantern under such circumstances would alone have afforded the deceased any protection. If so, it would have been because of seeing the light he might have been warned thereby of danger. There being a lantern in McGinn's hand near the middle of the car, and other lights showing the presence of the car just as effectually as if McGinn had stood a few feet further forward, it met the whole requirement of any rule, express or implied, touching the due care of the law in this respect imposed upon the railroad company. Even if McGinn had been on the forward end of the car, under the deceased's statement that he did not see the flat car because the headlight of the engine blinded him, it likewise would have eclipsed by its glare the figure of McGinn had he been on the forward end of the flat car.

In its charge to the jury the court told them, in effect, that it was for them to determine from all the facts in evidence, whether the defendant was guilty of negligence in its failure to have some one there as flagman for the purpose of warning pedestrians that the train was approaching. This affords an apt illustration of that conservatism in charging juries of indulging in generalities which amount practically to mere abstractions, of little aid to the jury in discerning the application of the law to the particular facts of the case. The jury is thus left on the sea of conjecture to proceed without chart or compass to guide. At most this crossing was but little used at the hour in question, and then mainly by railroad employes familiar with the situation and the probability at any time of switching cars over this crossing. Most certainly, unless the absence of such flagman in some degree contributed to the injury, the fact was not a factor in the case; and the court should have so said. Suppose there had been a flagman at the crossing, what fact is there in evidence from which any jury should be allowed to infer that the life of Clarkson would have been saved? The place where such flagman would have been Funda was about with his lantern alight, in plain view of Clarkson, if then approaching the crossing. To a person of his knowledge of the switching habitually conducted there, and of the fact that no flagman was kept at the place, notice was given that a switching movement at that crossing was in process of execution, as much so as if a flagman had told him in so many words.

The next charge in the petition, and the one upon which most stress is placed by the plaintiff below, is as follows: In pushing said

car ahead, being in such position that the same could not be seen by said Clarkson, it being after dark. The manner of pushing the flat car over the crossing, the evidence shows, was in the usual way. Without contradiction the evidence is that when the switch engine was being employed at that place and time, it was for pushing either box or flat cars across that street. As a railroad man of long experience and observation, and his habitually passing the place, the deceased is presumed to have been familiar with the habit of such switching. When he approached the crossing, if he came from the north, as is contended, the headlight of the engine was ablaze, radiating wider and wider as the distance increased from the reflector. While the presumption arising from the instinct of self-preservation is to be indulged that the deceased, if approaching the crossing at or about the time of the movement of the car, exercised due care, yet, like any other presumption this one disappears when the truth appears. The light from the engine the law presumes Clarkson saw, for it required him to look, as he was conscious of approaching a place of danger. If he looked he could but see. If he did not see the light he was not looking. In either event the physical fact concludes him. *Hayden v. M., K. & T. Ry.*, 124 Mo. 573, 28 S. W. 74. When a party advances a mere theory the court should see to it, as said by Judge Sherwood in *State v. Dettmer*, 124 Mo. 435, 27 S. W. 1117, that it "must not go counter to the physical facts in the case; for, if it does, neither courts nor juries are required to stultify themselves by disbelieving the immutable physical facts in the case."

Notwithstanding some minor differences in the version given by the witnesses as to the statements made by the deceased immediately after the accident, they are in practical accord that he admitted that he saw the headlight, and that he did not know what he was doing or thinking about, as he did not see the flat car. And there is little ground for doubting that he also said it was his fault. Touching this matter the court, in its charge to the jury, said:

"If Clarkson did make that statement, that is not conclusive upon him, nor is it conclusive upon the plaintiff in this action, because undoubtedly Clarkson was suffering pain at the time, and great mental suffering, and you should take that into consideration in determining its weight. Even if he made it, it is not conclusive that the fault was his, because we all know that a person in that situation is not to be held strictly to all that he may say under those circumstances."

This, it seems to us, was more than favorable to the plaintiff below. Its tendency was to minimize the effect of the admission.

The exclamations of persons in moments of sudden disaster are impressive. They are unpremeditated and ought to be presumed free from pretense. They reflect the truth of nature, first impulse. We fail to discover any incoherence, or external evidence of unconsciousness, to justify the rejection of the statements of Clarkson made within a few seconds or a minute after the accident. Of course his admission that his misfortune was his own fault would not necessarily conclude him, as his deduction might be incorrect; yet it was, if made, his own conclusion drawn from facts especially

within his knowledge. Like any other alleged admission, it was competent evidence against him or anyone claiming under him. His whole statement made at the time should be received, to be judged of by the triers of the fact. The charge of the court in this respect was hardly consistent with the fact that counsel for plaintiff below put in evidence the affidavit as to what McGinn, if present, would testify, which contained the statement that "said Clarkson said in my presence and hearing that he saw the headlight of the engine and did not see the car, and thought he had time to get across." And Funda, the other witness introduced on behalf of the plaintiff, testified that Clarkson said:

"Boys, it is all my fault. I have been railroading for a good many years. I saw that headlight, but I did not see the car. I thought I had time to get across, and I got caught before I got over. I did not notice the first car."

The plaintiff below having thus brought into the case the statement of the deceased without objection, she made it an issue of fact, and her counsel relies upon it in part for maintaining the verdict.

Having by its charge, practically destroyed the effect of deceased's statement beyond question the court should have granted the request of the defendant for a directed verdict. For eliminating the statement of the deceased, what have we in this record to support the verdict? The case would stand thus: Clarkson was found injured under the defendant's car; no one saw him approach, and no one witnessed the injury. While it is to be presumed from the nature of his injury that it was inflicted by the defendant's car or cars, whether he was lying down on the track or whether he had stumbled and fallen between the rails in crossing, at best would be matter of conjecture. Would such a state of facts, without more, sustain a verdict for damages against the railroad company? In *Cincinnati, etc., Railway Company v. South Fork R. Co.* (C. C. A.) 139 Fed. 528, 1 L. R. A. (N. S.) 533, Judge Lurton, in a forceful opinion, maintains that the maxim of *res ipsa loquitur* does not so apply even to the relation of carrier and passenger, that a mere injury to a passenger in transit is sufficient without more to warrant a finding that the injury resulted from the negligence of the railroad company. Clarkson was neither a passenger nor an employé. No contractual relation existed between him and the defendant railroad company. The company owed him no duty other than a public one. When, therefore, he or his representative asks to hold the railroad company for damages resulting from the fault of the company proof must be offered to show how he got under the car and how it was the fault of the railroad company.

The principal reliance to support the verdict is upon the case of *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186. While there are lines of parallelism between that and the case at bar, they soon diverge and draw apart. We only know what the facts of the Gentry Case were from statements found in the opinion of the court, to the effect that while there was conflict in it there was sufficient evidence to render it necessary to submit the case to the jury; that evidence tended to show the following state of

facts: While Gentry was passing over the defendant's yards he was run down and killed by a flat car coupled in front of a locomotive used by the defendant for switching purposes; that the defendant failed to place any headlight, lantern, or other lights of any kind, or any other signal of danger, or any person to watch for employes, on said flat car to give warning of its character, or to sound the whistle or ring the bell of the locomotive as it approached the crossing; that the headlight on the locomotive was so arranged that its rays passed entirely over and beyond the flat car in front of the locomotive; and that the defendant failed to have any lantern or light at the point in or about its yards or the crossing; and that the engine used by the company for switching purposes on the occasion was an ordinary heavy road engine with a pilot in front, and was not suitable, but unfit, for such purpose; and that the defendant did not have knowledge of such use of an ordinary engine, with a flat car coupled in front of it for switching purposes; that he was unable to see the flat car on account of the darkness of the night, and by being blinded by the headlight on the engine, and had not heard the whistle or bell of the locomotive, not knowing anything of the use and danger of the locomotive and flat car as an appliance for switching purposes. From which it appears that the railroad company in moving the flat car did so with a road engine, with the headlight so far above the flat car in front that its rays did not disclose the presence of the flat car; that there was no one on the flat car or about there with a lighted lantern, nor were there other lights about the crossing, and that the employment of such a road engine for such purpose was so unusual as to mislead the injured party. As everyone knows, whoever observed such engines, the headlight in a road engine is considerably higher from the ground than that of a switch engine; and, therefore, the light did not fall upon the flat car at all. But, in the case at bar, the evidence does not admit of dispute that the engine employed was the usual switch engine. That the headlight fell on the flat car so as to plainly disclose four-fifths—about 24 feet—of the forward part of the car to full view. That there was on top of the flat car, near or a little forward of the middle, a brakeman with a lighted lantern in his hand, who stood in the full glare of the headlight, who was plainly seen in that position by Funda, the plaintiff's witness, and as demonstrated by experiments made by a number of uncontradicted witnesses, both the flat car and the presence of McGinn on top of it were plainly visible at least 50 feet from the car to anyone approaching the crossing. There was also an arc light in the adjoining block, which threw sufficient light on this crossing to disclose the presence of an object like a flat car thereon. In addition to this, Funda was passing to and fro about this crossing with a lighted lantern in his hand. It would seem to be a physical impossibility for Clarkson not to have discovered the presence of the flat car unless he was positively heedless, or his mind was occupied about something else, or more likely because he had grown careless from familiarity with the situation. Unless it is to be assumed that

he supposed McGinn was in some way suspended in midair, four or five feet above the ground, he must have known he was standing on something moving in front of the engine. And when this is considered in connection with his knowledge of the habit of the defendant in switching flat cars across that street he was bound to assume that such movement was in process of execution—as the bell was ringing indicating movement. The point where he lay when found—several feet beyond the plank way in the street—corroborates his statement that he thought he could get around ahead of the engine; and we entertain little doubt that in that way he lost his life. Thus furnishing another illustration of the fact that rather than await, in perfect safety, the passing of a car at such crossing, to save a few seconds of time some people will run a race with the car as to which shall first cross, and usually lose on the hazard.

In any permissible view of the facts and the law of this case, this verdict cannot stand except upon the license of a mere conjecture, as needful to be restrained as a disguised confiscation. The court should have granted the request of the defendant for a directed verdict.

It results that the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to grant a new trial.

SALMON et al. v. HELENA BOX CO.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1906.)

(No. 2,309.)

1. TRIAL—INSTRUCTIONS—REFUSAL.

Where, in an action for breach of a contract of sale, the court charged that if the defendants were not guilty of a breach of the contract and acted in good faith, were ready to take the lumber contracted for, and the only reason they did not take it was because plaintiff was unable to fill their orders, then plaintiff could not recover, but that if defendants, and not plaintiff, were guilty of a breach of the contract, plaintiff was entitled to recover, it was not error to refuse to charge that plaintiff could not recover unless it had previously complied with the conditions imposed on it by the contract, it being substantially covered by the charge given.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 652.]

2. SALES—PLACE OF DELIVERY.

In the absence of any contrary provision in a contract of sale, the place of delivery is the place where the goods are located when sold.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 215.]

3. SAME—CONTRACT—CONSTRUCTION.

A contract provided for the purchase of 4,000,000 feet of different grades of dimension lumber at an agreed price on a certain freight rate, and 1,000,000 more feet to be delivered on another freight rate, "to be shipped at the rate of from 40 to 50 cars per month," in accordance with shipping directions to be given by the buyer from time to time. *Held*, that such contract bound the buyers to give shipping instructions within a reasonable time, and required the seller, within a like reasonable time, to make shipments according to the instructions.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 222, 223.]

4. SAME—UNCERTAINTY.

The clause of the contract requiring shipments to be made according to shipping instructions to be given from time to time by the buyers did not render the contract void for uncertainty or unenforceable except at the option of the buyers.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 54.]

5. SAME.

A contract by correspondence for the sale of lumber provided for shipment in accordance with the buyers' directions, and contained a clause that the buyers understood that the seller would be able to ship from 40 to 50 cars per month in accordance with shipping directions. *Held*, that such clause should be treated as a limitation imposed in favor of the seller to safeguard it against excessive orders at any one time, and did not impose on the buyers the obligation to order that much lumber monthly.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 222, 223.]

6. SAME—MEASURE OF DAMAGES.

If, in an action by the seller for breach of a contract for the sale of lumber, it appears that the lumber purchased had a market value at the mill from which it was to be shipped, the measure of plaintiff's damages is the difference between the contract price and market value at the time or times when delivery was required by the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 222, 223.]

7. SAME—MEASURE OF DAMAGES.

If, in a like action, it appears that the lumber purchased had no market value at the time and place of delivery, the measure of plaintiff's damages is the difference between the contract price and the market value at the nearest available market where the lumber could have been sold, less freight and other expenses attending the transportation to that market.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1099.]

In Error to the Circuit of the United States for the Eastern District of Arkansas.

Morris M. Cohn, for plaintiffs in error.

John I. Moore, U. M. Rose, W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action at law instituted by the Helena Box Company, defendant in error, against Hamilton H. Salmon and R. Brandt, composing the firm of Hamilton H. Salmon & Company, plaintiffs in error, to recover damages for a breach of an executory contract for the sale of lumber, and in addition thereto, to recover a balance due for lumber actually sold and delivered. The terms of the contract are not disputed. They are found in a letter written and signed by defendant of date, January 14, 1904, addressed to the box company, as follows:

"You may enter our order for the following cottonwood lumber: [Here follows a description of 4,000,000 feet of different grades and sizes of common commercial lumber and the agreed price for each kind.] All of the above on the Helena, Ark., rate of freight. [Here follows a description of one million feet more of such lumber, and its price.] To be delivered on Cincinnati, Ohio, freight rate. * * * We can start shipping on the above at once, and understand that you will be in a position to ship us from 40 to

50 cars per month, in accordance with shipping directions. Shipments to be made in accordance with instructions, as given by us from time to time.

"[Signed]

Hamilton H. Salmon & Co.

"Accepted:

Helena Box Company, by H. W. Mosby, Secretary."

The main issue of fact on the claim for damages for breach of the contract was whether the plaintiff or defendants first breached it. Plaintiff claims that defendants, after giving shipping instructions for a certain quantity of lumber, ceased giving any further instructions and refused to take the lumber according to the requirements of the contract; that plaintiff was at all times ready to fill orders made according to the contract, and that after waiting a reasonable time for shipping directions, it sold the lumber for what it could get and sustained the loss sued for. Defendants claim that plaintiff first breached the contract by failing to fill orders according to instructions and by filling them, when done at all, with inferior quality of lumber; and for these reasons that they were justified in rescinding the contract. The case was tried to a jury and a large amount of proof taken on the issue just stated.

The learned trial judge after carefully stating the contentions of the parties so that there could be no misunderstanding about the issue joined in the case, concluded that part of the charge relating to liability as follows:

"Now if you find from all the evidence in this case that the defendants were not guilty of a breach of the contract, that they acted in good faith and were ready to take the lumber and the only reason they did not take it was because the plaintiff was unable to fill their orders, then your duty would be to find the issues * * * in favor of the defendants and that would be the end of it."

Then the converse of the proposition was stated and the jury was told that if defendants, and not the plaintiff, were guilty of a breach of the contract, the plaintiff was entitled to recover. Considering the care with which the court defined the issues between the parties and the clear statement of the ultimate fact on which liability depended we think the jury was fully instructed and that there was no reversible error in not giving the instruction requested by defendants' counsel to the effect that plaintiff could not recover unless it had previously complied with the conditions imposed upon it by the contract. That proposition was substantially covered by the main charge, and it was not error to refuse to repeat it in the language chosen by defendants' counsel.

The next question for our consideration relates to the proper construction of the contract of July 14, 1904. On this the trial judge charged the jury substantially that the contract was valid and imposed the duty upon defendants to order lumber shipped within a reasonable time, and as to what was a reasonable time he charged as follows:

"What a 'reasonable time' is, depends upon the circumstances in each particular case. Now, in view of the fact that this contract provides that the plaintiff was to be ready to ship between 40 and 50 cars a month, what do you, as reasonable men, think would be reasonable * * * to require defendants to order shipped out during that time? * * * But on the other

hand the law does not expect, in view of the fact that the contract provides, that they shall await shipping instructions, that the defendants must * * * have ordered every month between 40 and 50 cars."

Plaintiff was the owner and operator of two saw mills, and by contract entitled to the product of other mills situated at or near Helena, Ark., and had either in stock or quickly available, cotton-wood lumber of the dimensions in length, width, and thickness usually found in lumber yards. Defendants were large dealers, requiring such lumber to meet existing and future orders of their customers located in different parts of the country. In these circumstances the contract in question was made. It contains an express agreement for the purchase and sale of specified quantities of different dimensions of lumber, an agreement fixing the price of each kind specified, an agreement that shipments should be made according to shipping instructions to be given from time to time by defendants.

In the absence of any contrary provision found in the contract for delivery, the general rule fixing the place of delivery at the place where the goods are located when sold, must prevail. *Benjamin on Sales*, § 682; *Hatch v. Oil Co.*, 100 U. S. 124, 134, 25 L. Ed. 554. The trial court properly held that the parties made a valid and enforceable contract obligating defendants to give shipping instructions to plaintiff within a reasonable time and requiring plaintiff, within like reasonable time, to make shipments according to the instructions. No option was left to either party. The buyers could no more neglect to give shipping instructions without violating their obligation than the seller could neglect to make shipments after receiving the instructions without violating its obligation. The contention of defendants' counsel that the clause requiring shipments to be made according to shipping instructions to be given from time to time by the buyers renders the contract void for uncertainty or enforceable only at the option of the buyers is not sound. *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 92 C. C. A. 25, 114 Fed. 77, 57 L. R. A. 696; *George Delker Co. v. Hess Spring & Axle Co.* (C. C. A.) 138 Fed. 647; *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938; *Excelsior Wrapper Co. v. Mesinger*, 116 Wis. 549, 93 N. W. 459; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981. It is contended that the following clause of the contract, "We understand that you will be in a position to ship us from 40 to 50 cars per month in accordance with shipping directions" imposed upon defendants the obligation to order that much, at least, monthly. This clause was treated by the trial court as a limitation interposed in favor of the box company to safeguard it against excessive orders at any one time; and this, we think, in the light of all the other terms of the contract, was its intended function. This clause was also properly treated as one of the terms of the contract which the jury might consider in determining what, within the contemplation of the parties, would be reasonable expedition in the matter of giving shipping instructions.

Was the true rule governing the measure of damages given to the jury? Plaintiff's secretary testified as a witness for his company concerning the efforts made to sell lumber during 1904 and the prices received for what was sold. Another witness connected with a different lumber company testified at the instance of plaintiff, about making two trips, in July and August, 1904, through the states of Ohio, Illinois, Michigan, Iowa, Kansas, and Nebraska, a route which he says presented the most desirable market for sale of cottonwood lumber. Both of these witnesses referred to "a market price," and one of them to the market price at Helena. Moreover, the evidence discloses that St. Louis, Louisville, Cincinnati, Chicago, Kansas City, and Omaha each afforded a market for lumber such as contemplated by the contract.

Notwithstanding evidence of this character, the court charged the jury concerning the measure of damages as follows:

"All that the law requires the seller to do when there is a breach of the contract is to exercise reasonable diligence such as any business man similarly situated would exercise to get the best price that he can and if he obtained that price, if he does that, and there is still a loss then the loss must fall on the party who breached the contract. So in this case it is for you to determine, if you find this issue in favor of plaintiff, (that the defendants breached the contract) how much less did the plaintiff have to take for the lumber in order to sell it, having exercised due diligence to obtain the best price, than it would have received under the contract price."

An exception was taken to this portion of the charge by identifying it in a way satisfactory to and approved by the trial court. Expressing the same thought the court in another part of the charge told the jury as follows:

"The only measure of damages which is to govern you is this: What price could the plaintiff, after there was a breach of the contract on the part of the defendants, obtain by the exercise of reasonable diligence for the lumber which the defendants under their contract ought to have taken and did not take," etc.

From these excerpts it is obvious that the court below took no heed of the evidence tending to show that there was a market value for the lumber at Helena or at any other place. It announced a general rule which in the absence of one more specific and applicable might be the only available rule. 1 Sedgwick on Damages, § 170 et seq.; Benjamin on Sales, §§ 758, 869, and cases cited. But we think the present case is subject to more specific treatment, and is governed by well-established rules applicable to different phases disclosed by the proof. It certainly does not clearly appear from the proof that there was no market value for cottonwood lumber at Helena in the summer of 1904. If there was such a market value plaintiff's measure of damages would have been the difference between the contract price and the actual market value of the lumber at that place at the time or times when delivery was required by the contract; and in that event, the rule adopted by the trial court would have been erroneous. If Helena afforded no market for the lumber in question and if there was any available market therefor, plaintiff's measure of damages, as will be presently seen, would have been the

difference between the contract price and the market value at the nearest available market where it could have been sold, with deduction of freight and other expenses attending the transportation of the lumber to that market. None of these hypothetical conditions were submitted to the jury for its determination, but the conclusion of the court below seems to have been predicated upon the hypothesis that there was neither a market value at Helena nor anywhere else for the lumber in question. This, for reasons already stated, we think, the record does not warrant.

The Supreme Court of the United States in *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71, had occasion to consider this subject. That was a case where the Grand Tower Company entered into a written contract with Phillips and others to deliver to them at Grand Tower, Ill., 150,000 tons of coal per year in equal daily proportions between February 15th and December 15th of each year. The company breached the contract by failing to deliver coal as required. Mr. Justice Bradley, in delivering the opinion of the court, after alluding to the familiar rule which regards the price at the place of delivery as the normal standard by which to estimate the damage for nondelivery, and to the obvious unfairness of confining plaintiffs to the prices at Grand Tower, where there was no general market and where the prices were under the control of defendant company, lays down the following rule:

"The true rule would seem to be, to allow the plaintiffs to show the price they would have had to pay for coal in the quantities which they were entitled to receive it under the contract, at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling [if any], would be the true measure of damages."

In *Yellow Poplar Lumber Co. v. Chapman*, 20 C. C. A. 503, 74 Fed. 444, which was a case where damages were sought by the seller against the buyer for failure to receive timber sold under a contract for its sale and delivery at certain times, the court says:

"We have no hesitancy, on the pleadings as they now stand, in announcing the true measure of damages in this case,—if damages there were,—as the difference between the contract price of the timber and its market value at the places where it was to have been delivered; and if the defendant below had entire control of the market at those places, as is claimed by defendant in error, then the measure of damages was the difference between the contract price of the timber at such points and the price of like timber in the nearest available market, less the additional cost of delivering such timber from said points to such nearest market"—citing *McNaughten v. Cassally*, 4 McLean, 530, Fed. Cas. No. 8,911; *Pope v. Filley* (C. C.) 9 Fed. 65, and *Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71. To the same effect are *Lawrence v. Porter*, 11 C. C. A. 27, 63 Fed. 62, 26 L. R. A. 167; 1 *Sedgwick on Damages*, § 246, and cases cited; *Benjamin on Sales*, pp. 883, 894.

As the record now appears we think the learned trial judge entertained an erroneous view concerning the measure of damages applicable to the facts of this case and erred in charging the jury as stated on that subject. Some exceptions were taken to the action of the Circuit Court concerning several small items of account in-

volved in the claim for balance due for lumber actually received by defendants, but after careful consideration, we find no reason for disapproval. Substantial justice was reached in those particulars. The reference by the trial judge in his charge to the rules of the National Hardwood Association as affecting widths of lumber, to which exception was taken, appears to have been inadvertent, and to have been properly explained when attention was called to it in the exception taken. Whether widths were fixed by the rules of the association or by the contract seems unimportant. The judge, at worst, only referred to the wrong document as making provision for certain unquestionable widths, about which he was instructing the jury. The mistake, if any, was harmless.

It results that because of the adoption of an erroneous standard for computing the damages, the judgment must be reversed, and a new trial ordered.

SANBORN, Circuit Judge (concurring). In this case each of the parties claims that the other first broke the contract, and the testimony upon this subject was voluminous and conflicting. If the plaintiff committed the first breach of the contract, and if that breach had not been waived by the defendants, this fact was a perfect defense to the action. There were two indispensable conditions to its maintenance: (1) That the plaintiff had not committed the first breach which had not been waived by the defendants; and (2) that the defendants had themselves violated the contract. Counsel for the defendants requested the court to instruct the jury that the plaintiff could not recover unless it had previously complied with the conditions imposed upon it, and no question of waiver was presented in the case. The court refused to grant this instruction, and submitted the case to the jury upon the single question whether or not the defendants had broken the agreement. Because the question whether or not the plaintiff had first breached the contract was not fairly presented to the jury for their determination, I am in favor of reversing the judgment.

But I am unable to concur in the reason stated by the majority for the reversal because the court below in my opinion correctly stated the general rule for the measure of damages applicable to this case, because no request was made for the submission of any subordinate or more specific rule and because no exception was taken sufficient to challenge the rule submitted. The charge of the court on this subject was that the measure of damages was the difference between the contract price of the rejected lumber and the price which the vendor could have obtained for it by the exercise of reasonable diligence. This is the fundamental rule for the measure of damages in such a case because compensation is the basis of all such rules, and this is the only rule which in all cases of this nature will make the vendor whole. This rule is not in conflict, but is the basis of the rule that if there is a market and an established market value for the rejected quantity and quality of lumber at the place of delivery, the difference

between that value and the contract price is the true measure of the damages, for in such a case the vendor by the exercise of reasonable diligence can obtain that value. *Barrow v. Arnaud*, 8 Q. B. 604, 609. It is not inconsistent with, but is the foundation of, the rule that if there is no market value at the time and place of delivery, or if he cannot sell the rejected quantity and quality of property at that place at the market value, the difference between the contract price and the price at which he can sell it in the nearest available market with a proper allowance for cost of transportation and incidental expenses is the true measure of his damages, because under such circumstances, he may in this way most conveniently make himself whole. *Grand Tower Co. v. Phillips*, 23 Wall. 471, 480, 23 L. Ed. 71; *Yellow Poplar Lumber Co. v. Chapman*, 20 C. C. A. 503, 515, 74 Fed. 444, 456; *Lawrence v. Porter*, 11 C. C. A. 27, 29, 63 Fed. 62, 64, 26 L. R. A. 167; *Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 535, 536, 57 N. W. 129. These are subordinate and auxiliary rules which spring from the fundamental general rule given by the court. They apply only when they are in accord with and aid in the enforcement of the general rule. When their application would result in a recovery of more or less than the difference between the contract price and the amount for which the vendor might sell the property by the exercise of reasonable diligence, they have no function. They apply to specific classes of cases, while the general rule is constant and governs all cases of the nature of that in hand. There was, therefore, no error in submitting to the jury for their guidance this general rule by which the damage in this case and in all others of its nature must be measured. If the subordinate and auxiliary rules recited in the opinion of the majority were also applicable to the "hypothetical conditions" they mention, the failure of the court to embody them in its charge was not error because no request for this submission was preferred. Where a court correctly states to the jury the general rule of law in its charge, its failure to present to them auxiliary and more specific rules upon the same subject is not error in the absence of any request for, or suggestion of, such action. *Frizzell v. Omaha St. Ry. Co.*, 59 C. C. A. 382, 386, 124 Fed. 176, 180, and cases there cited; *Chicago G. W. Ry. Co. v. Healy*, 30 C. C. A. 11, 16, 86 Fed. 245, 250; *Texas & Pac. R. Co. v. Cody*, 14 C. C. A. 310, 311, 312, 67 Fed. 71, 73; *Eastern Oregon Land Co. v. Cole*, 35 C. C. A. 100, 104, 92 Fed. 949, 953.

There was no such request or suggestion in this case. The only exception to the charge on the measure of damages was in these words:

"I also wish to save exceptions as to the matter of damages, in which your honor, commenting upon the evidence of Mr. Sumner, stated in substance that a person was complying with the law if he got the best price he could, or words to that effect."

The contention of the exceptor here that a vendor who secures the best price he can obtain for contract property which his vendee has refused to receive violates or fails to comply with the law is clearly untenable, and this is the only proposition to which the exception

points. It contained no request, suggestion or intimation that he desired the court below to instruct the jury to apply the specific rules mentioned in the majority opinion to the hypothetical conditions there described. Moreover the comments of the court upon the evidence of Mr. Sumner were correct and are sustained by the authorities. The plaintiff was a manufacturer of lumber in the state of Arkansas. The defendants were jobbers or middlemen in New York City who bought lumber in large quantities of manufacturers and sold it throughout the United States to contractors, builders, and consumers. Plaintiff's witnesses, millmen residing in Arkansas, had testified that they tried at Helena and in all the large cities, where they would be most likely to make sales, all over the central portion of the United States, to sell this lumber and that they could not obtain more than \$2 per thousand less than the contract price for it. Mr. Sumner and another witness testified for the defendants that they could get and that for two sales of portions of the contract amount of two grades of lumber they did obtain orders, one at Tiffin, Ohio, and another at Battle Creek, Mich., at prices \$2 per thousand in excess of the contract price and that the reason why the plaintiff and Mr. Uptograff were unable to sell at such prices was that consumers would pay the jobber's prices to only about five large concerns, and that they would not buy of others unless the latter sold the lumber at a sacrifice. In this state of the evidence the court instructed the jury that the manufacturer, the plaintiff, was entitled to recover the difference between the amount which it could realize from the lumber by the exercise of reasonable diligence and the contract price, and that it was not its fault if it was unable to obtain the price which the defendants, the jobbers, might have secured. The entire charge of the court on this question of damages was in these words:

"If you find for the plaintiff, the next thing to be considered by you is as to the damages the plaintiff is entitled to recover. As I said to you before, no speculative damages can be allowed on a contract of this kind. The only measure of damages which is to govern you is this: What price would the plaintiff, after there was a breach of the contract on the part of the defendants, obtain by the exercise of reasonable diligence for the lumber which the defendants under their contract ought to have taken and did not take. If it could, by the exercise of reasonable diligence, have obtained the full price that the defendants agreed to pay plaintiff, then, there is no damage, and the plaintiff is not entitled to recover any damages whatever. But on the other hand, if you find from the evidence that by reason of the stringency of the market, and that by reason of the fact that lumber had gone down the plaintiff was unable to find a purchaser for this lumber except at a lower figure than that agreed upon in the contract, then plaintiff is entitled to recover the difference between the price under the contract and the price it actually received. Of course, they cannot just go to work and sacrifice the lumber, but they must exercise reasonable diligence to get the best price they possibly could.

"Now, on the part of the plaintiff they have testified that they made every effort possible to sell the lumber; that Mr. Mosby made two or three trips; and also evidence was introduced to show that it was hard to sell lumber last year, and it seems to be now with cottonwood lumber; that there was no big demand for it, and that in order to sell it at all it had to be sold at a lower price than when the market was good and there was a good demand.

"In this connection, I want to say to you, gentlemen of the jury, that it has

been testified to by Mr. Sumner, that these people were not as well known as other firms, and for that reason could not get as good a price. That may be true. But if they could not get as good a price, it was not plaintiff's fault. They were willing to deliver, they say, according to the contract, and, if Mr. Sumner could get a better figure, it was his duty to do so. All that the law requires the seller to do, when there is a breach of the contract, is to exercise reasonable diligence, such as any business man similarly situated would exercise, to get the best price he can, and if he obtained that, if he does that, and there is still a loss, then the loss must fall upon the party who breached the contract. So in this case, it is for you to determine, if you find this issue in favor of the plaintiff (that is, that the defendants breached this contract), how much less did the plaintiff have to take for the lumber in order to sell it, having exercised due diligence to obtain the best price, than it would have received under the contract price."

The comments upon the evidence of Mr. Sumner were not error because the price which the defendants or other jobbers could, or did obtain for lumber of this character in the larger cities of the country, with proper allowances for freight and expenses, was not the true criterion by which to measure the plaintiff's damages, although that price might have been the market value of the lumber, because the plaintiff, a manufacturer in Arkansas, could not obtain that price and therefore the difference between that price and the contract price would not make it whole. The criterion for the measurement of the plaintiff's damages is the price which it, the manufacturer, not that which the defendants, the jobbers, could obtain for the property by the exercise of reasonable diligence.

In *Hewson & Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 536, 57 N. W. 129, the plaintiff, a jobber, purchased of a manufacturer of brick at Wheeler, Wis., its entire output to be delivered at Wheeler at a price which, with the charges for freight to St. Paul and Minneapolis added, made the contract cost in those cities \$16 per thousand. The defendant failed to deliver. St. Paul and Minneapolis constituted the nearest market to Wheeler, and the plaintiff could have purchased the contract quantity and quality of brick there for \$28 per thousand, which was the established market value of brick in those cities. This market value, however, was the price at which jobbers of brick sold them to contractors and builders. The plaintiff could have purchased the brick of a manufacturer in St. Louis and could have transported them to St. Paul and Minneapolis and have paid the freight upon them and they would then have cost it but \$22 per thousand. The court held that the measure of damages was not the difference between the market value or the market price of brick in St. Paul and Minneapolis and the contract price, with proper allowance for freight, but that it was the difference between the amount for which the plaintiff could have procured the brick at St. Paul and Minneapolis by purchasing them at St. Louis of the manufacturer and transporting them to those cities, and the contract price. In other words, the Supreme Court of Minnesota held that the measure was the difference between the contract price and the price at which the plaintiff could have procured the brick by the use of reasonable diligence.

In *Lawrence v. Porter*, 11 C. C. A. 27, 29, 63 Fed. 62, 64, 26 L. R. A. 167, the vendor had agreed to deliver lumber on a credit of 90 days. He refused to perform his contract, but offered to deliver the identical lumber for cash at a price 50 cents per thousand feet less than the contract price. The vendees could not obtain lumber of like quantity and quality of others without paying the market value, which was in excess of the contract price, and they sued for the difference. The court refused to permit them to recover the difference between the market value and the contract price and held that their damages were "measured by the difference between what they had agreed to pay and the sum for which they could have supplied themselves with lumber of the same character at the place of delivery, or if not obtainable there, then at the nearest available market, plus any additional freight resulting from the breach."

In *Grand Tower Co. v. Phillips*, 23 Wall. 471, 479, 23 L. Ed. 71, the tower company, a mining corporation, agreed to sell and deliver to Phillips and St. John at their coal dump, in Illinois, about 60 miles above Cairo, 150,000 tons of coal, and it failed to do so. The vendees sued for damages. There was no market for the purchase of such a quantity of coal at the place of delivery. The plaintiff proved the market value of such coal at Cairo and at points below it on the Mississippi river and the court instructed the jury that the true measure of damages was the cash value of the kind of coal mentioned at these points after deducting the contract price of the coal and the costs and expenses of transporting it thither. The Supreme Court reversed this ruling and said:

"The true rule would seem to be, to allow the plaintiffs to show the price they would have had to pay for coal in the quantities which they were entitled to receive it under the contract at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling [if any] would be the true measure of damages."

By the same mark the plaintiff in the case at bar was entitled to show the price at which it was able to sell the contracted lumber, which was rejected, at the nearest available market where it could sell that quantity and quality of lumber, and the difference between that price and the contract price, with the addition of any increased expense of transportation and of traffic, if any, was the true measure of damages. And this was the charge of the court. The rejected lumber was of a special quality. The quantity rejected was large. There is very persuasive evidence that there were few, if any, places where this quantity and quality could be sold, and that the manufacturer was unable to realize as much for it as the jobbers. The evidence of market value at the place of delivery is uncertain and confusing. In this state of the case the authorities cited above seem to be peculiarly pertinent, and in the light of the principles and rules to which reference has been made it seems to me that the judgment below should not be reversed on account of the charge of the court on the measure of damages.

CELLA COMMISSION CO. v. BOHLINGER.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1906.)

No. 2,370.

1. CONSTITUTIONAL LAW—SERVICE OF SUMMONS ON STATE AUDITOR FOR FOREIGN CORPORATION NOT DUE PROCESS OF LAW.

The act of the Legislature of Arkansas of February 26, 1901, Kirby's Dig. § 835, which authorizes a personal judgment against any foreign corporation on any cause of action in favor of a resident or citizen of that state upon service of a summons upon the Auditor of the state of Arkansas, is violative of the fourteenth article of amendments to the Constitution, because it authorizes judgment without the notice to the defendant of the hearing and proposed adjudication in his case, which is indispensable to constitute due process of law.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 929.

Service of process on foreign corporations, see note to *Eldred v. American Palace-Car Co.*, 45 C. C. A. 3.]

2. JUDGMENT—SUBSTITUTED SERVICE INSUFFICIENT EXCEPT BY CONSENT OR TO EXTENT OF PROPERTY IN STATE.

In the absence of consent or of property in the state, which by attachment, or otherwise, has become the subject or object of the action, nothing short of service of a summons upon the defendant within the state or his appearance in the action will give to a court the jurisdiction requisite to sustain a personal judgment against a nonresident of the state or a foreign corporation.

3. STATUTES—WHEN CONSTITUTIONAL PART SUSTAINED WHILE UNCONSTITUTIONAL PART FAILS.

Where a part of a statute is constitutional and a part is unconstitutional, the former may be sustained in many cases where the latter fails.

Indispensable conditions of such a result are that the constitutional part and the unconstitutional part are capable of separation so that each may be read and may stand by itself, and that the unconstitutional part is not so connected with the general scope of the law that it is impossible to give effect to the intention of the Legislature in its enactment without it.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

4. SAME—PRESUMPTION FROM GENERAL LANGUAGE LEGISLATURE INTENDED NO LIMITATION OR EXCEPTION.

Where the Legislature of a state has included in a law by general language many subjects, persons, or corporations and has made no limitation or exception, the legal presumption is that it intended to make none.

5. SAME—JUDICIAL LIMITATIONS AND EXCEPTIONS TO MAKE STATUTE VALID INADMISSIBLE.

A statute of a state which includes, by general language, subjects within and those without the constitutional jurisdiction of the state may not be limited by judicial construction to the former class and then sustained.

6. SAME.

Where a statute of a state covers by general language foreign corporations which are doing business in the state and foreign corporations which are not engaged in business therein, the latter class may not be lawfully excepted from the operation of the law nor may the statute be lawfully limited by judicial construction to the former

class and then sustained, because such a course would make a new law which the original statute clearly indicates that the Legislature did not intend to enact and because it is impossible to separate such a statute into a constitutional part and an unconstitutional part, each of which may be read and may stand by itself.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Chester H. Krum, for plaintiff in error.

W. H. Pemberton, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The Cella Commission Company is a corporation of the state of Missouri. A. Bohlinger brought an action against it for breach of a contract in one of the courts of the state of Arkansas. An attachment was issued and H. B. Ake & Co. and the German National Bank of Little Rock were garnished, but no property of the defendant was found or attached. The cause was removed to the court below, where a judgment was rendered against the commission company, which is challenged by this writ of error. After the removal to the Circuit Court the commission company moved to quash the service of the summons, which had been made upon the Auditor of the state of Arkansas pursuant to section 835 of Kirby's Digest of the laws of that state, on the ground that it was a foreign corporation, and was not doing business in the state of Arkansas. The court found that the defendant was doing business in that state at the time of the service of the summons and denied the motion. This ruling presents the first question in this case. A state may lawfully prescribe the terms under which a foreign corporation may transact business within it. The Legislature of Arkansas fixed these terms under which permission was given to any foreign corporation to do business in that state: (1) That it should file in the office of the Secretary of State a designation of an agent who should be a citizen of that state upon whom service of summons or other process might be made; (2) that it should file in the same office a copy of its charter; (3) that it should pay certain fees; and (4) that if it should fail to comply with these conditions it should be subject to certain penalties. Acts 1899 (Kirby's Dig. §§ 825-834). The summons in the case in hand was not served upon any agent of the defendant appointed under the provisions of these statutes.

On February 26, 1901, while the laws cited above were in full force, the Legislature of Arkansas passed this act:

"In all cases where a cause of action shall accrue to a resident or citizen of the state of Arkansas, by reason of any contract with a foreign corporation, or where any liability on the part of a foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort, or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served, or has not an officer continuously residing in this state upon whom summons and other process may be served so as to authorize a personal judgment, service of summons and other pro-

cess may be had upon the Auditor of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, whether sitting in the township or county where the Auditor is served, or elsewhere in the state. This act shall not be effective in cases where its enforcement would conflict with the powers of Congress or the federal laws to regulate commerce between the states." Kirby's Dig. § 835, p. 349.

The service of the summons in this case was made upon the State Auditor under this statute, and upon this service alone the personal judgment in question has been rendered against this foreign corporation. This statute of 1901 does not prescribe any condition or term under which any foreign corporation may do business in the state of Arkansas. It is an entirely independent act and a simple and plain fiat of the state of Arkansas that any of its citizens may recover a personal judgment against any foreign corporation upon any cause of action which he has against it upon service of the summons in the suit upon the Auditor of that state. It does not even require the Auditor to send the copy of the summons which he receives to the defendant or to give to it any notice whatever of the action, so that a foreign corporation of Maine or of England or of any other state or nation may find itself a judgment debtor for any amount in the state of Arkansas without any previous notice of the suit in which the judgment has been rendered.

A court that has jurisdiction of the person of the defendant and of the subject-matter of the action, a notice to the defendant before hearing and an opportunity to be heard before judgment are indispensable elements of that due process of law without which no person may be lawfully deprived of his life, his liberty or his property. Const. Amend. arts. 5-14. No state has any jurisdiction of persons or of property beyond its territorial limits (Story's Conflict of Laws, c. 2; Wheaton's International Law, pt. 2, c. 2) although it may often affect persons beyond its boundaries by virtue of its jurisdiction over their property within them and property without its limits by reason of its jurisdiction over the persons within them who own it. Nonresidents of a state and foreign corporations may consent that a summons or notice may be served upon them by its service upon an agent whom they appoint, or upon an officer of a state, and such service may then sustain the jurisdiction of its courts to render judgments thereon. When a state provides by law that one of the conditions under which a foreign corporation may do business therein is that the summons in an action against it may be served upon an agent which it appoints, and, in case that it makes no appointment, upon an officer of the state, and the corporation engages in business in that state, it thereby accepts the offer and the condition of the state and consents to such service and to the jurisdiction of the courts of that state to render judgments against it thereon. But no such condition or offer of condition to do business in Arkansas upon service of the summons upon the auditor of that state was made by the legislation of Arkansas, nor accepted by this defendant. The act of 1901 made the service of the summons upon the auditor as

effectual to give jurisdiction of foreign corporations which never transacted any business in the state as of those who were engaged in commercial transactions therein.

A state has jurisdiction of the property within its boundaries and to the extent necessary to justly apply that property it may by attachment thereof before hearing and by a substituted service of a summons upon its owner vest in its courts the power to render a judgment against the owner by virtue of which the attached property and that property only may be seized and administered by its court. No property was attached in this case, however, and no jurisdiction was acquired by the courts below in this way. But in the absence of consent to substituted service and in the absence of property of the defendant in the state, which is the subject or object of the action, nothing short of service of a summons upon the defendant personally within the state, or his appearance in the action, constitutes that due process of law which will give the necessary jurisdiction to a court of the state to render a personal judgment against a nonresident. *Pennoyer v. Neff*, 95 U. S. 714, 722, 724, 725, 726, 727, 730, 733, 24 L. Ed. 565; *Webster v. Reid*, 11 How. 437, 459, 13 L. Ed. 761; *Boswell's Lessee v. Otis*, 9 How. 336, 348, 13 L. Ed. 164; *Picquet v. Swan*, 5 Mason, 35, 19 Fed. Cas. 609, 612, No. 11,334; *D'Arcy v. Ketchum*, 11 How. 165, 175, 176, 13 L. Ed. 648; *Bissell v. Briggs*, 9 Mass. 462, 469, 6 Am. Dec. 88; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37, 40, 4 Am. Dec. 321; *Goidey v. Morning News*, 156 U. S. 518, 521, 15 Sup. Ct. 559, 39 L. Ed. 517; *Dull v. Blackman*, 169 U. S. 243, 247, 18 Sup. Ct. 333, 42 L. Ed. 733; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Hart v. Sansom*, 110 U. S. 151, 155, 3 Sup. Ct. 586, 28 L. Ed. 101; *Noble v. Union River Logging Railroad*, 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. Ed. 123; *Millan v. Mutual Reserve Fund Life Ass'n (C. C.)* 103 Fed. 764, 769; *Ralya Market Co. v. Armour & Co. (C. C.)* 102 Fed. 530, 532. The declaration of Chief Justice De Grey in *Fisher v. Lane*, 3 Wils. 297, that it would be contrary to the first principles of justice to bind a defendant personally when he was never personally served or given notice of the proceeding, has been universally recognized as the basic rule of English and American jurisprudence. The act of 1901, whereby the state of Arkansas attempted to subject all foreign corporations to personal judgments in its courts at the suits of its citizens upon the service of summons upon its auditor, was a flagrant disregard of the first principles of justice and a patent violation of the fourteenth article of amendments to the Constitution.

Counsel for the defendant in error, however, seeks to sustain the jurisdiction of the courts below and the judgment here in issue upon the ground that while this statute is void as to foreign corporations which are doing no business in the state of Arkansas, it is valid and constitutional as to those engaged in business in that state. But the statute is general in its terms. It makes no distinction between foreign corporations that are and those that are not engaged in business in Arkansas. The exception which it contains, that it "shall not be

effective in cases in which its enforcement would conflict with the powers of Congress or the federal laws to regulate commerce between the states," is not material, because the question at issue does not relate to the powers of Congress or the commercial laws of the nation, but concerns the power of the state and the national Constitution. The question is whether a statute of a state which includes by general language foreign corporations without as well as those within the constitutional jurisdiction of the state may be lawfully limited by judicial construction to the former class. Where a law is constitutional in part and unconstitutional in part, the former part may often be sustained, while the latter fails. But there are two indispensable conditions of such a result, that the constitutional and the unconstitutional parts are capable of separation so that each may be read and may stand by itself (*Baldwin v. Franks*, 120 U. S. 679, 685, 686, 7 Sup. Ct. 656, 32 L. Ed. 766), and that the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the Legislature in enacting it. *Allen v. Louisiana*, 103 U. S. 80, 84, 26 L. Ed. 318; *Baldwin v. Franks*, 120 U. S. 679, 685, 686, 689, 7 Sup. Ct. 656, 32 L. Ed. 766; *U. S. v. Reese*, 92 U. S. 214, 218, 221, 23 L. Ed. 563; *The Trade-Mark Cases*, 100 U. S. 82, 99, 25 L. Ed. 550; *U. S. v. Harris*, 106 U. S. 629, 641, 642, 1 Sup. Ct. 601, 27 L. Ed. 290; *The Virginia Coupon Cases*, *Poindexter v. Greenhow*, 114 U. S. 270, 305, 5 Sup. Ct. 903, 29 L. Ed. 185; *Sprague v. Thompson*, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115; *The Income Tax Cases*, *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 636, 15 Sup. Ct. 912, 39 L. Ed. 1108.

In *U. S. v. Reese*, 92 U. S. 214, 218, 221, 23 L. Ed. 563, Congress had enacted a law which prescribed punishment for the unlawful refusal to accept votes from all voters while its constitutional power was limited to prescribing the penalty for refusing to receive votes "on account of the race, color, or previous condition of servitude of the voter." The contention of the government was that the act was constitutional as to all refusals to receive votes on account of the race, color, etc., of the voter, and that it could be sustained to this extent and permitted to fail in other cases, because the two classes of cases and the two portions of the act applicable to them were readily separable. But the argument failed. The Supreme Court said:

"We are, therefore, directly called upon to decide whether a penal statute, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be de-

terminated, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

In the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, Congress possessed the constitutional authority to protect trade-marks in interstate and foreign commerce and it enacted a statute which by its terms protected trade-marks in all commerce. The court was urged to restrict this law by construction to trade-marks in interstate and foreign commerce and to sustain it. But it cited and quoted from the opinion in the Reese Case, and held the act unconstitutional.

In the Virginia Coupon Cases, *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185, the same argument was again met and overthrown with this declaration, which was subsequently quoted and affirmed in the Income Tax Cases, *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S., at page 636, 15 Sup. Ct., at page 920 (39 L. Ed. 1108):

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In *Sprague v. Thompson*, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115, the Legislature of Georgia had enacted a statute which would have been valid if it had not contained certain unconstitutional exceptions. The Supreme Court of that state sustained it upon the ground that the body of the act was readily separable from the exceptions. The Supreme Court reversed that decision and said:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

The act of the Legislature of Arkansas of 1901 expressly includes within the same general terms foreign corporations which transact no business within that state and those engaged in business therein. The words of the statute are plain and clear, so that there is no room for construction. It does not classify, distinguish or separate in any way corporations engaged in business in the state and those not thus occupied. The part of the statute applicable to the former class cannot be separated from that applicable to the latter class, so that each part may be read and may stand by itself, because they are both embodied in a single general clause and included in a single declaration.

The unconstitutional part cannot be eliminated from the law by striking out or disregarding any words or clauses of the act. That result can be attained only by introducing into the statute words of limitation, words which would expressly restrict the term "foreign corporation" wherever it occurs in the law by the phrase "doing business in the state of Arkansas," a species of legislation the court is without power to enact. *U. S. v. Reese*, 92 U. S. 221, 23 L. Ed. 563.

Again, this proposed amendment of the law would except from its operation all foreign corporations not engaged in business in the state of Arkansas, by far the larger portion of the corporations specified by the terms of the act. The Legislature of Arkansas had plenary power to limit this statute to foreign corporations engaged in business within that state and to except from its operation those which were not doing business therein. It expressly included both classes and excluded neither. The fact that it made no exception of foreign corporations which were not transacting business in the state raises a conclusive legal presumption that it intended to make none and it is not the province of the courts to do so. *Omaha Water Co. v. City of Omaha* (C. C. A.) 147 Fed. 1; *Madden v. Lancaster County*, 12 C. C. A. 566, 572, 65 Fed. 188, 194; *Wrightman v. Boone Co.*, 31 C. C. A. 570, 572, 88 Fed. 435, 437; *Union Central Life Ins. Co. v. Champlin*, 54 C. C. A. 208, 210, 116 Fed. 858, 860.

The conclusion is that a statute of a state which clearly includes by general language foreign corporations without, as well as those within, its constitutional jurisdiction, for example those which are not doing business within the state and those which are engaged in business therein, may not be lawfully limited by judicial construction to the former class and then sustained (1) because the constitutional and unconstitutional parts of such a statute are not separable so that each may be read and may stand by itself, (2) because the Legislature excepted neither class but expressly included both and the legal presumption is that it intended to except neither, and (3) because such a limitation would except from the operation of the statute the larger part of those which the Legislature made subject to its operation by the plain terms of the law and would thus make a new statute. For these reasons the act of 1901 may not be limited to foreign corporations within the jurisdiction of that state and then sustained, but it is unconstitutional and void in toto and the service of the summons under it upon the auditor of that state gave the courts below no jurisdiction of the Cella Commission Company. The motion to quash the service of the summons should have been granted.

The judgment below must be reversed, and the case must be remanded to the Circuit Court, with instructions to dismiss the action on the ground that it has no jurisdiction of the Cella Commission Company herein; and it is so ordered.

GLOVER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 18, 1906.)

No. 2,392.

1. WITNESSES—CRIMINAL LAW—MISCONDUCT OF COURT—CROSS-EXAMINATION.

Where, in a prosecution for robbery, a witness had testified positively in support of defendant's alibi as to the place where he saw defendant on or about the time of the alleged robbery, it was improper for the court to catechise the witness at length as to whether he was absolutely sure that the defendant was at the place stated, and to tell the witness that if he was mistaken he could correct his statement, and to ask him to think and see whether or not he was not mistaken, and to correct his testimony if there was any doubt in his mind concerning his testimony.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 852, 911.]

2. SAME—IMPEACHMENT OF CHARACTER OF WITNESS—ACCUSATION OF CRIME.

In a prosecution for robbery, it was improper for the prosecuting attorney, after certain witnesses had answered that they had been arrested for offenses in instances in which they had not even been prosecuted, and in others where they had been acquitted, to ask them whether they had not been arrested or accused several times, the mere accusation or indictment of a witness for a criminal offense, without conviction, being inadmissible for the purpose of impeachment.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1126-1128.]

3. CRIMINAL LAW—ALIBI—BURDEN OF PROOF.

Where, in a prosecution for robbery, the indictment contained a charge that defendant did "then and there" commit an assault, the burden of proof that defendant was present at the time and place alleged was on the prosecution, and never shifted, and it was therefore error to charge that the defense of alibi, to be entitled to consideration, must be such as to show that at the very time of commission of the offense charged the accused was at another place so far away and under such circumstances that he could not have participated in the commission of the offense, and that the burden of proof that the defendant was at another place, etc., must be sustained by a preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 751.]

4. SAME—CURING ERROR.

Such instruction was not cured by a further instruction that if the jury had any reasonable doubt as to whether defendant was at some other place when the crime was committed, they should give defendant the benefit of that doubt.

In Error to the United States Court of Appeals for the Indian Territory.

For opinion below, see 91 S. W. 41.

De Roos Bailey and Thomas H. Owen, for plaintiff in error.

William M. Mellette, U. S. Atty., and E. L. Kistler, Asst. U. S. Atty.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error, John Glover (for convenience hereinafter designated the defendant), was indicted at the December term, 1904, in the United States Court for the Western District of the Indian Territory for the crime of robbery. He was tried, convicted, and sentenced to pay a fine of \$50 and to imprisonment in the United States Penitentiary at Ft. Leavenworth for a term of six years. This judgment was affirmed by the Court of Appeals of the territory, to reverse which the defendant sued out writ of error from this court. The robbery in question was alleged to have been committed upon one Frank Neeley on the 27th day of May, 1904. The property taken from him was a pistol of the value of \$15.

No unprejudiced, intelligent mind can read the evidence and proceedings in this record without receiving a deep impression that this defendant was convicted, the evidence and the law to the contrary notwithstanding. This spirit of unfairness towards him throughout the trial is apparent. He was designated by the prosecuting attorney in a question as a "State nigger." And in many instances he and the witnesses of his race were treated as if they had no rights in law which a court of justice was bound to respect. There was but one witness on behalf of the prosecution, Frank Neeley, the person claimed to have been robbed. His testimony in substance was, that about 8 or 9 o'clock in the morning of May 27, 1904, he was arrested on the highway by a party of five men, and under the fear of a Winchester rifle in the hands of the defendant he was forced to give up his pistol, valued by him at about \$10. It appears from his testimony that he had no acquaintance with the defendant, and left it extremely doubtful whether or not he had ever seen him previous to the alleged assault. Despite his evasiveness and equivocation, the cross-examination developed beyond any reasonable ground for cavil that when this defendant and one Jamison, with others, were brought before the commissioner charged with this felony, on preliminary hearing, Neeley identified said Jamison as his assailant, and testified that he did not recognize the defendant as one of the party. On his testimony Jamison was bound over and committed to jail, and while thus held for the action of the grand jury he died. On this state of the proofs the prosecution rested. Had the defendant's counsel moved, as he should have done, for a directed verdict of not guilty, the trial court would have been justified in granting the request. The safeguarding of the liberty of an accused person is not wholly left in the keeping of the jury of 12. A jealous regard for that humane spirit of the law that attends every human being brought before the judgment seat for trial on a criminal charge, declaring that he must be presumed to be guiltless, and that before his liberty can be interrupted his guilt must be established beyond a reasonable doubt, demands of the presiding judge in the first instance a determination of the question as to whether or not, on such self-contradicting and self-stultifying statements as made by the witness, Neeley, without a single corroborating fact or circumstance, the case should pass beyond the control of his enlightened judgment and conscience. Mr. Justice Brewer,

in *Patton v. Texas & Pac. Railway Company*, 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361, speaking of a proceeding in a civil action, said:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact. * * * Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

If this rule of judicial responsibility obtains in a mere civil action, how much more potential should it be where the issue of life or liberty is involved. The cause of the defendant was certainly not prejudiced by the large amount of evidence in his behalf, which was mainly directed to the establishment of an alibi. Aside from the testimony of the defendant, which, viewed from the standpoint of his meager intelligence and evident lack of capacity for invention, accounting with marked particularization for his whereabouts away from the scene of the robbery, four witnesses testified positively to his presence at the time at a place far removed from that of the robbery. A fifth witness testified to seeing a posse of men corresponding in number to that claimed by Neeley as present at the assault, near to and going in the direction of the place about the time fixed by Neeley, and that the defendant was not one of them. A sixth witness, a woman in nowise related to the defendant, testified to seeing the overt act, and that the defendant, well known to her, was not there. It may be conceded that in all matters of detail the testimony of some of these witnesses was not entirely harmonious. But having a sensible, reasonable regard to their different view points, the degree of inattention to some one incident and the degree of attention given by others thereto, there was no such marked divergence as ought to create in any impartial mind a reasonable suspicion of a conspiracy among these witnesses to establish the alibi. It is the judgment of intelligent and observant critics that one of the strong proofs of the absence of manufactured evidence among a class bearing testimony to a common, central fact, is the existence of some discrepancies in their statements as to minor details.

A striking illustration of the character of the discrepancies relied upon by the prosecution is found in the incident of leaving the house of the defendant's mother-in-law for the schoolhouse to attend a neighborhood gathering; the departure and trip being claimed by the defendant to have been concurrent in time with the alleged robbery. One witness, for instance, testified that the defendant, with others, rode in a wagon; while he and another stated that he walked. That such a wagon did so go is not controverted. How easy was it for a witness who saw the wagon leaving with a number of people in

it at the time the defendant started to have received the impression that he was also in the wagon, there being nothing especially to direct the attention to the particular fact. Again, one witness, on cross-examination, testified as to what kind and variety of things the party had for breakfast before starting on the trip; while another testified to a different menu. As it does not appear that any of them were epicures, the quality and quantity of the eatables on the particular occasion, which was not a feast, naturally enough would not have been definitely carried for a long period of time in their memory. So in respect of exactly how many people and who they were at this house the day before. Likewise was it rather smart than fair to press some of these witnesses on cross-examination as to where they were and what they did on some other specified day of the same month, in disregard of the absolute reasonableness why a day like the closing scene of a school term, when the neighbors with their baskets of delectable viands assembled and made it a festal event, would be fixed in their minds. On such trivialities, of claimed divergencies in testimony, was the evidence of six witnesses in favor of the defendant discredited, while on the testimony of one witness, a self-confessed perjurer, was the defendant convicted and sentenced to serve six years in a penitentiary. To further illustrate the spirit of dealing with the defendant's witnesses, when the witness Solomon was on the stand, who had testified very positively as to the place where he saw the defendant on or about the time of the alleged robbery, and whose testimony, if unimpeached, was of the highest value to the defendant, the court, as if to break the force of his testimony, took the witness in hand and catechised him as follows:

"Solomon, the court asks you whether you are absolutely sure and certain that this defendant was there at the school celebration on the 27th; if you are mistaken you can correct your statement yet, but if you are absolutely certain say so; but think a moment and see whether or not you are mistaken about it. If you are mistaken correct your statement; if you are not, why just say it out. Perhaps you might be mistaken; the court doesn't know; but the court wants to have you remember everything properly and truthfully, and if there is any doubt in your mind, make your correction; if there is any doubt in your mind that this defendant was not there; men sometimes are mistaken; just think about it and deliberate about it, and correct your statement if you are mistaken."

This bears on its face its own comment.

As further illustrating the irregular method of procedure to the prejudice of the defendant, the prosecuting attorney inquired of several witnesses for the defense as to whether they had not been arrested at some time on some charge or other. Although the witnesses answered that they had been arrested for offenses, in instances they had not even been prosecuted, and where prosecuted they had been acquitted, the prosecuting attorney would follow this up, however, with a suggestive query: "You have been arrested or accused several times?" It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime must rise to the dignity of a felony or petit

larceny. *State v. Taylor*, 98 Mo. 244, 11 S. W. 570; *State v. Kelsoe*, 76 Mo. 507; *State v. Donnelly*, 130 Mo. 651, 32 S. W. 1124; *Coble v. State*, 31 Ohio St. 100; *Glenn v. Clore*, 42 Ind. 60. Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted, for the reason that innocent men are often arrested charged with a criminal offense. 1 *Greenleaf on Evidence* (16th Ed.) 461b, 461c, pp. 579, 580. The proper evidence of a conviction of crime is the record thereof. See *Baltimore & Ohio Railroad Company v. Rambo*, 59 Fed. 75-80, 8 C. C. A. 6; *Bise v. United States* (recently decided by this court) 144 Fed. 374. The practice of proving the former conviction by cross-examination is recognized in many states, usually by statute and occasionally by judicial decisions. 1 *Greenleaf on Evidence* (16th Ed.) par. 461b, note 8. But where this practice is recognized, the proper question would be as to whether or not the party being interrogated had been convicted of a crime, and not whether he had been arrested or indicted. Whether it is permissible, in the absence of any statute in the Indian Territory regulating the practice in this respect, to undertake to prove by cross-examination of the witness, without the production of the record, that he had been convicted of a crime, for the purpose merely of affecting his credibility and not as to his competency, it will be time enough for this court to determine when the question is properly before it.

In charging the jury on the important issue of the alibi the court said:

"Such defense, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place so far away and under such circumstances that he could not, with any ordinary exertion, have reached the place where the crime was committed so as to have participated in the commission thereof. But the court instructs the jury also, as a matter of law, that the burden to prove that the defendant was at another place at the time of the commission of the crime must be by a preponderance of evidence, that is, by the greater and superior evidence."

The defendant excepted to that part of the charge, whereupon the court further said:

"Gentlemen of the jury, the court will read to you again the instruction as to the alibi. The defense interposed by the defendant in this case is what is known in law as an alibi; that is, that the defendant claims that he was at another place at the time of the commission of the crime, and the court instructs the jury that such defense is as proper and legitimate, if proved, as any other, and all evidence bearing upon that point should be carefully considered by the jury. Such defense, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place so far away and under such circumstances that he could not, with any ordinary exertion, have reached the place where the crime was committed so as to have participated in the commission thereof. But the court instructs the jury also, as a matter of law, that the burden of proof that the defendant was at another place at the time of the commission of the crime must be by a preponderance of the evidence, that is, by the greater and superior evidence, but the court also instructs the jury that if they have any reasonable doubt as to whether

the defendant was at some other place when the crime was committed, they should give the defendant the benefit of that doubt."

The Supreme Court met the objection in question with two propositions of law: (1) That the exception was not renewed after the amended charge was delivered; and (2) that the amendment cured the defect in the original charge. To neither of these propositions can we assent.

If there was vice in so much of the paragraph as imposed upon the defendant the burden of establishing the alibi "by a preponderance of evidence, that is, by the greater and superior evidence," and that from all the facts and circumstances the jury were to "determine upon which side is the weight or preponderance of the evidence," it was not necessary to repeat the exception to the same matter when repeated by the court. As said by this court in *Long-Bell Lumber Company v. Stump*, 86 Fed. 583, 30 C. C. A. 260, speaking to a kindred question of practice:

"Having requested the court to give a proper declaration of law, and the court, by its refusal, having declared that it held the law to be otherwise, to which exception was duly taken, why should counsel be required again to except to the converse or modified declaration given by the court? It would be but a repetition of the objection already expressed in the first exception. And, so far from the silence of counsel at the reassertion of the error by the court evidencing a waiver of the first error, it but evinces a respectful deportment by counsel towards the court, in refraining from repetitious objections at the ruling of the court, after having once taken exception involving in effect the same principle which would be represented in the second exception."

The underlying vice in the foregoing charge of the court is in the assumption that in respect of the alibi the burden of proof "by a preponderance of evidence, that is, by the greater and superior evidence," shifted to the defendant. It loses sight of the fundamental rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged; that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it.

Included in the indictment is the charge that the defendant did then and there commit the assault. Whereby the prosecution undertook to show by evidence that the defendant was present at the time and place. On this issue thus tendered the burden rested upon the prosecution. It never shifted. So when the defendant introduced evidence to show that he was not "then and there" present, he was but rebutting the proof offered by the prosecution tending to maintain the allegation that he was then and there. The protection of any reasonable doubt in favor of the defendant applies in such instance as to any other affirmative issue tendered in the charge. This is recognized as the correct doctrine by the great weight of authority.

People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233; State v. Waterman, 1 Nev. 543; French v. State, 12 Ind. 670, 74 Am. Dec. 229; Adams v. State, 42 Ind. 373; Binns v. State, 46 Ind. 311; Howard v. State, 50 Ind. 190; Walker v. State, 42 Tex. 360; Toler v. State, 16 Ohio St. 583; Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703; Miller v. People, 39 Ill. 457; Watson v. Commonwealth, 95 Pa. 418; Landis v. State, 70 Ga. 652, 48 Am. Rep. 588; Chappel v. State, 7 Cold. (Tenn.) 92; State v. Jaynes, 78 N. C. 504; People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642; O'Connell v. People, 87 N. Y. 377, 380, 41 Am. Rep. 379; Walker v. People, 88 N. Y. 81, 88; People v. Garbutt, 17 Mich. 9, 22, 97 Am. Dec. 162; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 630; Dove v. State, 3 Heisk. (Tenn.) 348, 371; 1 Bishop, Crim. Proc. (3d Ed.) § 1062; Wharton, Crim. Evidence, § 333.

In the case of State v. Taylor, 118 Mo. 153, 24 S. W. 449, Gantt, P. J., maintained this rule of law in an exhaustive opinion in which the authorities are reviewed. This rule was applied by the Supreme Court in Davis v. United States, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499, to the instance where the defendant relied upon the plea of insanity under an indictment for murder. Inasmuch as the prosecution in such case starts out with the presumption of the defendant's sanity, which presumption must be rebutted by the defendant, the burden is much more impressed in such trial than in the case at bar. Mr. Justice Harlan, speaking for the court, said:

"Upon whom then must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed this crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive ground of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime."

Further on he said:

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged."

This ruling was applied and approved again in *Hotema v. United States*, 186 U. S. 413, 22 Sup. Ct. 895, 46 L. Ed. 1225. The vice, therefore, in the said charge was not cured by subsequently adding the words:

"If the jury have any reasonable doubt as to whether the defendant was at some other place when the crime was committed, they should give the defendant the benefit of that doubt."

The two propositions embraced in the same paragraph are legally incongruous, and were well calculated to confuse the understanding of the jury as to how they should apply the rule of reasonable doubt to a state of facts where, in the same connection, they were told that "as matter of law, the burden of proof that the defendant was at another place at the time of the commission of the crime must be by a preponderance of the evidence, that is, by the greater and superior evidence."

Error is assigned by the defendant respecting the refusal of the trial court to leave the matter of the assessment of the punishment to the jury. The indictment was predicated of section 2 of the act of Congress, approved February 15, 1888, entitled "An act to punish robbery, burglary, and larceny in the Indian Territory" (Act Feb. 15, 1888, c. 10, 25 Stat. 33), which declares:

"That any person hereafter convicted of any robbery or burglary in the Indian Territory shall be punished by a fine of not exceeding one thousand dollars, or imprisonment not exceeding fifteen years, or both, at the discretion of the court."

Section 3 declares that all acts and parts of acts inconsistent with this act are hereby repealed. As this provision of the act of Congress is complete within itself, and not made to depend upon any other statute, national or local, for its applicability or enforcement, it is exclusive. It is conformable to the general provisions of the United States statutes defining criminal offenses, committing to the jury only the question of the guilt or innocence of the accused, and to the court the discretion as to the assessment of the punishment, within the limits fixed by the statute.

It results that the action of the Court of Appeals of the Indian Territory in affirming the judgment of the District Court, and the judgment of the District Court, are reversed, and the case is remanded, with directions to the District Court to set aside the judgment of conviction and the verdict, and to grant a new trial.

PARSHALL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1906.)

No. 2,404.

POSTOFFICE—RAILWAY MAIL CLERKS—EXPENSES—LIABILITY OF GOVERNMENT.

Rev. St. § 3678 [U. S. Comp. St. 1901, p. 2453]; 1 Supp. Rev. St. p. 201; Rev. St. §§ 3690, 3691 [U. S. Comp. St. 1901, p. 2471], declare that all sums appropriated for the various branches of expenditure in the

public service shall be applied solely to the objects for which they are respectively made, and for no others. Section 3679 [U. S. Comp. St. 1901, p. 2454] provides that no department of the government shall expend in any one fiscal year a sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations. The annual appropriations for the post office department provide for actual and necessary expenses by railway postal clerks "while actually traveling on business of the department, and away from their several designated headquarters, etc. *Held*, that under such acts, a railway postal clerk could not recover against the United States as on an implied contract for expenses of bed and board while on his regular run, in addition to his fixed salary.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

C. O. Tichenor and Frank Schibsby (George Reinhardt, on the brief), for plaintiff in error.

D. P. Dyer, U. S. Atty., and E. P. Johnson, Asst. U. S. Atty., for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action by the plaintiff to recover for his expenses incurred between August 15, 1899, and November 15, 1904, aggregating \$1,200 as a railway postal clerk while engaged on his regular runs.

The petition alleges that he was duly appointed and commissioned as such railway postal clerk by the Postmaster General under section 4025, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2738]; that while he was acting in the capacity of such clerk, by orders and directions of the Postmaster General, and other superior officers, he was compelled to travel a great part of the time on business of the Post Office Department; that the said officers had authority to assign him to any route of travel whatsoever, and to change this assignment at wil.; that while so traveling he was necessarily absent from his headquarters as established and designated by his superior officers, to wit: St. Louis, Missouri, and was obliged to expend the sums of money mentioned for hotel bills and other necessary traveling expenses, for which expenses he claims he is entitled to be reimbursed "as upon an implied contract." The account presented by him in his petition is as follows:

From August 15, 1899, up to and including June 30, 1900.....	\$200 00
From July 1, 1900, up to and including June 30, 1901.....	210 00
From July 1, 1901, up to and including June 30, 1902.....	220 00
From June 1, 1902, up to and including June 30, 1903.....	240 00
From July 1, 1903, up to and including June 30, 1904.....	240 00
From July 1, 1904, up to and including November 15, 1904.....	90 00

All of said sums being a total of.....\$1200 00

The petition alleges as authority for these reimbursements section 2 of the Revised Postal Laws and Regulations, and the following acts of Congress: Act March 1, 1899, c. 327, 30 Stat. 964 [U. S.

Comp. St. 1901, p. 2730]; Act June 2, 1900, c. 613, 31 Stat. 259 [U. S. Comp. St. 1901, p. 2737]; Act March 3, 1901, c. 851, 31 Stat. 1105; Act April 21, 1902, c. 563, 32 Stat. 115; Act March 3, 1903, c. 1009, 32 Stat. 1173. A demurrer to this petition was interposed by the United States Attorney, which was sustained by the court. The plaintiff below brings the case here on writ of error.

The contract of service between the plaintiff and the government has its sole foundation in a positive statute. The authority of the Post Office Department to employ and assign him to the service in which he was engaged was derived from the statute. No discretion was lodged in the Postmaster General or his subordinates as to what compensation such employé should receive—that was fixed absolutely by Congress. It will be observed on reading the acts of Congress above referred to that Congress in each appropriation bill fixed the number of such railway postal clerks, classified them, and fixed the maximum salary to each class, which in the case of this plaintiff was \$800 per annum. It is the settled and recognized policy of Congress to keep all the departments of the government, in the matter of incurring obligations for expenditures, within the appropriations annually made for conducting its affairs. Hence the general statute (Rev. St. § 3678 [U. S. Comp. St. 1901, p. 2453]; 1 Supp. Rev. St. p. 201; Rev. St. §§ 3690, 3691 [U. S. Comp. St. 1901, p. 2471]) that:

"All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

Section 3679 [U. S. Comp. St. 1901, p. 2454] provides:

"No department of the government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations."

So it is that in the annual appropriations for the Post Office Department providing for railway postal service, the acts prescribe the maximum number of such clerks in each classification and their maximum salaries; and in order to limit the extra expenditures incurred on account of claimed necessity in traveling on special assigned duty, it is provided in each of the appropriation bills that:

"For actual and necessary expenses of general superintendent, assistant general superintendent, chief clerk, office general superintendent, division superintendents, assistant division superintendents, chief clerks, and railway-postal clerks, while actually traveling on business of the department and away from their several designated headquarters," etc.

Congress limited the amounts as follows:

For fiscal year ending June 30, 1900.....	\$15 000 00
For fiscal year ending June 30, 1901.....	40 000 00
For fiscal year ending June 30, 1902.....	26 000 00
For fiscal year ending June 30, 1903.....	23 000 00
For fiscal year ending June 30, 1904.....	21,000 00

No authority is conferred on the Post Office Department to incur any liability for traveling expenses of any railway postal clerk except when such clerk is "traveling on business of the department and

away from his designated headquarters." The clear implication is that when such employé accepts service at a specified salary, to work at an assigned place, designated as headquarters, his undertaking is to perform his assigned duty at such place, and the salary prescribed is the full compensation for his entire services, including whatever personal expenses may be incident thereto. The Post Office Department knows from experience that in conducting the multi-form matters connected with a business so comprehensive, it now and then becomes important to detail certain officers and clerks, especially qualified and adapted, to some special work outside of their regular assignment, necessitating travel perhaps to distant places, which necessarily would be attended with extra expenses; and, therefore, provisions for such traveling expenses are annually made by Congress in appropriations for that department. The railway postal clerks accept service to be performed by trips on postal cars. Their places of business and the facilities for performing their duties are thus furnished by the government; and their headquarters may be designated as the initial point where their "run," like that of a railway conductor or brakeman, begins. Their regular assignment is on a postal car between different points, for the performance of which work such clerk agrees to accept a stated salary. In deciding whether or not the compensation be acceptable, he is presumed to take into account the probable outlay for expenditures incident to that particular service; as much so as any superintendent or assistant superintendent or clerk in accepting employment at a particular city or other given locality considers the matter of expense of living at the place, in deciding whether or not they will accept the service. Each is at liberty to accept or decline on the compensation offered, as it may seem to him to be sufficient or not.

The petition in this case does not state between what points the plaintiff made his runs; and as drawn it is so phrased as to give color to the idea that the pleader might have intended to have it understood that the expenses claimed were incurred in traveling on special orders from the Post Office Department, outside of his regular duties. But his counsel dealt candidly in arguing the case to the court by conceding that the expenses claimed were incident alone to the plaintiff's regular runs as a railway postal clerk. Otherwise the petition would be bad as presenting a double aspect.

Instead of an "implied contract" arising in favor of this extraordinary claim put forth by the plaintiff, the implication, to our minds, is the reverse. A legislative act is to be interpreted according to the intention of the Legislature, apparent on its face. *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *United States v. Fisher*, 109 U. S. 143, 3 Sup. Ct. 154, 27 L. Ed. 885. It will be observed from the acts of Congress making appropriations for the periods covered by the plaintiff's claim, the amounts of appropriations for expenses incurred by superintendents, assistants and clerks for traveling from their headquarters aggregate only \$130,000; or averaging about \$26,000 a year. The average annual expenses claimed by the

plaintiff are \$200. As shown by the report of the General Superintendent of the Railway Mail Service, as also appears from the statutes, there were in the division alone to which the plaintiff belonged 501 clerks, and in all the classes, excluding superintendents, assistant superintendents and chief clerks there were about 12,000. If their expenses, like those claimed, average \$200 per year, it would require an appropriation of \$2,400,000 per year to meet them; and for the class alone to which the plaintiff belonged, it would require an annual appropriation of \$100,200. This fact clearly demonstrates that it was not the mind of Congress that railway postal clerks, in addition to their fixed salaries, should be paid their expenses for bed and board while out on their runs. They are supposed to have their homes at one end of their runs, and not to be out over a day and a night at a time. Under the plaintiff's contention he is continuously traveling away from his headquarters whenever he is on duty at all, because the mail car in which he works may run daily. Whereas, the statute contemplates that traveling expenses reimbursed are such as are incurred when the employé travels under special order taking him outside of his regular routine duty. Otherwise, the special statutory provision would be meaningless and supererogatory. Where the legislative branch of the government has thus clearly indicated its purpose by its appropriations and the provisions connected therewith that the salary fixed by the act shall be full compensation to the employé for the services performed by him, and only allows for expenses incurred for bed and board when separated from his regular duty by special assignment attended with traveling expenses, to allow the claim presented by the petitioner would, in our judgment, amount to an amendment of the acts of Congress by judicial construction.

A similar claim to this was presented to and passed upon by the Court of Claims, entitled *Hartman v. United States*, 40 Ct. Cl. 133, 136, taking the same view of the statute above expressed, denying the claim. We have not overlooked or failed to duly consider the authorities presented in the brief of counsel for plaintiff bearing upon the doctrine of implied contracts, and the instances in which it has been applied by the Supreme Court and on the circuit for services performed for the government. We do not consider them applicable to or as controlling the case at bar, for the reason that this cause of action is wholly statutory.

The judgment of the Circuit Court in sustaining the demurrer and dismissing the petition is affirmed.

DOKKEN v. PAGE.

(Circuit Court of Appeals, Eighth Circuit. July 30, 1906.)

No. 2,399.

1. BANKRUPTCY—PETITION BY ADVERSE CLAIMANT OF PROPERTY—NATURE OF PROCEEDING.

A receiver in bankruptcy, by order of the court, took possession of a stock of goods which the bankrupt had transferred to a third person, and, by stipulation between the petitioning creditors, the trustee, and the transferee, the latter filed an intervening petition in the court of bankruptcy setting up his claim to the goods as a bona fide purchaser. *Held*, that the proceeding on such petition was essentially one in equity relating to property in the custody of the court, and triable by the court without the intervention of a jury.

2. SAME—FRAUDULENT TRANSFER OF PROPERTY—PURCHASER OF STOCK OF INSOLVENT MERCHANT.

A purchaser of the entire stock of an insolvent retail merchant, within four months prior to his bankruptcy, is presumptively a purchaser with knowledge of the insolvency, and the burden rests upon him to show by satisfactory evidence that his purchase was in good faith for a present fair consideration, and that he did not know or have reason to believe, after making all reasonable inquiry, that the seller was insolvent.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 285.]

3. SAME—EVIDENCE CONSIDERED.

A bankrupt, within a few days prior to his bankruptcy, and when insolvent, sold to petitioner two stocks of goods for less than half their actual value. The goods were bought and paid for in the evening after a short negotiation, without invoice or examination of the goods or the bankrupt's books, or any inquiry as to his financial condition. Petitioner borrowed the greater part of the money from a banker who was present when the sale was made, and who had reason to know of the seller's insolvency. *Held*, that petitioner had no standing in equity as a purchaser in good faith, but that the sale was fraudulent and void as against the bankrupt's creditors.

Appeal from the District Court of the United States for the District of North Dakota.

John Burke (Burke & Middaugh, on the brief), for appellant.

Fred B. Dodge (Clarence A. Webber, on the brief), for appellees.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. On the 13th day of May, 1905, Abraham Z. Tveten was adjudged a bankrupt in an involuntary proceeding in the United States District Court for the District of North Dakota. Upon the appointment of a receiver of the estate of the bankrupt, under order of court, he took possession of a lot of goods, transferred and delivered by the bankrupt on or about the 19th day of April, 1905, to Nils Dokken. Thereafter on the 24th day of June, 1905, a stipulation was entered into between the petitioning creditors in bankruptcy and E. B. Page, trustee in bankruptcy, and said Nils Dokken, the claimed purchaser of said goods from the bankrupt, that said Dokken should file in the above-named court "his complaint and intervention setting forth all the claims of the said Nils Dokken to said

stock of goods by the 1st day of July, 1905"; and that answer thereto should be filed on or before the 1st day of July, 1905; and that the cause should be set down for trial at the July term of said court. Thereafter on the 26th day of June, 1905, said Dokken filed his complaint of intervention, claiming that on the 18th day of April, 1905, he purchased of the bankrupt the stock of goods in question, paying therefor the sum of \$2,800, for a present and fair consideration at the time; that he was ignorant of the insolvency of said Tveten, and did not have knowledge of any facts to put him upon inquiry as to the financial condition or insolvency of said Tveten; that the purchase was made in good faith, etc.; that the goods were turned over to the receiver in bankruptcy on the 4th day of May, 1905, in compliance with the order of court to that effect; and prayed judgment for the return of the goods or their value, alleged to be the sum of \$3,000. Answer was filed, taking issue on the validity of the claim asserted, and, on trial of the issues to the court, the complaint was dismissed, from which action of the court the said Dokken has appealed.

The first error assigned is to the action of the court in refusing appellant's request for a trial by jury. This is a misconception of the functions of a court of bankruptcy in respect of the situation of this suit. The goods in question had been surrendered by appellant to the receiver in bankruptcy under order of the court. They were thereafter in custodia legis, held by the court for the purpose of administration and distribution, *pari passu*, among the creditors. The proper method which the appellant should pursue to assert his claim thereto was the one adopted by the petition of intervention in the court of bankruptcy, invested with equitable jurisdiction to determine whether or not the asserted claim was superior in right to that of the general creditors. The petition presented by appellant was in conformity to the stipulation that he should intervene, and it is styled "Complaint in intervention," and the petition begins as follows: "Comes now Nils Dokken and for his complaint in intervention," etc. It is essentially a proceeding in equity, triable to the court without the intervention of a jury. *Barton v. Barbour*, 104 U. S. 126, 134, 26 L. Ed. 672; *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Dodge v. Norlin*, 133 Fed. 363, 66 C. C. A. 425; *Swarts v. Siegel et al.*, 117 Fed. 13, 16, 54 C. C. A. 399; *In re Rochford*, 124 Fed. 187, 59 C. C. A. 388, 393.

The claim of the intervener is a palpable fraud on the bankrupt act. It is full time that speculating purchasers from insolvent debtors should know that under the bankrupt act they cannot stop their ears and shut their eyes lest they may hear or see that such a merchant as Tveten was selling out his entire stock of goods in order to defeat his creditors in the collection of their just claims. Such speculators on chance seem to think that they can escape the statute by studiously and cunningly placing themselves in a position to half satisfy conscience by saying:

"I did not know the vendor was bankrupt. He did not so inform me; and I did not ask him. I did not know about his creditors, as I did not examine

his books. I did not take an inventory of the goods or carefully examine them, as I had a general knowledge of their character, and did not look further"—and the like.

Under the bankrupt act such a purchaser, within the four months' limitation, is presumptively a purchaser with knowledge. To protect his purchase the burden rests upon him to show satisfactorily that he was purchaser in good faith; that he paid a present, fair consideration for the property; and that he did not know or have reason to believe that the vendor was insolvent.

The pronouncement of the Supreme Court in *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489, as to what will constitute an innocent purchaser within the meaning of the bankrupt act, as applied to the facts of the case at bar, has ever since been the recognized rule of law, and has been repeatedly followed on the circuits under the present bankrupt act. That was the case of a merchant who sold his entire stock of goods out in a lump sale to a purchaser. After observing that the ordinary course of such a merchant's business was to sell at retail from a miscellaneous stock of goods, and that as long as he pursued the course of a retailer in disposing of his goods his creditors could not reach him, even if he had a concealed purpose to defraud them, the court said:

"But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such business, is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase."

The court then adverts to the fact that the purchaser undertook to overthrow the presumption of the vendor's intention to commit a fraud on his creditors by showing that he paid full value for the goods, in ignorance of the vendor's financial condition. The court then said:

"But the law will not let him escape in this way. The question raised by the statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller, and he was put on inquiry to ascertain the true condition of Mendelson's [the bankrupt vendor] business. This he did not do, nor did he make any attempt in that direction. Indeed, he contended himself with limiting his inquiries to the object Mendelson had in selling out, and to his future purposes. Something more was required than this information to repel the presumption of fraud which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain the sale, the provision of the bankrupt law we are considering would be no protection to creditors, for any one in Mendelson's situation, and with the purpose he had in view, would be likely to give the party with whom he was dealing a plausible reason for his conduct. The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield [the vendee] had employed any means at all directed to this end, he would have discovered the actual insolvency of Mendelson. In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy, in case Mendelson should, within the time limited in the statute, be declared a bankrupt."

See *In re Pease* (D. C.) 129 Fed. 446; *In re Moody* (D. C.) 134 Fed. 628, 631; *Dutcher v. Wright*, 94 U. S. 557, 24 L. Ed. 130.

The evidence in the case at bar shows that on the 18th day of April, 1905, the said Tveten owned a stock of goods at the town of Leeds, N. D., and also a stock of goods at the town of Niles, N. D. After allowing every reasonable deduction for their condition, said stocks were worth, in the usual course of business to a merchant, between \$5,000 and \$6,000. According to his schedules in bankruptcy, Tveten then owed \$8,129. He was being pressed by his creditors and was in fear of the institution of bankruptcy proceedings. He and the appellant claim that they met on the 18th day of April, 1905, when the subject of the sale and purchase of the goods was broached. Without more, after business hours, in the nighttime, these two parties met in the claimant's storeroom in Leeds and consummated the sale of the entire stock of goods at Leeds and at Niles, at the price of \$2,800. There was present at this storeroom that evening one Iverson, president of the bank at Leeds, who bore intimate business and personal relations to the complainant, who had reason beyond question to know that Tveten was in financial straits, that claims were held against him at the bank, and who was undoubtedly helping Tveten to get rid of the goods with the view of having the claim of the bank against him settled. Neither of these parties, in their examination as witnesses, would tell any detailed conversation between them during this negotiation. They simply talked about what the goods could be had for. The complainant made an offer of \$2,000, and they finally agreed upon \$2,800. This was concluded about 10 o'clock p. m., and thereupon the parties left the store and went to Iverson's bank, where a certified check for \$2,800 was made in favor of Tveten. At the time the complainant had but \$700 to his credit in the bank, and the president thus accommodated him, upon his assurance of giving collateral security on some land on which there was a mortgage, and perhaps some personal property. The next day Tveten paid off the debts held against him by the bank, and some other debts to the amount of about \$700, and claims that he converted the balance into national currency and sent \$1,200 of it by letters to his father in Norway. No invoice of the goods was taken, and only the most cursory inspection, with the sweep of the eye, was made. Although an inventory of these goods was taken in the month of February preceding, showing a valuation of over \$8,000, this inventory was not called for. No examination of the books was made or asked for, although present in the store. No inquiry was made respecting the indebtedness of the claimant. The stock of goods at Niles, some four miles distant, was not even then seen by the complainant. The next day the complainant went to Niles and had the goods there loaded into eight wagons and hauled over to Leeds, when he began selling some of the articles as rapidly as possible, and at low rates.

There are other facts and circumstances in evidence which persuade a nonsuspicious mind that the complainant had knowledge of

the straightened condition of Tveten's affairs, and that he was conscious of obtaining his property at a great sacrifice because of that fact. Such a vendee has no standing in a court of equity as a purchaser in good faith, for a present, fair consideration, without knowledge of, or reason to believe that his vendor was then insolvent.

The decree of the District Court is therefore affirmed.

KRAUSE et al. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. August 20, 1906.)

No. 2,359.

1. CRIMINAL LAW—CONSOLIDATION OF INDICTMENTS.

Indictments charging offenses of the same nature and degree and based on the same statute may be consolidated for trial under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720].

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1376.]

2. SAME—SEPARATE TRIAL OF CODEFENDANTS—DISCRETION OF COURT.

The request of defendants charged in the same indictment for separate trials is addressed to the discretion of the court, and its action in refusing the same will not be reviewed in the absence of clear indications that serious prejudice resulted therefrom to one or more of the defendants.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1380; vol. 15, Cent. Dig. Criminal Law, § 3050.]

3. SAME—WRIT OF ERROR—REVIEW—PRESUMPTIONS—SENTENCE—GOOD AND BAD COUNTS.

Where defendants were acquitted on certain counts of an indictment and convicted on others, and the judgment imposes a punishment within the limits permissible under any one of such counts, if any of them are good it is sufficient to support the judgment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3035.]

4. PUBLIC LANDS—UNLAWFUL INCLOSURE—INDICTMENT—SUFFICIENCY.

Indictments under Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], for inclosing and asserting a right to the exclusive use and occupancy of public lands without claim or color of title thereto acquired in good faith under the land laws, considered, and *held* good.

5. CRIMINAL LAW—REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.

Where the bill of exceptions in a criminal case does not profess to contain all the evidence, the appellate court must assume that there was sufficient to support the verdict.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3031.]

6. JURY—PEREMPTORY CHALLENGES IN CRIMINAL CASE—CONSOLIDATION OF INDICTMENTS.

Semble, that when a number of indictments against the same defendants charge similar offenses of the same degree, based on the same statute, and which might have been charged in separate counts of the same indictment, their consolidation for trial places them in the same category as if they were separate counts of one indictment, and the defendants are entitled to only the same number of peremptory challenges.

*Rehearing denied December 5, 1906.

7. CRIMINAL LAW—WRIT OF ERROR—REVIEW—HARMLESS ERROR—PEREMPTORY CHALLENGES—FAILURE TO EXHAUST.

A defendant who does not exhaust the peremptory challenges allowed him cannot assign as error the refusal of the court to allow a greater number.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3115.]

8. PUBLIC LANDS—ILLEGAL INCLOSURE—PROSECUTION—EVIDENCE.

On the trial of an indictment for inclosing and asserting an exclusive right to public land without claim or color of title, in violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], acts, conduct, and statements of defendants tending to show the assertion of a right to exclude the general public or others from the lands described are competent evidence.

9. CRIMINAL LAW—ERROR IN ADMISSION OF EVIDENCE—CORRECTION BY INSTRUCTION.

The misconduct of a prosecuting attorney in securing the admission of incompetent testimony, prejudicial to defendants upon his statement that its materiality would later be shown, was rendered harmless, and the admission of such evidence is not assignable as reversible error where the court subsequently clearly stated to the jury that they should disregard it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2122.]

10. SAME—JOINDER OF DEFENDANTS IN WRIT OF ERROR—DECISION OF APPELLATE COURT.

Where two defendants tried together after conviction sued out a joint writ of error and joined in the assignment of errors and argument, the appellate court cannot consider their cases separately, but must affirm or reverse as to both.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3215.]

In Error to the District Court of the United States for the District of Nebraska.

R. C. Noleman and C. C. Barker, for plaintiffs in error.

Sylvester R. Rush, Special Asst. U. S. Atty. (Charles A. Goss, U. S. Atty., on the brief).

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The defendants were prosecuted under three indictments, found at successive terms of court, containing in all 17 counts.

They are predicated of sections 1 and 3, c. 149, Act Feb. 25, 1885, 23 Stat. 321, 322 [U. S. Comp. St. 1901, pp. 1524, 1525], which are as follows:

"That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construc-

tion, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

"Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: Provided, this section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto in good faith."

As the offenses charged are under the same statute, with the proper information which should precede the presentation of an indictment for the consideration of the grand jury, the offenses could have been embraced in one indictment, and with proper analysis could have been condensed into fewer counts, always to be desired, as it tends to prevent embarrassing confusion in the consideration of a multiplicity of issues which are difficult to be intelligently carried in the minds of the jury through a protracted trial, and to be properly separated in making up their verdict.

But there is no merit in the objection made on behalf of plaintiffs in error (hereinafter for convenience designated the defendants) to the action of the court in consolidating the several indictments for trial. As the several acts charged are predicated of legally allied transactions of the same degree, their consideration for trial to one jury was permissible under section 1024, Rev. St. U. S. [U. S. Comp. St. 1901, p. 720]. *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Pointer v. United States*, 151 U. S. 401, 14 Sup. Ct. 410, 38 L. Ed. 208; *Bucklin v. United States* (No. 2) 159 U. S. 685, 16 Sup. Ct. 182, 40 L. Ed. 304.

Neither was there reversible error in the action of the court in refusing the request of defendants for separate trials. In practice this is matter resting largely in the sound discretion of the trial court, which will not be reviewed in the absence of clear indications that serious prejudice resulted therefrom to one or more of the defendants. *United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300. At the time such preliminary question arises the judge, not being in possession of other facts than those disclosed on the face of the indictment, must act thereon until a clear showing made on the part of the objecting defendant that his interests will be seriously prejudiced by a joint trial. And where it becomes apparent to the presiding judge in the progress of the trial that injustice may be done to any defendant by such joint trial, it is to be presumed that he will afford relief by awarding a new trial. As the defendants were acquitted on certain counts and convicted on others, if any of the latter are good, they are sufficient to support the verdict; the penalty imposed by the judgment of the court being within the limit permissible under either of such counts. *Dunbar v. United States*, 156 U.

S. 185-192, 15 Sup. Ct. 325, 39 L. Ed. 390; *Tubbs v. United States*, 105 Fed. 61, 44 C. C. A. 357. Both defendants below were found guilty on the first and third counts of the third indictment; the defendant John Krause being sentenced to pay a fine of \$800 and one-half the costs, and the defendant Herman H. Krause to pay a fine of \$500 and one-half the costs.

The first count of the third indictment is predicated of section 1 of said statute, which, after laying the venue, charges that the defendants on the 1st day of August, 1903—

"Did then and there wrongfully, unlawfully, willfully and knowingly maintain and control an inclosure of the public lands of the United States, containing four thousand five hundred and sixty acres [a particular description of which follows], said inclosure so maintained and controlled consisting of and being posts and wire fences, and they, the said John Krause and Herman H. Krause, so maintaining and controlling said fence and inclosure as aforesaid, then and there having no claim or color of title to any of said land, made or acquired in good faith or asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office of the United States in said District, under the general laws of the United States, contrary," etc.

This clearly enough charges the offense of maintaining and controlling an inclosure of public lands within the prohibition of the statute.

The third count charges that the defendants—

"Did then and there unlawfully, willfully, wrongfully, and knowingly assert a right to the exclusive use and occupancy of certain public lands of the United States, by then and there taking actual and exclusive possession thereof, and which said public lands consisted of four thousand five hundred and sixty acres [then follows a specific description of the land, being the same as that contained in the first count aforesaid], and they, the said John Krause and Herman H. Krause, then and there had no claim or color of title to any of said lands, or any asserted right thereto, by or under claim or color of title made or acquired in good faith by or under claim made in good faith with a view to entry thereof at the proper land office of the United States in said district, under the general laws of the United States, contrary," etc.

This brings the act done clearly within the clause of the first section of the statute prohibiting "the assertion of a right to the exclusive use and occupancy of any part of the public lands * * * without claim, color of title, or asserted right," etc. In the absence of all the evidence presented at the trial (as the bill of exceptions does not profess to contain all the evidence) the court must assume that there was sufficient evidence to support the finding. *McCarty v. United States*, 101 Fed. 113, 41 C. C. A. 242; *Durland v. United States*, 161 U. S. 306, 312, 16 Sup. Ct. 508, 40 L. Ed. 709; *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746. It therefore only remains to determine whether or not there was any reversible error committed by the court in the progress of the trial, the charge of the court not being preserved in the bill of exceptions.

The assignment of errors and the brief on behalf of defendants pay little heed to the rules prescribed by this court as to what they should contain. The questions sought to be raised are so obscured by lack of directness and specifications, and proper references to the record where

instances complained of may be found, that the court, out of a desire to see that no injustice was done to the defendants in matters of law, have imposed upon themselves much labor and pain in going carefully through the record of proceedings in search of any substantial errors.

Complaint is made of the statement of the court when inquired of as to how many peremptory challenges would be accorded to the defendants that they were entitled to only three. Unquestionably, had the trial been had on only one indictment, the defendants would have been entitled to but three peremptory challenges. Although there were three indictments, the offenses charged being based on the same statute and allied in character and degree, they could have been set out in separate counts in the same indictment. Does it make any difference that the three indictments were consolidated for trial? In *Mutual Life Insurance Company v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, the beneficiary under several policies of insurance taken out upon the life of John W. Hillmon, in different insurance companies, brought separate suits on each policy against the insurers. They were consolidated for trial, and the question arose as to whether or not each defendant was entitled to three peremptory challenges. It was held that they were. The court said that, although consolidated for convenience in the economy of time and cost, the causes of action remained distinct and required separate verdicts and judgments; and neither of the defendants, without its consent, could be deprived of the material right of a peremptory challenge accorded by section 819 of the Revised Statutes [U. S. Comp. St. 1901, p. 629]. The case at bar is more nearly allied in its legal status to that of *Betts v. United States*, 132 Fed. 228, 65 C. C. A. 452, where the several indictments against the defendants were tried together before the same jury (only one of the defendants being on trial) without any order of consolidation. By a divided court it was held that the defendant was entitled to three peremptory challenges on each indictment. In the case at bar the several indictments were consolidated and tried as one case. In *McElroy v. United States*, 164 U. S. 77, 17 Sup. Ct. 31, 41 L. Ed. 355, the court, speaking of the order of consolidation, said:

"The order of consolidation under this statute put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment."

From which it seems clear that where the offenses common to all the indictments, committed by the same defendants respecting the same subject-matter, which might have been embraced in separate counts in the same indictment, are consolidated, they stand "in the same category as if they were separate counts of one indictment." Be this as it may, the defendants did not place themselves in position to complain of the statement of the court at the trial, as they made no peremptory challenge whatever.

In *Connecticut Mutual Life Insurance Company v. Hillmon*, 188 U. S. 208, 212, 23 Sup. Ct. 294, 47 L. Ed. 446, the court, speaking to this question, said:

"We are of opinion that it [the defendant] is not entitled to take advantage of it, inasmuch as it made but two peremptory challenges, waiving its right to a third, and thereby acquiesced in the composition of the jury. * * * Having failed to exhaust its peremptory challenges, it stands in no position to complain that it was deprived of the right to challenge others."

Error is assigned of the act of the court in respect of the testimony of the witness De Freese. He was in the employ of the branch office of the Land Office Department located in Nebraska, and was sent to make examination into the charge of fencing the lands claimed to have been made and maintained by the defendants, and he made a rough survey thereof. Here, as generally throughout the trial, the defendants' counsel objected to almost every question asked of and answer made by the witness, without assigning any special, intelligible grounds therefor. The assignment of errors summarized is that there was error in permitting the witness to testify from Exhibit 1, and to his attention being directed to a red line running through the center of a given section. The court ruled that the witness might refer to the exhibit, and the witness answered that he drew the line. As this exhibit is not contained in the bill of exceptions, the court does not know what it was except inferentially. Again, the question was asked on what sections of township 25 did the witness follow the fence. The only objection to this was that the witness had not shown himself qualified. It is hardly possible for the court to know from this objection what was the precise thought in the mind of the objector. Its indefiniteness justified its rejection. Another assignment of error is that the defendants objected to the question:

"What was said at that time in regard to public lands, if anything, unless it was specifically as to the lands described in the indictment?"

Whether or not it pertained to lands described in the indictment and with whom he was talking does not appear from the objection or the record.

The only matter testified to by this witness, as disclosed by the record and assignment of errors, which might have been vulnerable to a valid objection, was his statement that he got the starting point for his survey from where one Albert Curry told him he lived. The objection which would naturally occur to the legal mind to this evidence is that it is hearsay. But no such objection was made. The very purpose of the rule requiring specific specifications of the grounds of objection to questions or answers or particular evidence is to advise the court and opposite counsel thereof, so that the objection might be obviated then and there. For instance, the only availing objection to the statement of De Freese that he got his starting point from one Curry is that it was mere hearsay. Had this objection been interposed, the court should have sustained it, and the prosecution might have obviated it by calling Curry (who, the record shows, was in attendance and testified in the case) to testify that the point or particular corner taken for the survey was correct.

Looking again to the record, we find that the witness De Freese testified to a conversation he had with the defendant John Krause, that Krause in effect admitted he had notice to remove the fence and

claimed that he had removed it. The witness said he inspected the fence again later and found it was not removed, and that this defendant called on him and in a conversation claimed that he had removed the fences, when the witness informed him that he had been out there a number of times and the fence was still there. This was a practical admission by the defendant that the fence spoken of by the witness was the one complained of and which he claimed to have removed.

In a most confused way error is assigned respecting the testimony of the witness Bessie Osborn. Complaint is especially made with reference to her testimony respecting a plat of the lands made by her, showing how the fences ran, which she testified were maintained by the defendants. She had for years lived in the locality in question, and claimed to be acquainted with all the "settlements" and inclosures thereabouts. She had acquired, according to her testimony, familiarity with the sectional divisions, with what lands had been homesteaded, and what were public lands. The accuracy or correctness of her information was for the consideration and determination of the jury, also as to the plat or map of the lands made out and testified about by her. If she or any other witness was in error in the identification of the lines and fences as related to the lands in question, it was open to the defendants to expose it by countervailing proofs, either by other witnesses or competent surveys. As indicative of the intelligent and reasonable restraint placed by the court on the identification of the lands in question by Mrs. Osborn, she was asked to state what certain lines on Exhibit A (which is said plat) represented. The defendants objected to this as being immaterial and being apart from the lands described. The court thereupon said:

"Does that fence inclose a part of, is it a part of the inclosure of this land?"

Mr. Rush, counsel for the government, interposed with the remark:

"There is a whole range covering a large amount of land and divided into fields.

"The Court: That is not an answer to my question at all. My question is, does that fence there with other fences which you have been describing make an inclosure which takes in this land which is described in the indictment?"

After some further interpositions of counsel, the court said:

"When you prove your general inclosure is this land which you claim as government land, is that inside or not?"

"Answer: That represents a fence that is kept in good repair by Krause Bros. and their hired men."

In the progress of the trial there was evidence on the part of the government as to the location of certain gates and roads, the herding and ranging of defendants' cattle, colloquies, quarrels and fights between the defendants, or one of them, and persons seeking to make homesteads on or coming upon and over certain of the lands. On objections interposed by defendants, the court made the following statement:

"It is admissible for the purpose of showing what was the purpose and intent of their building these fences. Was it simply to inclose their own lands, or was it for the purpose of making the inclosure of government lands with their own or somebody else for the purpose of giving them a benefit over what the general public would have? * * * It certainly goes to show what was their intent and purpose in inclosing government land, if they inclosed any. * * * We are trying the question as to whether or not the Mr. Krauses have inclosed government land, with a view and a purpose of having a better control over it themselves than the public generally, and whatever they said or did with regard to land in this inclosure is competent as bearing upon their purpose and intent and good faith in building the inclosure, inclosing these lands if anything. * * * It is only material as it may bear upon the intent and purpose of the defendants in making the inclosure, if they did make the inclosure, as to whether or not their purpose and intent was to give to themselves a right to the use of government land to an extent greater than the general public could have. In other words, in a measure withdrawing the use of certain public lands from the general common use by all the public."

Again, when evidence was introduced respecting a certain fence that one Bissel put up which was objected to by the defendants, the court said:

"That is wholly immaterial except, in this, that because he was putting up a fence that encroached somewhat upon their inclosure and they were objecting to it resulted in a contest. That is evidence to go to the jury whether or not—for the purpose of determining whether or not the defendants in their inclosure were not claiming and having it there for the purpose of giving to themselves a benefit of the government lands within such inclosure, to the exclusion of others. In other words, have they put a fence around it and claimed that they had a better right to it than the general public? Whether or not that was the purpose."

We perceive no valid objection to these views of the court being expressed in the presence of the jury. The essential issue on trial was whether or not at the times in question the defendants had knowingly and wrongfully erected or maintained the inclosures on the public lands described, or were asserting exclusive right of occupancy without authority of law. Acts, conduct, and speeches by them tending to show the exercise or assertion of dominion over or right to the exclusive control of the lands, or any part thereof, bore directly upon the issue involved; and under the circumstances the many details of which aggregated were competent instances and matters for the consideration of the jury in forming a judgment as to the guilt or innocence of the accused.

On cross-examination of the defendant John Krause by the then United States Attorney he was asked if he did not have some trouble with a man named Sylvester. On objection the court observed that he did not see for the present how it was material whether he had trouble with a man named Sylvester or not. Thereupon the District Attorney asked the defendant if he had ever been arrested. The objection to this question was sustained. Thereupon the District Attorney began: "If your honor please—" Upon objection by defendants' counsel on the ground that there was nothing before the court the District Attorney said:

"Well, there will be in a few minutes. If your honor please, the government claims the right to show the character of this man, with reference to intimidating people up there in that vicinity and around this range, and it

is in connection with that fact, and a fact that has played an important part in this intimidation."

The court then suggested to get at the facts in the first place so as to see whether it was important or not; that quarrels which he had had with people not connected with the occupancy of government lands were wholly immaterial. This was followed by a further question by the prosecution:

"Didn't you have trouble with a man by the name of Sylvester over the location of lands or claims within your range? A. I had trouble with one Sylvester. Q. Wasn't it with reference to lands there within your range? A. I don't think it was over lands. Q. Well, wasn't it over lines between lands?"

Against the objection of defendants' counsel the witness answered: "Well, I guess it was." It is to be observed that he was not asked as to whether it was with respect to lines between the lands in controversy. This was immediately followed up with the question: "And didn't you shoot this man Sylvester in the back and kill him?" Over the objection of defendants' counsel he was compelled to answer and said: "I had the misfortune of killing the man Sylvester." Here the District Attorney dropped the matter; and on redirect examination the defendant testified that he was tried and acquitted for the Sylvester homicide, and that after being shot at by Sylvester he shot him in self-defense. Then on recross-examination the prosecution put this question:

"Isn't it true that you and your men or your brother drove along that day in a wagon there and you laid concealed in the wagon with the gun?"

Objection to this was sustained, and the court said:

"It was first admitted on the assumption that you were going to show that it related to keeping people from going upon the government land, and you haven't got to that at all. It is simply trouble over a fence."

Thereupon defendants' counsel moved that the testimony in regard to Sylvester be stricken out. This was overruled.

"Q. And haven't you boasted since that time that you had killed one man and that you would kill more if they didn't keep off your range? A. No, sir, I have never mentioned it."

Counsel for defendants renewed the objection in relation to the Sylvester incident and asked to have it stricken out. The court said:

"I think it should be overruled, but I don't think it has much to do with this."

The conduct of the District Attorney in respect to this incident is neither to be commended nor passed by without criticism. The trouble the court was led into fitly illustrates the wisdom of the law in suggesting to trial courts, as the better and safer rule, except under peculiar conditions, to require the prosecutor in the first instance to introduce the requisite preliminary proof showing the legal connection of the apparently extraneous matter with the transaction on trial. On the implied assurance of the prosecutor that he

would subsequently show that said homicide grew out of the controversy between the defendant John Krause and said Sylvester touching the assertion of dominion or control by the defendants over the lands in question, by his interrogatory he got before the jury the implication that the defendant John Krause had been guilty of an act of assassination. As under the statute the offense in question was of no higher dignity than a misdemeanor, there was nothing in the case which, to the judicial mind, warranted an excess of zeal in the prosecution. And while consideration for impulsive action of counsel, growing out of the competition and heat of a trial, may be recognized, the court should see to it that it is not indulged to the serious and unwarranted injury of a defendant in a criminal prosecution, who stands at the bar of justice clothed with the presumption of law that he is innocent. The defendant in a criminal prosecution is an integral part of the composite body of the people represented by the prosecution, and as such he should be regarded as having claims to the fairness and impartiality of the government.

True it is, as suggested by counsel for the government at the hearing, that the defendant, while compelled to the admission before the jury that he had the misfortune to kill Sylvester, said he did so in self-defense, for which he was acquitted by a jury of the country (a fact which due inquiry on the part of the prosecution would have disclosed before bringing the incident to the attention of the jury), yet, as it is difficult often to entirely erase from the minds of some jurors who may have an aversion to a slayer of his fellow man, especially where all the explanatory facts are not before them in a collateral proceeding, it may not always be in the power of the court to entirely destroy the effect of such extraneous and incompetent evidence. In so far as the prosecuting attorney is concerned, he seems to have been willing that the cause should be finally submitted to the jury without any request on his part to rectify his mistake. The court, however, tried to accord to the defendant all the protection in its power at the time. After the prosecuting attorney had entered upon his address to the jury the court, of its own motion, called their attention to the matter of the killing of Sylvester, and said:

"Gentlemen of the jury, the testimony relative to the killing of Sylvester was admitted upon the statement of the District Attorney that the government would show that the killing took place and grew out of the defendants' attempt to prevent persons from going upon public land within the defendants' inclosure, but there has been upon the part of the government an utter failure to show such facts. Therefore, gentlemen of the jury, all of the testimony given by the witness John Krause relative to the killing of Sylvester is withdrawn and stricken out of this case, and you are instructed not to consider any testimony relative to the killing of Sylvester in your deliberations in this case, and treat the same as though it had never been admitted in evidence upon this trial."

In *Pennsylvania Company v. Roy*, 102 U. S. 451, 459, 26 L. Ed. 141, the Circuit Court had improperly admitted evidence as to the pecuniary responsibility of the plaintiff in a civil action for damages. In its charge to the jury the court directed that they would not take into consideration any evidence touching the plaintiff's pecuniary

condition at the time of his injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured. It was insisted on review of the case, notwithstanding the direction to the jury, that the original error was not thereby cured. After adverting to the fact that there are adjudged cases which announce the broad proposition that such error in the admission of evidence could not be corrected by instruction to the jury so as to cancel the exception taken to its admission, the court said it was against the great weight of authority that:

"The charge from the court that the jury should not consider evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence."

This ruling was followed by this court in *Tubbs v. United States*, 105 Fed. 59, 44 C. C. A. 357. See, also, *Hopt v. Utah*, 120 U. S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708. In view of the general rule thus laid down by the Supreme Court, and in deference to the action of the trial court refusing to grant a new trial predicated in part of the alleged misconduct of the prosecuting attorney, we feel constrained to overrule this assignment of error.

Contention is made that the trial court did not properly discriminate in the admission of evidence as it affected the respective defendants. There are several sufficient answers to this. (1) The charge of the court to the jury is not given in the bill of exceptions, and we have a right to assume that the attention of the jury was properly directed to any such differences in the proofs; (2) the verdict of the jury in finding the defendant Herman Krause not guilty on certain counts on which John Krause was found guilty, and the assessment by the court of different penalties against the defendants, clearly enough indicate that such discrimination was made both by the court and jury; and (3) the defendants sued out a joint writ of error, joined in the assignment of errors, and in an indiscriminate brief. Thus they made common cause, and in effect each sought to help the other; and there can be but one judgment by this court, either an affirmance or reversal as to both. *Sibert v. Copeland*, 146 Ind. 387, 44 N. E. 305; *Long v. Clapp*, 15 Neb. 417, 19 N. W. 467; *Moseman v. State*, 59 Neb. 629, 81 N. W. 853; *Elliott's Ap. Prac.* § 318.

Other errors are assigned in the brief of counsel for defendants, but both in the assignment of errors and the brief they are presented in total disregard of the rules of this court; and in so far as we are able to discern their purport they are too inconsequential to affect the result.

It results that the judgment of the District Court must be affirmed.

ALDRICH v. GRAY.

(Circuit Court of Appeals, Sixth Circuit. July 31, 1906.)

No. 1,513.

1. BUILDING AND LOAN ASSOCIATIONS — WITHDRAWALS — EFFECT OF INSOLVENCY.

A building and loan association was organized under the statutes of Michigan (Comp. Laws 1897, c. 206), which provide that "any stockholders wishing to withdraw from the said corporation shall have the power to do so by giving thirty days' notice in writing at a stated meeting of his or her intention to withdraw, * * * but payments of the stock so withdrawn shall only be due when the funds applicable to the demands of withdrawing stockholders are sufficient to meet and liquidate the same." The association became in fact insolvent, but continued to do business in that condition, although regular meetings of the directors were not held, and the officers, except the secretary, ceased to perform their duties, devolving upon him practically the entire management of its business and control of its funds. While in such condition a stockholder effected a withdrawal through the secretary, and received payment of his stock without any notice having been given at a stated meeting and when the association had no funds lawfully applicable to withdrawals. *Held*, that such withdrawal was without authority and ineffective, and could not be validated by a subsequent ratification by the directors, the conditions on which a withdrawal could be made not then existing, and that the amount so received was recoverable for the benefit of all of the stockholders.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Building and Loan Associations, § 16.]

2. SAME—ACTION BY RECEIVER.

A receiver appointed for an insolvent building and loan association, when authorized by the court, may maintain an action against a stockholder to recover a fund unlawfully withdrawn by him, and which rightfully belongs to the association for distribution among all of its stockholders.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

D. Forest Paine, for appellant.

J. C. Harper and Jay W. Curts, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The bill in this cause is a dependent bill filed by the complainant as receiver by direction of the court in a cause therein pending in which Edward W. Bishop was complainant and the Michigan Savings & Loan Association and George Lord were defendants, and the object of which was to wind up the affairs of the said association as an insolvent corporation. The bill in the original cause was filed March 30, 1901. Aldrich, the complainant in this dependent bill, was appointed receiver April 11, 1901, and was directed "to take possession of all the property, rights, securities, moneys, books, choses in action and assets of said association, and to collect and reduce the said assets to cash; and to that end, upon being directed or permitted by the court, to bring such suits as might be necessary to

collect the same." The parties defendant to the present bill were some of them persons who had been, or were at the time of filing the bill, directors or other officers of the association. Against these defendants charges of mismanagement and willful violation of duty or culpable neglect in the conduct of the affairs of the association, whereby it "became insolvent early in its career and its capital wasted and lost," were made. The other defendants had been stockholders or held other relations with the association, and it is alleged connived at such misconduct in the management of the association and profited thereby to the prejudice of the association. One of such stockholders was George H. Scripps, of whose estate the defendant, Gray, is administrator; and as his relation to and transactions with the association are the subject of the present controversy, we do not extend the narrations of the bill beyond the matters now involved.

The association was incorporated under chapter 206, Comp. Laws Mich. 1897, entitled "Building and Loan Associations," and began business about October 18, 1889, with an authorized stock of \$25,000,000 in shares of \$100 each, and continued its operations until April 11, 1901, the date of the appointment of the receiver. Its stock was of three kinds, termed "installment," "paid-up," and "fixed dividend" stock. The first two of these classes shared in the profits. The third received interest only at 7 per cent. in the form of fixed dividends. The business was for a time apparently prosperous. On June 30, 1896, a date about contemporaneous with the investments of Scripps, the active stock, for which the association was liable amounted in all kinds to \$655,800, of which \$122,600 was fixed dividend stock. On the dates following Scripps applied and paid for fixed dividend stock in the amounts mentioned and received certificates therefor:

1896—February.	One for	\$2,500 00
1896—December.	One for	4,000 00
1897—February.	One for	7,000 00
1897—February.	One for	2,000 00
	One for	1,500 00
Total		\$17,000 00

The terms of the certificates were:

"(1) An acknowledgment by the association of the payment of the par of the shares, and an agreement to repay the money on or before five years from the date of the certificate.

"(2) An agreement on the part of the association to pay dividends semi-annually on the surrender of the coupons attached.

"(3) That the shares should be nonassessable.

"(4) That the shares should be payable when the last coupon was due.

"(5) That the shares might be retired by the directors in the inverse order of issue.

"(6) That the stock should be subject to the same limitations as other withdrawals under the law; and that interest at the rate of ——— per cent. per annum should be allowed in lieu of dividends for the period elapsing since the preceding semiannual dividend up to date of notice of withdrawal, provided, that a reduction of five dollars per share should be made for shares withdrawn within six months of date of issue."

After Scripps took his stock, he received interest in the way of dividends, how much does not very clearly appear. By section 6 of its charter provision was made in regard to withdrawals of stockholders as follows:

"Any stockholder wishing to withdraw from said corporation shall have the power to do so by giving thirty days' notice in writing at a stated meeting of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, and such interest thereon or such proportion of the profits as the by-laws may determine, less all fines or other charges; but payments of the stock so withdrawn shall only be due when the funds applicable to the demands of withdrawing stockholders are sufficient to meet and liquidate the same, and then only in the order of the respective times of presentation of the notices of such withdrawals; provided, that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of the withdrawing stockholders without the consent of the board of directors."

The by-laws did not, as they could not, essentially vary these conditions. The financial condition of the association was growing worse at the times when Scripps became a stockholder, and it was apparently nearing, if it had not already reached, an insolvent condition. This, it is alleged, was the result of the mismanagement, neglect of duty, and the unauthorized and unlawful proceedings of its governing and administrating officers, which are detailed in the bill. It began borrowing considerable sums of money. The board of directors, though required to hold monthly meetings, rarely met. The president, vice president, and treasurer did not perform the duties pertaining to their offices, and left substantially the whole management of the association and the control of its funds to the secretary. But the association kept on doing business in an insolvent condition and in the same disorderly way until the filing of the bill to wind it up. In August, 1897, Scripps began to withdraw his stock from the association and continued his withdrawals from time to time thereafter. The dates and amounts withdrawn were as follows:

1897—August	\$2,500 00
1898—January	4,000 00
1898—April	2,000 00
1898—June	7,000 00
.....	1,500 00
Total	<u>\$17,000 00</u>

As will be seen these amounts correspond with his several subscriptions. These withdrawals were effected with the secretary, from whom he received of the funds of the association the par amount of his shares and to whom he surrendered his certificates. None of the shares had matured, there were no funds in the treasury applicable to the demands of withdrawing stockholders, the association was insolvent, as already stated, and no written notice of withdrawal had been given at a stated meeting as required by the statute, or, so far as appears, to any one. It does not appear that Scripps made any attempt to secure a meeting of the board of directors. Upon this state of facts the main question in the case arises, whether his attempted withdrawal

and his perception of the funds of the association were respectively valid and lawful.

With respect to the course taken by him to effect his withdrawal it is to be observed that his relation with the other stockholders of his class were mutual, and no one more than another was responsible for the misfeasances and neglect of duty by the officers of the association, and a serious question arises whether he could avail himself of their desertion of their duties as a sufficient reason for his neglect to take such steps as would enable him to give his written notice of withdrawal to the board of directors. The statute evidently devolves upon the board the exercise of certain duties for the protection of other stockholders, and the action of the board is made a condition of the right to withdraw. But if it were held that, in the circumstances stated in regard to the method of conducting the corporate affairs, the intervention of the board was not absolutely essential, still if the conditions were such that Scripps was not entitled to withdraw, so that, if the board were present to act upon his notice, the withdrawal could not have been lawfully permitted, the question of the sufficiency of his method of procedure becomes immaterial. For in such case the essential conditions of his right did not exist.

The current of decisions in this country in regard to this subject seems to be that, when insolvency supervenes in the status of such associations, the right of withdrawal which before existed is suspended, in the absence of some express provision to the contrary. This is the result of the mutuality of the stockholders and the equity of equality, which is of the essence of their relation to each other. If it were otherwise, and the stockholders could at will successively take their investment out and desert the failing enterprise, those remaining would have to bear the brunt of the joint misfortune. *Endlich on Build. & Loan Associations*, §§ 108, 514; *Coltrane v. Baltimore B. & L. Association* (C. C.) 110 Fed. 281; *Id.*, 113 Fed. 785, 51 C. C. A. 457; *Christian's Appeal*, 102 Pa. 184; *Hohenshell v. Sav. & L. Association*, 140 Mo. 566, 41 S. W. 948; *Gibson v. Association*, 170 Ill. 44, 48 N. E. 580, 39 L. R. A. 202; 6 Cyc. 130.

The English cases seem to accord the right of removal so long as the association is a going concern, and not to restrict the right upon the fact of its insolvency. Apparently this course of decision is founded upon the provisions of the English statutes regulating the subject. At all events we think the American doctrine is founded upon the clearer equity.

But it is contended that the association ratified the action of the secretary in permitting the withdrawal, and the following resolution of the board of directors is cited to show the ratification:

"Meeting of the board of directors of the Michigan Savings & Loan Association, held at the office of the association May 20, 1898, at 11 a. m. Present: Directors Clark, Ives, Hancock, and Wemple. Resolved, that, owing to the failure of the members of this board to meet for consultation, it has become necessary for the president and secretary to conclude certain transactions, such as discharging mortgages and acceptance of drafts, etc., and being apprised of these transactions, we hereby ratify the same to date."

It is contended for the appellant that this does not purport to be a ratification of the action of the secretary in the matter of Scripps' withdrawal, and, moreover, that the withdrawal could not be effected in this way in view of the statutory conditions. We do not, however, think it necessary to decide the question upon the method of procedure. The board could not by ratification accomplish what it would not have been authorized to do originally. As we have already shown, the conditions prescribed by the statute permitting withdrawals did not exist, and it would have been a distinct violation of the law for the board to have sanctioned it. And we think our decision might well rest upon this ground.

It is further objected that the receiver is not the proper party to bring the suit, and that if there was any cause of action it belonged to the stockholders who were injured. But the fund sought to be recovered belonged to the association, and not to the stockholders. When recovered, it would be in its possession for distribution to the stockholders. The court directed the receiver to take possession of the assets, among them the choses in action of the association, and to bring such suits as were necessary for their recovery; and it directed the receiver "to file this bill, and prosecute the suit thereon in his own name." We think there is no sufficient ground for the objection regarding parties.

The decree of the Circuit Court must be reversed, with costs, and the cause remanded, with directions to overrule the demurrer and permit the defendant to answer the bill and to take further proceedings in due course.

EMPIRE STATE CATTLE CO. et al. v. ATCHISON, T. & S. F. RY. CO.*

(Circuit Court of Appeals, Eighth Circuit. July 9, 1906.)

No. 2,276.

1. TRIAL—DIRECTION OF VERDICT—REQUEST BY BOTH PARTIES—INSTRUCTIONS.

Where both parties request a directed verdict, and the request of one of them is accompanied or followed by requests for other instructions to the jury, such other requests do not of themselves amount to a withdrawal of the request for a directed verdict, and do not require the court to submit the case to the jury in case the request for a directed verdict submitted by the party asking such additional instructions is denied.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 399, 400.]

2. SAME.

Where, at the conclusion of the evidence, both parties move for a directed verdict, each thereby asserts that there is no disputed question of fact that can control or affect the conclusion of law that on all the evidence he is entitled to prevail.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 400.]

3. WRIT OF ERROR—DIRECTED VERDICT—REVIEW.

Where, at the close of all the evidence, both parties move for a directed verdict, and the court directs a verdict for the defendant, the only questions reviewable on a writ of error are whether there

*Rehearing denied November 16, 1906.

was substantial evidence supporting the conclusion of the court, and whether any error of law occurred during the trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3474, 3475.]

4. SAME—ASSIGNMENTS OF ERROR.

An assignment that the trial court erred after refusal of plaintiff's request for a peremptory instruction in refusing to charge the jury at plaintiff's request instructions numbered 1 to 13, inclusive, is fatally defective for failure to comply with Court of Appeals Rule 11.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3013-3016.]

5. SAME.

Assignments that the court erred in refusing plaintiff's request for a directed verdict, and that it erred in granting the like request of defendant, taken together present the single question for review, whether under the circumstances of the case, the court erred in directing a verdict for defendant instead of for plaintiff, when both invoked the action of the court.

Sanborn, J., dissenting in part.

In Error to the Circuit Court of the United States for the District of Kansas.

For opinion below, see 129 Fed. 480; 135 Fed. 135.

This was an action by the cattle company and others to recover from the railway company damages alleged to have been sustained by a wrongful deviation and the negligence of the defendant in respect of, a shipment of 778 head of cattle over its lines, resulting in the death of part of them and injury to the others. The acts and omissions of the defendant which were complained of were in connection with and in view of an unprecedented flood in May, 1903, in the Kansas and Missouri rivers. The defendant received the cattle May 25, 1903, in Texas, for transportation over its lines to Atchison, Kan., and thence over connecting lines to South Dakota. It was claimed that the defendant was negligent and acted wrongfully in the following particulars:

(1) In detaining the cattle at Strong City, Kan., south of the Kansas river, from May 27th to the 29th, and in not forwarding them on the 27th across the river at Topeka and thence to Atchison, where they could have been delivered to a connecting carrier without interference from the rising waters.

(2) After keeping them at Strong City until the 29th of May, in not then detaining them longer until the subsidence of the flood would permit of their further transportation in safety.

(3) In their deviation from the route contracted for to Kansas City at the mouth of the Kansas river between which point and Atchison the defendant had no connecting line.

(4) In endeavoring to head off the flood by landing and depositing the cattle in pens on the bank of the Kansas river near its mouth, when it knew of the flood and its continued rise from May 27th to the 30th.

(5) In failing to move the cattle from their position of peril at Kansas City after having wrongfully transported and placed them there.

The trial was to a jury, and at the conclusion of the evidence the court directed a verdict for the defendant. This writ of error challenges the action of the court in directing the verdict and in certain other respects, to which attention is directed in the following opinion.

James S. Botsford (Buckner F. Deatherage and Odus G. Young, on the brief), for plaintiffs in error.

Gardiner Lathrop and C. Angevine (Robert Dunlap, Wm. R. Smith and Angevine & Cubbison, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the conclusion of the evidence the plaintiffs preferred a written request that the court direct a verdict in their favor and by a separate writing also asked that 13 other instructions directed to particular features of the case be given to the jury. The defendant likewise asked that a verdict be directed in its favor. After an extended consideration of both requests for a directed verdict the court denied the plaintiffs' and sustained that of the defendant. The special requests of the plaintiffs were denied. A verdict was accordingly returned for the defendant, and it had judgment.

It is a familiar rule that if at the conclusion of the evidence in an action at law each party requests the court to direct a verdict in his favor and the court acts upon the invitation thus given and directs the jury to return a verdict for one of them and against the other, the only questions open on appeal are: First, was there substantial evidence supporting the conclusion of the court? and, second, did any error of law occur during the trial? This doctrine first found expression in *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, where the court said:

"As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to defect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

This court has applied the rule in the following cases: *Western Express Co. v. United States* (C. C. A.) 141 Fed. 28; *Phenix Insurance Co. v. Kerr*, 64 C. C. A. 251, 129 Fed. 723, 66 L. R. A. 569; *United States v. Bishop*, 60 C. C. A. 123, 125 Fed. 181. It has also been applied in the seventh circuit (*Insurance Co. v. Wisconsin Central Railway Co.*, 134 Fed. 794, 67 C. C. A. 300). In the fifth circuit (*McCormick v. National City Bank* [C. C. A.] 142 Fed. 132; *West v. Roberts*, 68 C. C. A. 58, 135 Fed. 350; *Bradley Timber Co. v. White*, 58 C. C. A. 55, 121 Fed. 779). And in the second circuit (*Magone v. Origet*, 17 C. C. A. 363, 70 Fed. 778; *Merwin v. Magone*, 17 C. C. A. 361, 70 Fed. 776; *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551. See *Sigua Iron Co. v. Greene*, 31 C. C. A. 477, 88 Fed. 207).

It is said, however, that by submitting the 13 requests for special instructions the plaintiffs showed their purpose not to so invoke the action of the court that they would be thereafter precluded from going to the jury. Some warrant for this contention may be found in the cases from the second circuit, in each of which it is recited either in the opinion or in the preceding statement that when the requests

by both parties for a directed verdict were made neither of them requested that any question of fact should be submitted to the jury. The qualification, it it be one, suggested by these cases seems to have had its origin in a rule of practice obtaining in the state of New York, in which all of them arose. *Sutter v. Vanderveer*, 122 N. Y. 652, 25 N. E. 907; *Kirtz v. Peck*, 113 N. Y. 222, 21 N. E. 130; *Koehler v. Adler*, 78 N. Y. 287. The Court of Appeals of the Sixth Circuit came to a similar conclusion in *Minahan v. Railway*, 138 Fed. 37, though the case there was peculiarly circumstanced. At the conclusion of the evidence the defendant submitted a request for a directed verdict, and the trial court, while passing upon it, indicated that it was about to grant it. It then permitted plaintiff's counsel to interrupt and to present a number of requests for instructions, the first of which was that the plaintiff was entitled to a verdict; the only question for a jury being as to the amount of damages. The others related to matters of law and fact involved in the case. When permission was thus given plaintiff's counsel to file his requests the court assured him he should have the benefit of them. A verdict for the defendant was nevertheless directed. It was held that the rule in question must rest upon the implication of consent, and that it was repelled by the request for additional instructions, and by the further fact that the trial court was co-operating with plaintiff's counsel in his effort to save the questions so presented.

In *Insurance Co. v. Wisconsin Central Railway Co.*, *supra*, the Court of Appeals of the Seventh Circuit, after reciting that both parties moved for a directed verdict, said:

"The record shows that the court reviewed the evidence and stated the ultimate facts substantially as we have done, and thereon announced the legal conclusion that the policies were in force. After the court thus virtually ended the case the insurance company could not revive its right to demand a jury trial and to predicate error on the court's refusal to submit the cause to the jury."

We are of the opinion that where both parties invoke the action of a trial court by requests for a directed verdict, and the request of one of them is accompanied, as in this case, or followed by requests for other instructions to the jury, such other requests do not, by themselves, amount to a withdrawal of the one for a directed verdict. The request for a directed verdict is first in insistence upon the attention and action of the court. It searches the entire case for the legal sufficiency and effect of the evidence, and as long as it remains before the court to be acted upon it takes precedence. If granted, the others serve no purpose. The question should not be determined wholly by a presumed intention of the party to waive or not to waive a submission of the facts to the jury. Regard must be had to the legal import of his action, the position in which he has placed the court, what he has asked it to do and the effect of its decision so invoked. When, at the conclusion of the evidence, the parties move for a directed verdict, each of them asserts to the court that there is no disputed question of fact that can operate to deflect or control the conclusion of law that upon all of the evidence he is entitled to prevail. There

is in such a case a request by each of them that the court announce its finding of the ultimate fact and give effect to its conclusion of law by direction to the jury. There is a joinder in the issue, and when the court has accepted and acted upon the invitation, and has rendered its decision practically disposing of the case, it is then too late for the defeated one to say that his intention to go to the jury is shown by other requests for instructions.

It is true that the Supreme Court held in *Beuttell v. Magone*, supra, that a request by each party for a peremptory instruction was not equivalent to a stipulation waiving a jury and a submission of the cause to the court within the intendment of sections 649 and 700, Rev. St. [U. S. Comp. St. 1901, pp. 525, 570], but it was so held with reference to the contentions there made: First, that there being no written stipulation the decision below could not be reviewed upon writ of error; second, that even if the request of both parties in open court be treated as a written stipulation, the correctness of the decision below could not be examined because it was in the form of a general finding on the whole case. The court while making the distinction, nevertheless announced the rule heretofore indicated. If both parties should join in a writing in the nature of a demurrer to the evidence, each saying in his own behalf in express terms that there is no disputed question of fact for the jury, and that under the law he is entitled to the verdict and judgment, and asking the court to review the evidence to ascertain the ultimate fact and to then declare the resulting conclusion of law, and the court being so requested acts thereon and directs a verdict for one and against the other, we take it that the mere presence, without more, of written requests of the latter for special instructions would not destroy the action of the court and make it an idle and ineffectual proceeding. And yet the conditions supposed are in legal effect those of the case at bar.

Passing to the questions open to review: It cannot be denied that there was substantial evidence supporting the conclusion of the trial court. It is sufficient to say, without setting it forth at large, that there was much evidence on behalf of the defendant tending to prove its defense to each charge of negligence and wrong asserted by the plaintiffs. With this conclusion our investigation of the facts can proceed no further.

But four assignments of error are relied on by the plaintiffs. In one it is said that the trial court erred "after the refusal of said peremptory instruction, in refusing to give and charge the jury at plaintiffs' request instructions numbered from 1 to 13, inclusive." Under repeated decisions of this court applying the eleventh rule this assignment presents no question challenging the attention of the court to the merits of the several requests. Of the remaining assignments one asserts that the trial court erred in refusing plaintiffs' request for a directed verdict and the other two that it erred in granting the like request of defendant. Taken together, these three assignments present the single question whether, under the circumstances of the case, the court erred in directing a verdict for defendant instead of

for plaintiffs when both invoked the action of the court. The limitations upon the scope of our inquiry in such case have already been stated.

The judgment is affirmed.

SANBORN, Circuit Judge (concurring). The only reason why the request of each party for a directed verdict in his favor estops him from a determination of any question in his case, by a jury, and, when one of the requests is granted, restricts the inquiry in the appellate court to errors of law occurring at the trial and the existence of substantial evidence to support the conclusion of the court, is that these requests demonstrate the fact that each party waives his right to the determination of any question of fact by the jury and requests the court to decide them all. But when a party requests the court to instruct the jury to return a verdict in his favor and at the same time prefers a series of requests for instructions to the jury, the presentation of these requests conclusively shows that he does not intend to waive, and does not waive, his right to a determination by the jury of every question of fact which remains in the case. The effect of such a series of requests is to say to the court that in the opinion of the party who prefers it the evidence is so conclusive in his favor that he is entitled to a verdict on the ground that there is no evidence which will sustain a verdict against him, that if the court is of his opinion he requests the direction, but that if the court is of the opinion that the evidence is not of this conclusive character in his favor, then he requests the court to submit the issues to the jury under the other instructions he presents. The series of requested instructions to the jury which generally accompanies a request for a directed verdict has no other office but to indicate that the party who presents them does not waive his right to a trial by jury, but insists upon it if his request for a directed verdict is denied, and if they do not have this effect, they are without meaning, purpose or effect. No opinion or decision opposed to this view has been cited except *McCormick v. National City Bank*, 142 Fed. 132, 133, in which no reason for the conclusion is presented, and Judge Shelby dissents. In no other case where the appellate court has held that the right to a submission of the questions of fact to the jury was waived by requests for an instructed verdict was the claim made that the accompanying requests for instructions to the jury demonstrated the fact that the party did not intend to waive and did not waive it. In my opinion, the right to a submission to the jury of every question of fact upon which the evidence is not so conclusive that a verdict but one way could be sustained, is waived only when a request or motion for a directed verdict, without other requests, is made by each party, and it is expressly reserved and demanded by presenting, with a request for a directed verdict, requests for other instructions to the jury respecting the issues of fact in the case. The experience of the profession, the practice in the trial courts and the opinions of the appellate courts, in my opinion, uniformly sustain this view. *Minahan v. Grand Trunk Western Railway Co.*

(C. C. A.) 138 Fed. 37; *Chrystie et al. v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Sigua Iron Co. v. Greene*, 31 C. C. A. 477, 480, 88 Fed. 207; *Kirtz v. Peck*, 113 N. Y. 226, 21 N. E. 130; *Sutter v. Vanderveer*, 122 N. Y. 652, 25 N. E. 907; *McCormick v. National City Bank* (C. C. A.) 142 Fed. 132, 133. I am therefore compelled to dissent from the conclusion of the majority that the question whether or not there was any evidence which would have sustained a verdict for the plaintiffs was not properly preserved and presented for our consideration. But, after a careful and deliberate examination of the evidence, and the points and arguments of counsel, I concur in the result, on the grounds that there was no error at the trial prejudicial to the plaintiffs, and that the evidence was insufficient to sustain a verdict in their favor.

MINNESOTA & D. CATTLE CO. v. ATCHISON, T. & S. F. RY. CO.*

(Circuit Court of Appeals, Eighth Circuit. July 9, 1906.)

No. 2,277.

In Error to the Circuit Court of the United States for the District of Kansas.

For opinion below, see 129 Fed. 480; 135 Fed. 135.

R. E. Ball, for plaintiff in error.

Gardiner Lathrop and C. Angevine (Robert Dunlap, Wm. R. Smith and Angevine & Cubbison, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This case is like that of *Empire State Cattle Company* (just decided), 147 Fed. 457. The two cases were tried together and the facts, with some exceptions not material here, were the same, as were also the proceedings in the trial court.

For the reasons stated in the opinion in the preceding case the judgment in this is affirmed.

McCLAUGHRY et al. v. KING.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1906.)

No. 2,315.

REWARDS—OFFER AND ACCEPTANCE.

Where defendant, as sheriff of a county, offered a reward "for the arrest of each of the parties convicted" of a certain bank robbery and murder, the reward was not accepted merely by the giving of information concerning the whereabouts of the suspect, but could only be accepted by the party assuming the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rewards, §§ 8, 9.]

Hook, Circuit Judge, dissenting.

*Rehearing denied November 16, 1906.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

For opinion below, see 135 Fed. 195.

Cravens & Cravens, A. C. Cunkle, and Arthur M. Jackson, for plaintiffs in error.

Cravens & Covington, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The petition filed below shows that the defendant, who was sheriff of Johnson county, Ark., on the occasion of the robbery of a bank and murder of one Powers in that county, offered a reward of \$2,750 "for the arrest of each of the parties convicted of such bank robbery and said murder"; that thereafter plaintiffs discovered that one West had been arrested by the police force of Evansville, Ind., for vagrancy, and, being informed that he was suspected of being guilty of the Johnson county robbery and murder, and knowing that the reward of \$2,750 had been offered for his arrest, notified defendant that West was under arrest in Evansville under an assumed name of Charles Johnson; that defendant, acting upon that information, immediately went to Evansville, apprehended West, and took him back to Johnson county, where he was subsequently tried, convicted, and executed for the crime of murdering Powers; that plaintiffs, at the request of defendant, furnished evidence which largely contributed to the conviction of West. A demurrer interposed to this petition on the ground that it failed to state facts sufficient to constitute a cause of action was sustained, and, plaintiffs declining to plead further, final judgment was rendered in favor of defendant.

Was the ruling on the demurrer right?

A reward offered for the arrest of an offender is an offer or conditional promise to pay the person performing the required service a certain sum of money. The performance of the service is the acceptance of the offer, or performance of the condition on which the promise is made, and, when done, concludes a binding contract. The matter rests exclusively in the domain of contract, involving an offer and its acceptance. One desiring to offer a reward may fix his own terms and conditions. If they are satisfactory they must, like other propositions, be accepted as made. If unsatisfactory no one need accept them. The offer may be, and doubtless is, made according to the kind of service required. If the apprehension of a desperate character be required it would naturally be made to persons who would brave the danger and assume the responsibility, either of making the arrest or causing it to be made. If, on the other hand, the apprehension of a different character is desired, personal bravery and responsibility might not be as much required as diplomacy, and the offer would naturally be addressed to one who would work up clues and give information.

From considerations like these we well understand how an interested party may discriminate in the proposition he makes. It is obviously one thing to offer a reward for an arrest which involves dan-

ger and responsibility and quite a different thing to offer a reward for information which involves neither. The brave and strong of purpose only would naturally undertake the former, while the timorous and conservative might undertake the latter. One accepting the first offer would actually make the arrest or cause it to be made, while one accepting the other offer might do the equally efficacious act, and the arrest might follow as a consequence and he not be subjected to any personal danger or responsibility. The difference in the offer as well as the difference in the performance clearly shows that the two make different contracts. This is recognized and affirmed in the case of *Shuey v. United States*, 92 U. S. 73, 23 L. Ed. 697. The Secretary of War had offered one reward of \$25,000 "for the apprehension of John H. Surratt," charged with being one of Booth's accomplices in the murder of President Lincoln, and at the same time announced that "liberal rewards will be paid for any information that shall conduce to the arrest" of Surratt. The trial court found that the claimant gave information which conduced to the arrest of Surratt, but that it did not constitute an "arrest" of him within the meaning of the offer. Mr. Justice Strong, in delivering the opinion of the court, says:

"It is found as a fact that the arrest was not made by the claimant, through the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents," etc.

The following authorities are in harmony with the foregoing views and sustain the contention that furnishing information merely which leads to an arrest is not the acceptance of an offer of a reward for making the arrest: *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012; *Juniata County v. McDonald*, 122 Pa. 115, 15 Atl. 696; *Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140; *Williams v. West Chicago St. R. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; *Lovejoy v. Atchison, Topeka & S. F. R. R.*, 53 Mo. App. 386. The following authorities are relied on to sustain the contrary: *Crawshaw v. City of Roxbury*, 7 Gray (Mass.) 374; *Besse v. Dyer, et al.*, 9 Allen (Mass.) 151, 85 Am. Dec. 747; *First National Bank v. Hart*, 55 Ill. 62; *Haskell v. Davidson*, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254; *Ralls County v. Stephens*, 104 Mo. App. 115, 78 S. W. 291. These cases have been carefully examined and considered and the principle of decision will be briefly stated.

In the *Crawshaw Case* a reward was offered by the city of Roxbury "for the apprehension and conviction" of any person who shall set fire to any dwelling house. A fire was subsequently set by an incendiary. Plaintiff, *Crawshaw*, was at the fire, sought out three police officers of the city, and requested one of them to arrest one *Clarke*, whom he pointed out as the incendiary. Thereupon the officer was

induced to and did arrest Clarke. The foregoing facts make it appear that Crawshaw made the officer his agent for making the arrest, and that in doing so the officer acted under the directions of Crawshaw. Some expressions are found in the charge of the court to the jury which obviously were made in the light of the facts just referred to and should be construed accordingly. Chief Justice Shaw, in announcing the opinion of the Supreme Court, disposes of the case on other grounds, and makes no reference, except to generally approve of the law as laid down in the charge, to the point now under consideration. In the Besse Case the doctrine of the Crawshaw Case is approved; emphasis being laid upon the fact that the incendiary was arrested by the officer at the request of Crawshaw. In the First National Bank Case the reward was given to the claimant because his services were accepted and availed of by the persons offering the reward after he had informed them that he would claim the reward if he performed the services. The court held that, although the claimant was not embraced in the description of the persons to whom the reward was first offered, he was entitled to it by reason of the subsequent engagement made between the parties. In the Ralls County Case it distinctly appeared that the claimant directed an officer to arrest the suspected criminal, and the court there says that, although the officer was the first to lay hands on the suspect, "he did so as the agent, or, one may say, the arm of Stephens. He acted entirely for Stephens and by the latter's direction."

The foregoing cases practically announce the doctrine that, where a reward is offered for the arrest of a suspect, any person who either personally makes the arrest or induces another to act for him, as his agent, in so doing, is entitled to the reward. Concerning this doctrine there can be no difference of view. The only other case relied upon by counsel for plaintiffs is that of *Haskell v. Davidson*. That case contains expressions favorable to their view, but it is founded upon a state of facts which permit of a recovery on principles not out of harmony with those already stated. The defendant in that case had offered a reward "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and stole \$35 therefrom." The plaintiffs were informed of this offer and were thereby induced to enter upon an investigation of the crime. They discovered facts and circumstances strongly inculcating one Thompson, who was found and confronted with the charge by the plaintiffs, and thereupon made a full confession of his guilt to them and subsequently pleaded guilty to the indictment found against him by the grand jury. The arrest was but a matter of form, and was made by a deputy sheriff, who made no claim for the reward. It is in the light of such facts that the court says:

"The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining and giving to some proper person interested sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction."

Disconnected with the peculiar facts of that case, we doubt that the learned court would have announced the principle quite as broadly as it did.

Applying well recognized rules governing the interpretation of contracts, and the reasoning indulged, and authorities considered, we think the true rule is that when an offer of a reward is made for an "arrest" of a suspect it is not accepted by the giving of information merely, concerning the whereabouts of the suspect, but is accepted only when one assumes the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him. The petition in this case fails to make such averments and was for that reason fatally defective.

The judgment is affirmed.

HOOK, Circuit Judge (dissenting). The offer of a reward and its acceptance by the performance of the service is a contract, but it is not different from other contracts in respect of the rules of construction that should be applied. In such contracts, as in others, regard should not be had to the mere letter to the exclusion of the spirit. "The fruit and profit of a nut lie in the kernel, and not in the shell." It matters not that the proponent of the reward is entitled to make his own terms. When he has done so it is then for the court to say what they mean and whether they were substantially complied with, and in doing so it is not unjust to him to deprive him of a shrewd, narrow meaning of his own words.

The reward offered was for the arrest of each one of the parties guilty of a robbery and murder in Arkansas. A man named West was suspected. The plaintiffs discovered that under an assumed name he was under arrest in Evansville, Ind., for vagrancy and street begging. His identity was unknown to the police of that city, and his identity and whereabouts were unknown to the Arkansas sheriff who offered the reward. Had not the plaintiffs acted he would have served his time at Evansville and disappeared. In this condition of affairs the plaintiffs, knowing of the reward and alone knowing of the identity and whereabouts of the accused, immediately notified the sheriff, who, acting thereon, at once went to Evansville, took him into custody, and removed him to Arkansas, where, with the assistance of plaintiffs, he was convicted and afterwards executed. It does not appear that any one else than plaintiffs is claiming the reward. The Evansville police would not be entitled to it because what they did was in the mere performance of other duties and had no relation to the Arkansas crime or to the reward. The sheriff himself would not be entitled to it because his receiving possession from the police was a mere perfunctory service performed after receipt of the important and necessary information from the plaintiffs. The man was already under arrest. He was where any one who knew his identity could get him. It is not as if he had been at large. True, it may be said that he was not under arrest for the Arkansas crime until the sheriff arrived, but it seems to me to be quite a narrow construction to say that by

simply laying a hand upon the accused and peacefully receiving him from the police the sheriff himself made the arrest and thereby escaped paying the reward he offered. Even if so narrow a meaning is to be given to the word "arrest," there is still reason for holding that when the sheriff went to Indiana he went for the plaintiffs and waived the personal performance of that unimportant service by them, since all that was vital and of consequence had already been done. The better rule is that he who is the active and efficient cause in securing the result described in an offer of reward is the one who is entitled to it. He is the one who accomplishes the result—who brings it about. It is not the man who, when all else is done and when the accused is as it were tied to a stake, merely performs the letter of the final act without effort, skill, or enterprise. Such rule would conform to the spirit that actuated the offer of reward, and if it does it is the one that should prevail.

I think that the Massachusetts rule expressed in *Crawshaw v. City of Roxbury*, 7 Gray (Mass.) 374, and that of Maine, shown in *Haskell v. Davidson*, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254, is the reasonable one and is in harmony with those applied to contracts generally. In the *Roxbury Case* the reward was "for the apprehension and conviction of any person or persons who shall set fire to any dwelling house," etc. Thereafter a building was set on fire by an incendiary and consumed. The plaintiff was at the fire and sought out three police officers and requested them to arrest one Clarke for having set the fire. He pointed Clarke out to one of the officers and stated facts and circumstances tending to show that Clarke committed the offense. Clarke was arrested by this officer upon the information given and afterwards confessed to him. Another police officer made the complaint. Clarke pleaded not guilty at the trial, but was convicted upon the testimony of the officers. The plaintiff's information upon which he accused Clarke and requested his arrest was hearsay, and therefore he was not summoned to attend the trial. The city having refused to pay the reward, the plaintiff brought action therefor, and having recovered a judgment the city took the cause to the Supreme Judicial Court of Massachusetts, where it was affirmed. At the trial below the court instructed the jury as follows:

"That the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be entitled to the reward by becoming the prosecutor, and, as such, causing the arrest, and conducting the case to a conviction, or he might be entitled to it by giving information which should lead to and produce the arrest and conviction of the offender; that is, by giving such information to the city government of Roxbury, or to some officer authorized to act for them in making the arrest and prosecuting the offender to conviction upon the information so given, that, in this case, the officers of the city having instituted and carried on the prosecution to conviction after the arrest, if the jury were satisfied that the facts disclosed by the plaintiff were such as induced the officer who arrested the offender to arrest him, and were material, and had a tendency to produce ultimate conviction, and without them Clarke would not have been convicted, unless upon his own subsequent confession of guilt the plaintiff would be

entitled to the reward; and the fact that Clarke, subsequently to the disclosure of such information, made by the plaintiff, and upon which he was arrested, confessed his guilt, would not deprive the plaintiff of the right to recover, though Clarke's confession of guilt was produced in evidence upon his trial, and might have been the ground upon which he was convicted."

Upon appeal Chief Justice Shaw observed of this and other instructions:

"The court are of opinion that the directions of the judge on the trial were correct in law, carefully guarded, and were adapted to the evidence before the jury."

In *Haskell v. Davidson* the reward offered was "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and stole \$35 therefrom." The plaintiffs, being informed of the offer, commenced an investigation of the crime, with the result that facts and circumstances were discovered tending strongly to inculcate one Thompson, who, upon being found and confronted with the charge by the plaintiffs, made a confession of his guilt and subsequently pleaded guilty to an indictment found by the grand jury. The formal arrest of Thompson, however, was on a *capias* issued by the court and was made by a deputy sheriff. The Supreme Judicial Court of Maine sustained a recovery by the plaintiffs. It said:

"An offer of reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all of the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient if the party claiming the reward has substantially performed the service required by the proposal. An offer of a reward for the 'arrest and conviction' of an offender cannot be taken literally. The person who by reason of the offer is induced to make an investigation, and finally obtains possession of sufficient facts to authorize the arrest of an offender, and, his subsequent conviction, for the crime referred to in the offer, certainly cannot himself convict the offender. The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining, and giving to some proper person interested, sufficient information in relation to the perpetrator of the crime, and his whereabouts, as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction."

The case of *Shuey v. United States*, 92 U. S. 73, 23 L. Ed. 697, is not in point, because it appeared from the face of the proclamation or reward by the Secretary of War that he made a clear distinction between the apprehension of Surratt on the one hand and information conducing to the arrest on the other. It was his privilege to do so. The sum of \$25,000 was offered expressly for the apprehension, and it was specified in addition that "liberal rewards will be paid for any information that shall conduce to the arrest," etc. The claimant gave information, but other agencies effected the arrest. It is obvious that a man who asked and received a reward for information under such an offer should not also be rewarded for the apprehension of the fugitive by others. This feature of the case was particularly adverted to by the Supreme Court. I think the plaintiffs here fairly earned the reward offered and should receive it.

GILCHRIST TRANSP. CO. v. SICKEN et al.*

SICKEN et al. v. GILCHRIST TRANSP. CO.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1906.)

Nos. 2,366, 2,376.

1. TOWAGE—NEGLIGENCE OF TUG—LIABILITY.

A steamer which engages to tow a vessel to a port undertakes to exercise reasonable skill and care in everything relating to the work, including the entrance to the port, and the lack of either charges her with liability for the damage caused thereby.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 11-23.]

2. SAME.

The entrance to the harbor at Duluth is through a canal 1,200 feet long and 300 feet wide, which extends in a general easterly and westerly direction and is bounded by heavy cement piers on each side.

It was negligence for a laden steamer which was towing a sailing vessel light up Lake Superior to Duluth upon a line 900 feet long when the steamer approached the canal from a southerly direction into a northwesterly wind of 35 to 40 miles an hour which blew nearly athwart the line of the canal, to fail to wait for a tug or to take some other reasonably safe course, and to attempt to draw the barge, whose lights were visible, and which was drifting far to the leeward, into the canal, whereby the barge was brought into collision with the outer end of the south pier and damaged.

3. SAME—CONTRIBUTORY NEGLIGENCE OF TOW.

The master of a barge in tow of a steamer which has drawn it up from a southerly direction in a heavy northwest wind and then squared away to enter the Duluth ship canal, who first learns when he is moving at the rate of 10 miles an hour and is within 200 feet of the south pier, that his vessel will be drawn against it, is not guilty of contributory negligence because he fails to throw off or cut his tow line before his barge strikes the pier.

4. SAME—ACTS OF MASTER IN EXTREMIS.

The acts and failures to act of a master of a vessel after it has been put in extremis by the negligence of another, do not ordinarily constitute contributory negligence even when erroneous.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 24-26.]

(Syllabus by the Court.)

Appeals from the District Court of the United States for the District of Minnesota.

Herbert R. Spencer, for M. Sicken and others.

John H. Norton and Albert J. Gilchrist, for the Gilchrist Transp. Co.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. About 6 o'clock in a dark, stormy evening in November, 1903, the steamer, John Harper, a vessel 290 feet in length by 40 feet beam, laden with coal, towed the barge, Gawn, light, a sailing vessel 171 feet in length by 32 feet beam, which the Harper was taking from Lake Michigan to the port of Duluth, against the outer end of the south pier of the Duluth ship

*Rehearing denied November 16, 1906.

canal, whereby the owners of the Gawn sustained damages in the sum of \$2,949.50. They libeled the Harper, and the court found that the master of each vessel was negligent and divided the damages. Both parties appealed.

The Duluth ship canal extends in a general easterly and westerly direction and is 1,200 feet long and 300 feet wide at its eastern end. It cuts near its base Minnesota Point, a narrow tongue of land which stretches several miles in a southeasterly direction and separates Lake Superior from the harbor of Duluth. Heavy cement piers bound the sides of the canal. On the outer end of the south pier there is a lighthouse and a fog signal and half way from the eastern to the western end of this pier is a range light. On the north pier are electric lights. The Harper came up Lake Superior from the vicinity of Devil's Island on the usual course, towing the Gawn on a line 900 feet long. The usual course brings vessels a mile and a half or two miles south of the entrance of the canal, as they approach Minnesota Point. At some distance from the shore the crew of the Harper discovered the lights of the harbor and of the piers. The wind was blowing from the northwest at the rate of between 35 and 40 miles an hour, so that it was running at nearly right angles with the course of the canal. After the lights were discovered the Harper shifted its course toward the north and ran into the wind. It signaled the Gawn to shorten its tow line. It signaled for a tug. It subsequently gave a signal to the Gawn to make fast its line. It turned to port and ran into the canal. The Gawn failed to shorten its line because it was too taut. It drifted to leeward as the Harper entered the canal and struck the south pier. The facts which have been thus far recited are not in dispute and they are not decisive of the questions in the case. The testimony of the witnesses for the respective parties in regard to the facts which condition the determination of the issues in this case is in hopeless conflict. The witnesses agree that at some place within seven miles of Duluth the Harper was south of the projected line of the canal, that she shifted her course toward the north, ran into the wind until she reached or passed that line, and that she subsequently turned to port and entered the canal. It goes without saying that when the Harper headed toward the northwest into the wind the Gawn must have tailed off to leeward on a line approximately at right angles to the line of the canal and that as they approached the harbor an obvious danger arose which no navigator of skill or prudence could have failed to perceive and to endeavor to avoid, the danger that a turn of the Harper to port at a point too near the canal would draw the barge upon the south pier. The evidence for the respective parties is addressed to the acts of the masters and crews of the two vessels in respect to this acknowledged danger. The witnesses for the libelants are the master and the members of the crew of the Gawn, the wheelsman of the Harper, the master of a tug which answered the signal and picked up the Gawn after the accident and the keeper of the light house. Their evidence is that

the Harper followed the usual course of vessels coming from the vicinity of Devil's Island to Duluth until she was a mile and a half or two miles southward of the entrance to the canal, that she then ran northwesterly into the wind, checked her speed or stopped, signaled the barge to shorten the tow line, signaled for a tug, subsequently signaled to make fast the tow line and then when she was from a quarter to a half a mile easterly of the entrance to the canal headed to port, squared away for the canal and ran into it at the rate of 10 miles an hour. These witnesses say that the northwesterly wind constantly drifted the barge to leeward, that the tow line was so taut that the crew could not shorten it and that the attempt of the master of the Harper to enter the canal while the barge was drifting out to the leeward on its long line under the strong northwesterly wind was the cause of the accident.

On the other hand, the master and the members of the crew of the Harper testify that they shifted her course toward the north at a point about six miles out in the lake and ran into the wind until they crossed the projected line of the canal and opened the range lights to the northward at a place about three miles out, that they then gave the signal to shorten the tow line and for the tug, checked and held the steamer in its place for half an hour, then signaled to the barge to make the line fast, headed the steamer and kept her on a course north of the line of the north pier until she came within 100 or 200 feet of the canal when they starboarded her wheel so that she would clear the north pier and then ported it and sent her at full speed through the canal about 75 feet south of the north pier. They testify that the Gawn followed nicely, that she came up north of the extended line of the north pier and did not drift off to leeward until she was from 75 to 600 feet of the piers when she suddenly sheered to the southward and struck the south pier.

The court below was unable to credit the story of the master and crew of the Harper, and concluded that they ran into the canal when the barge was drifting to leeward so far under the heavy northwesterly wind that a navigator of ordinary prudence and skill would have held the vessels out in the lake until a tug arrived, or would have taken some other course to avoid the plain danger of the collision and that this negligence of the master of the Harper was the cause of the accident. A careful examination of the testimony in the light of the briefs and arguments of counsel and the established rules of law applicable to a case of this nature has failed to lead our minds to a different conclusion. At some place within seven miles of Duluth the Harper was from one to two miles south of the projected line of the canal. At some time after she arrived at this place she ran in a northwesterly direction to, or across that line. When she arrived at the line the barge must have been far to her leeward on the 900 feet of line. The witnesses for the Harper say that after this the Harper ran for more than two miles on a course north of the extended line of the north pier before she squared away

to enter the canal and that the Gawn followed her on that course north of the line of the north pier. They say that the Harper and the Gawn then came down to the south and the former entered the canal. This testimony has failed to convince not only because the members of the crew of the Gawn testify that the latter vessel never followed the Harper on that course north of the north line of the canal but that she continually drifted to leeward, and that she directly followed only when the Harper was headed into the wind, but also and chiefly because it is improbable that a vessel light towed by a line 900 feet long at a speed of not more than 10 miles an hour through a wind abeam of 35 miles an hour would not drift to leeward, because with her wheel hard aport, as the evidence convinces us it was, she did drift in that direction until she struck the south pier, and because the master of the tug who came out in answer to the call of the Harper, and the lighthouse keeper, both apparently disinterested witnesses, testify: The former that when he first saw the Harper she was out about a quarter of a mile, was headed north-west and looked to be coming from the southward; and the latter that when he first perceived her he was on the eastern end of the south pier, that she was a quarter to a half a mile south of the south pier and that he estimated that she was from a quarter to a half a mile out in the lake. The lighthouse keeper was on the south pier. No witness was in a better position to determine whether the steamer came to the line of the canal from a course north of the line of the north pier, as her witnesses declare, or from some point south of the line of the south pier, as the master and members of the crew of the Gawn testify, and there is no reason to believe that his evidence was influenced by interest or prejudice or that it was untrue. Doubtless the distances given by the various witnesses in their evidence are inaccurate, for they were necessarily estimates. The evidence is voluminous and contradictory, but it has borne in upon our minds the conviction that the master of the Harper came up from the southward with a barge tailing off to leeward on its long line, that as he approached the entrance to the canal the Gawn was still drifting far to leeward, that under these circumstances a navigator of ordinary skill and prudence would have perceived and would have avoided the danger of her collision with the south pier, and that his failure to do so was poor seamanship and a lack of ordinary care which caused the disaster. A steamer which engages to tow a vessel to a port is required to exercise reasonable skill and care in everything relating to the work, including the entrance to the port, until the service has been rendered, and the lack of either charges her with liability for the damage which it causes. *The Margaret*, 94 U. S. 494, 24 L. Ed. 146.

The court below was of the opinion that the master of the Gawn was guilty of negligence which contributed to the injury, because he failed to throw off or to cut the line when he discovered that his vessel would strike the pier. His vessel was without power, and the primary duty and responsibility for her safe transportation fell upon the master

of the Harper. It was the province of the latter, and not that of the former, to consider and determine in the first instance whether or not he could safely tow the barge through the canal, and, when he had reached this decision, it was his duty to exercise reasonable care and skill to do so. The extent of the duty of the master of the barge was to use ordinary care to follow the steamer, to obey her master and to avoid obstructions and injuries. The master of the Harper had signaled for a tug and until he squared away his steamer to enter the canal the master of the Gawn naturally supposed that the Harper would wait without the canal until the tug arrived. The master of the steamer was in the better position to observe the danger, and to provide against it and the master of the barge naturally relied upon the presumption that he would exercise reasonable skill and care to do so. It was not until the Gawn was within 200 feet of the pier, while it was moving at the rate of 10 miles an hour, that its master knew that the master of the steamer had committed an act of negligence and that the barge would strike the pier. The collision occurred in about 17 seconds thereafter. South of the pier stretched the beach of Minnesota Point, where his barge might have stranded if he had cut the line. In that event he would probably have been called upon to meet the claim of the owners of the Harper that he would have passed the pier in safety if he had relied on the master of the steamer and had held fast his line. The time between his knowledge of the danger and the collision was too short, the chances of safety were too doubtful; the disaster was too imminent, when the master of the Gawn discovered his danger, to render his subsequent inaction before the collision any want of reasonable care. Where a vessel has been brought into imminent danger by the negligence of another, she may not ordinarily be condemned for any error of her master while she is in extremis, and he is endeavoring to extricate her (*The Ludvig Holberg*, 157 U. S. 67, 15 Sup. Ct. 477, 39 L. Ed. 620), and the testimony in this case fails to convince that the master of the Gawn committed any error.

The proctor for the owners of the Harper makes other claims of negligence on the part of the master of the Gawn. He insists that the Gawn was negligent because she failed to shorten her tow line, and failed to signal that she had not done so, but the testimony convinces that the wind kept the line so taut that she could not safely shorten it, and that the lights of the Gawn and her distance were perceptible to the master and crew of the Harper as the latter approached and entered the canal; because she failed to use her centerboard, but the weight of the testimony is that she used it; and because she eased up on her wheel as she approached the piers and thereby permitted herself to sheer to leeward and to fall into collision, but the record convinces that her wheel was hard aport all the time after the Harper squared away for the canal. These various charges of contributory negligence were not sustained by the court below, and our conclusion is that the evidence fails to support them.

The decree below must accordingly be reversed, and the case must

be remanded to the district court, with instructions to enter a decree for the libelants for the amount of the damages, interest, and costs; and it is so ordered.

COOK INLET COAL FIELDS CO. v. CALDWELL et al.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1906.)

No. 648.

1. BANKRUPTCY—APPEALS.

Under the express provisions of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], appeals may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals and to the Supreme Courts of the territories in like manner as appeals in equity are taken.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—PROCEEDINGS REVIEWABLE—NATURE OF REMEDY.

Under the express provisions of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], appeal is the proper remedy to review a judgment adjudging or refusing to adjudge the defendant a bankrupt, a judgment granting or denying a discharge, and a judgment allowing or rejecting a debt or claim for \$500 or over.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

3. SAME—RECORD.

On appeals in bankruptcy, no case will be heard until a complete record has been prepared by the clerk after he has been directed by counsel to do so, and unless the record contains in itself, and not by reference, all papers, exhibits, deposits, and other proceedings necessary to the hearing in the appellate court.

4. SAME.

On appeals in bankruptcy, the record required to be certified and filed is the record of the case in the bankruptcy court.

5. SAME—PETITION TO SUPERINTEND AND REVISE—SCOPE.

An objection to an order entered *nunc pro tunc*, adjudging petitioner a bankrupt, is reviewable on appeal taken at the time the order of adjudication was entered, and not on a subsequent petition to superintend and revise.

6. SAME—RECORD—CERTIFICATION—RULES.

Circuit Court of Appeals Rule 36, subd. 2, relating to petitions to superintend and revise, and providing that petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of the Circuit Court of Appeals within 30 days from the date of the filing of such petition, contemplates the certification of the record and proceedings by the clerk of the bankruptcy court, and not a transcript certified by the referee.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of West Virginia, in Bankruptcy, at Clarksburg.

W. N. Miller, for petitioner.

Geo. Bryan and Charles I. Caldwell, for respondents.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. On the 7th of September, 1904, James H. Caldwell, James A. Watson, and Charles T. Caldwell filed their petition, alleging that they were creditors, in the District Court for the Northern District of West Virginia, at Clarksburg, to have the Cook Inlet Coal Fields Company, a corporation, adjudged an involuntary bankrupt. A subpoena to show cause was issued upon the filing of this petition, returnable on the 21st day of September, 1904, which was served upon the corporation, and on the return day of the subpoena a demurrer was filed, by the attorneys of the corporation, to the petition. The record does not show a further proceeding in the bankruptcy court until the 9th of March, 1905, when an order adjudging the Cook Inlet Coal Fields Company a bankrupt was entered nunc pro tunc as of September ———, 1904. This order was based upon the affidavits of Charles T. Caldwell and James A. Watson that the order of adjudication in the case had been duly prepared in September, 1904, and presented to John J. Jackson, late judge of the District Court of the United States for the Northern District of West Virginia, and a certificate, to the same effect, signed by Judge Jackson. In order to a full understanding of the proceedings in the case, it is necessary to state that Hon. John J. Jackson was in September, 1904, and had been theretofore, district judge of the United States for the Northern District of West Virginia, but that prior to March, 1905, having arrived at the age required by law, he had resigned for retirement, and Hon. Alston G. Dayton had been duly appointed and qualified as his successor, and the nunc pro tunc adjudication above referred to was signed and filed by Judge Dayton on the 9th of March, 1905. Subsequent to the filing of the nunc pro tunc order, adjudging the corporation a bankrupt, to wit, about the 1st of May, 1905, the corporation filed an answer to the original petition before the referee, in which the indebtedness alleged by the petitioning creditors was denied and some other matters set up in opposition to the adjudication in bankruptcy. No exception appears upon the record to have been taken to the nunc pro tunc order until later on, when an application was made to the referee to order the sale of certain property by the trustees who had been appointed to administer the estate in bankruptcy, and the bankrupt appeared and protested against the order of sale. The objection, however, was overruled by the referee on the 15th day of July, 1905, and thereupon the bankrupt, through its attorneys, filed a petition to the judge of the District Court of the Northern District of West Virginia to have the order of sale set aside and annulled, and in this petition one of the grounds set forth for the annulment of the order of sale was the averment that the order entered nunc pro tunc, adjudging the Cook Inlet Coal Fields Company a bankrupt, was illegal and improper. Other grounds set forth in opposition to the order of sale were want of jurisdiction of the court to entertain the petition in bankruptcy; that the Cook Inlet Coal Fields Company had not been permitted to be heard upon its answer and issues tendered in the manner provided by law; that the court had no jurisdiction without an appraisal of the property of the bankrupt by three disinterested persons, as required by law, to sell the

property by the trustees. And as a further reason why the order of sale should be set aside, it was charged that the case was illegally and improperly referred to George W. Johnson, referee. There are some other causes stated, which it is not now necessary to mention. The petition concluded:

"That for these and other reasons apparent on the face of the record, your petitioners pray that the order of sale be set aside, that the petition for the sale of said property be dismissed and that the proceedings of the said referee and orders made by him, as aforesaid, may be reviewed by the said District Court of the United States for the Northern District of West Virginia," etc.

The district judge, on the 19th day of September, 1905, overruled this petition and affirmed the action of the referee in ordering the sale of the bankrupt's property. Thereupon, on the 18th day of December, 1905, the petition of the Cook Inlet Coal Fields Company was filed in this court, to superintend and revise, in matter of law, the proceedings of the District Court of the United States for the Northern District of West Virginia, in this proceeding in bankruptcy. Motion is now made by the respondents to dismiss the case here, first, upon the ground that the order of adjudication entered nunc pro tunc on the 9th of March, 1905, can only be reviewed in this court upon appeal and not upon petition to superintend and revise, and, second, that the record is not before this court certified as required by law and the rules of court, so as to authorize the court to review any matter of law involved in the order for the sale of the property of the bankrupt.

In the record, the greater part of the proceedings, including the findings of fact, orders, and decrees in the case, are certified by George W. Johnson, referee in bankruptcy, and the certificate which he attaches severally to the various proceedings is as follows:

"I, George W. Johnson, at Parkersburg, one of the referees in bankruptcy in the District Court of the United States, for the Northern District of West Virginia, do certify that the foregoing is a true and correct copy of * * * entered in the matter of the Cook Inlet Coal Fields Company, in bankruptcy, the original of which is now of record in my office.

"Given under my hand at Parkersburg, in said District, on this ——— day of ———, A. D., 1905.

"[Signed]

George W. Johnson, Referee in Bankruptcy."

At the conclusion of the record appears the following certificate of the clerk:

"United States of America, Northern District of West Virginia—ss:

"I, Jasper Y. Moore, clerk of the District Court of the United States for the Northern District of West Virginia, do certify that the foregoing (with the exception of the certificates of George W. Johnson, referee in bankruptcy) are true copies of original papers and orders of bankruptcy proceedings, on file or of record in my office, of the matter to be reviewed, in the case of the Cook Inlet Coal Fields Company, bankrupt.

"In testimony whereof I have hereto set my hand and the seal of said court at Clarksburg, in said district, this 15th day of March, A. D. 1906.

"[Signed]

Jasper Y. Moore,

"[Seal of Court.]

Clerk D. C. U. S., N. D. W. Va."

By virtue of the provisions of the bankrupt act, the Circuit Courts of Appeals have appellate jurisdiction in bankruptcy cases, and appeals

may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Courts of Appeals of the United States and to the Supreme Courts of the territories, in like manner as appeals in equity are taken. Appeal is the proper remedy, so made by the act in the following cases: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; (3) from a judgment allowing or rejecting a debt or claim for \$500 or over. If the case falls within one or more of these classes, it can be reviewed only on appeal. Loveland's Bankruptcy, p. 816, § 314, and authorities cited under note 67.

"When an appeal has been allowed, a transcript of the record of the proceedings in the court of bankruptcy must be prepared and filed in the appellate court. It is the duty of the clerk to make it after and not before he is directed by counsel to do so." "No case will be heard until a complete record, containing, in itself and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in the appellate court, shall be filed." Loveland's Bankruptcy, p. 833, § 323, citations under note 5.

"Perfecting an appeal by giving a bond, issuing and serving a citation, and filing the record in the appellate court, is essential to the prosecution of a suit in an appellate court." Loveland's Bankruptcy, p. 836, § 325.

The practice and the requirements upon appeals in bankruptcy cases are substantially the same as in other cases, and the record required to be certified and filed in such cases is the record of the case in the bankruptcy court.

The District Courts in the several districts of the United States are, by law, the courts of bankruptcy. The referee is not the District Court. He is only an elemental part of the court; one of the instrumentalities of the court, created by the law for the purpose of carrying out the provisions and purposes of the bankruptcy act. He occupies, in many respects, the relation to the bankruptcy court that the master does to the court of chancery. Such orders and proceedings as are had before the referee in any case, after the same is concluded by him and the proceedings certified, become a part of the record of the case and as such belong in the office of the clerk of the court in the district and territory within which the referee acts. The clerk of the District Court, being also clerk of the bankruptcy court, can alone, therefore, certify to the appellate court the proceedings had in a bankruptcy case, either on appeal or on petition to superintend and revise. He, and he alone, has the authorized seal of the court.

Certain judicial powers are vested in the referee and also certain administrative duties devolve upon him, but these he exercises, as before stated, as an instrumentality to carry into effect the bankruptcy act and as an essential of the court designated by law for that purpose. But these do not constitute him the keeper of the records or authorize him to certify records directly to a Circuit Court of Appeals. Indeed, as we have said, the proceedings taken before the referee become a part of the case in the court of bankruptcy, and section 272 of the act provides as follows:

"When the debts have been proved and allowed, the assets collected and distributed, the case is concluded before the referee. He should then certify to

a record of the proceedings before him, together with such papers as are on file before him, and transmit them to the clerk of the court. They are preserved by the clerk as a part of the records of the court." Bankr. Act July 1, 1898, c. 541, § 42c, 30 Stat. 536 [U. S. Comp. St. 1901, p. 3437]; Loveland, p. 735.

Aside from the right of appeal, which exists in the particular instances before stated, from the courts of bankruptcy to the Circuit Courts of Appeals, the latter courts have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. And it is recognized, as the law, that the provisions of the present bankruptcy act confer a complete supervision in matters of law over all the proceedings of the courts of bankruptcy within the limit specified. It has been held that the Circuit Courts of Appeals may review the whole bankruptcy case after a final decree and decide upon it, or that they may assume jurisdiction of any particular proceeding or order arising in the progress of the case. These powers, however, are not exercised by the Circuit Courts of Appeals upon appeals taken in the usual way, but the jurisdiction attaches by petition presented to the court, praying that the action of the court of bankruptcy in a case, or some part of its action, may be superintended and revised. This revisory jurisdiction, however, has been held in many cases not to include orders or judgments of the court of bankruptcy or of the district judge, which can be reviewed on appeal under the bankrupt act.

This case being before us now, upon a petition to superintend and revise the action of the court in bankruptcy, presents two questions: The one based upon an objection taken to an order entered *nunc pro tunc*, adjudging the petitioner, the Cook Inlet Coal Fields Company, bankrupt, and the other an exception to a decree of sale of the property of the bankrupt, made by the referee and affirmed by the judge of the District Court.

As to the adjudication in bankruptcy, we are of the opinion that the question suggested as to its illegality cannot be considered by this court under the present proceeding, the proper remedy, in event error is alleged in making the order, being by an appeal duly taken at the time the order of adjudication was entered. The other question, therefore, alone remains for consideration upon the motion of James H. Caldwell, James A. Watson and Charles T. Caldwell, respondents, to dismiss this proceeding on the ground that the record before us is not properly certified.

It will be seen that the clerk, in making his certificate, specifically excepts, as a part of the record in his office, the certificates of George W. Johnson, referee in bankruptcy. This exception, of course, includes all the proceedings, orders, and decrees found in the record purporting to be authenticated by the certificate of the referee.

These proceedings, orders, and decrees are those which are made the ground in the petition filed to superintend and revise the action of the bankruptcy court. Rule 36 of this court, under which petitions like that in the present case are filed, provides as follows in subdivision 2:

"The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of said petition."

There can be no question that this rule contemplates a transcript of the record and proceedings of the bankruptcy court certified by the clerk of that court, and not a transcript certified by the referee. In view of these conclusions, it is ordered by the court that the petition in this case be dismissed.

Dismissed.

FARWELL v. COLONIAL TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 7, 1906.)

No. 2,330.

1. EQUITY—ADEQUATE REMEDY AT LAW.

The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 151, 152; vol. 23, Cent. Dig. Fraud, § 14.]

2. SAME.

An action at law against the vendor of the stock of a corporation for damages is not as adequate, nor is it as complete or efficient, as a suit in equity against the vendor and the corporation to rescind the sale, to recover the purchase price, and to relieve the complainant from liability to the corporation on account of the stock.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 147-156.]

3. SALE—RESCISSION—MISREPRESENTATION REQUISITE TO INVOKE.

The misrepresentation which will induce a court of equity to avoid a contract or sale must be material, inducing, damaging, and calculated to deceive.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 65-67.]

4. SAME—PROMISE OR PROPHECY WILL NOT EFFECT.

A promise, a prophecy, an expressed opinion or belief, concerning future events or conditions, furnishes no ground for the rescission of a contract or sale.

The subject of an actionable misrepresentation must be the existence or nonexistence of a fact at the time the statement is made.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 65-74.]

5. SAME—INADEQUATE REPRESENTATIONS TO EFFECT—FACTS.

A promoter sold the stock and bonds of a bridge company under the representations (1) that the stock, which was not then issued, would be full-paid and nonassessable, and it was not so; (2) that the bridge company had a contract with a railroad company that it should receive 5 cents for each passenger whom the railroad company carried over the bridge, and it had no such contract, but secured one more than a year before the bridge was ready for use.

Held, these representations were insufficient to sustain a rescission of the sale; the first because it related to future acts and conditions, and the second because it caused no damage.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 65-74; vol. 23, Cent. Dig. Fraud, § 14.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Benjamin Schnurmacher and Colin C. H. Fyffe (Leo Rassieur, Theodore Rassieur, and Arthur E. Kammerer, on the brief), for appellant.

P. Taylor Bryan (Harvey L. Christie, on the brief), for appellees Commonwealth Trust Co., Colonial Trust Co., and St. Charles & St. Louis County Bridge Co.

W. C. Scarritt, John K. Griffith, Elliott H. Jones, and Edward L. Scarritt, for appellees Freygang and Trocon.

Before SANBORN and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of dismissal of a bill to rescind a purchase by the complainant from the Colonial Trust Company of 15 bonds, of \$1,000 each, and 90 shares of stock, of the par value of \$100 each, of the St. Charles & St. Louis County Bridge Company, to recover back their purchase price of \$13,125, and for other relief, upon the ground that the bill failed to state facts sufficient to constitute a cause of action. The material facts it set forth were these: In April and May, 1902, the Colonial Trust Company was promoting the construction of a railroad bridge across the Missouri river at St. Charles in the state of Missouri to connect the railroad of the St. Louis, St. Charles & Western Electric Railroad Company, which extended from Wellston in that state to a point on the bank of the river opposite St. Charles, with the latter city. The trust company had made a loan of \$400,000 to some of the directors and others connected with the railroad company and was deeply interested in the construction of this bridge. The capital stock of the bridge company was \$2,000. Thereupon the trust company issued a plan, pursuant to which the complainant purchased his bonds and stock, wherein the proposal was made that the bridge company should increase its capital stock to \$400,000; that it should issue bonds to the amount of \$400,000, and secure them by a mortgage upon the bridge; that the bridge company should agree that its capital stock should be full-paid and nonassessable; that its stock should be delivered to the contractors in consideration of their construction of the bridge; that the trust company should be the trustee in the mortgage, and the trustee and manager for the subscribers, and should accept subscriptions and sell the bonds and stock at the price of \$875 for one bond and six shares of stock. Before the complainant subscribed, the trust company, in answer to an inquiry, wrote him on April 21, 1902:

"The issuance of these securities will be made in strict accordance with the Missouri statutes and will come out through the contractors as full-paid and nonassessable. The greatest care is being exercised by our attorneys in this matter. * * * In reply to your inquiry as to the guarantee of an amount sufficient to pay at least the interest on the bridge bonds by the St. Louis, St. Charles & Western Electric R. R. Company, the estimate is based on the amount of through traffic now existing, together with the ferry business. The bridge company, through its contract, gets all the 5-cent arbitrary over the river."

The complainant avers in his bill that the trust company wrote another letter on April 24, 1902, which will be the subject of subsequent consideration. By these various representations the complainant was induced to subscribe and pay for his stock and bonds. At the time these statements were made there was no contract between the railroad company and the bridge company about the fare for the transportation of passengers over the bridge, but on June 3, 1902, such an agreement was made by which the railroad company agreed to pay the bridge company 5 cents for each passenger carried over the bridge in any car operated by the railroad company during the term of 50 years. The capital stock of the bridge company was increased to \$400,000. Its bonds to the amount of \$400,000 were issued and secured by a mortgage on the bridge. The bonds and 399 shares of the stock were, on May 1, 1902, sold to the contractors in consideration of their construction of the bridge, and on the same day they assigned and delivered them to the Colonial Trust Company for \$310,000, which the latter company agreed to pay them only in the event that it obtained the same from the subscribers for the bonds and stock under the proposed plan. The bridge was completed in 1904. The Commonwealth Trust Company has succeeded to the rights and has assumed the liabilities of the Colonial Trust Company. All the parties that have been mentioned except the complainant and the railroad company are defendants in this suit.

In this state of the case the complainant seeks a rescission of his purchase of the stock and bonds because of the misrepresentations that the stock of the bridge company would be full-paid and non-assessable; that the bridge company had a contract with the railroad company on April 24, 1902, to the effect that it should receive 5 cents for every passenger carried across the bridge by the railroad company; and that the latter company should not receive any more for their transportation. The defendants challenge the bill on the ground that the complainant has an adequate remedy at law by an action to recover of the trust companies the price he paid for his bonds and stock or the damages which have resulted to him from the false representations he avers. But the adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity. *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Williams v. Neely*, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232; *Brown v. Arnold*, 131 Fed. 723, 727, 67 C. C. A. 125, 129; *Wiemer v. Louisville Water Co. (C. C.)* 130 Fed. 246, 250; *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389. If the complainant's purchase was induced by fraudulent misrepresentations of material facts, he is entitled to an avoidance of that purchase, not only against the trust company, but also against the bridge company, to a decree that he is not the owner of the stock of the latter company and is not liable to pay to it any assessment or other claim whatever. This relief against the bridge company he cannot obtain in an action at law against the trust companies, and for this reason his remedy at law is neither adequate, nor is it as complete and efficient as the remedy in

equity which he invoked, and the dismissal of the bill cannot be sustained upon that ground.

Are the misrepresentations alleged in the bill adequate to invoke a rescission of the purchase? Actual or legal fraud is an essential element of those misstatements which will induce a court of equity to set aside a contract or a sale. The subject of such misrepresentations must be the existence or nonexistence of facts at the time the statements were made. Neither promises, nor prophecies, nor expressed opinions or beliefs, concerning future events or conditions, will sustain a rescission of a contract or a sale. The facts concerning which the misrepresentations are made must be material to the contract or transaction. They must be facts concerning which the victim is ignorant, and of which a person of ordinary sagacity and diligence in his place would have acquired no knowledge. The false statements or representations must be well calculated to deceive and to induce the victim to enter upon the trade, and they must accomplish that result and cause him substantial damage. Let us try the representations set forth in this bill by these established tests.

Conceding, without deciding, that the stock of the bridge company is not full-paid and that it is assessable, the misrepresentations that it would be full-paid and nonassessable were made in April, 1902. They had no relation to the existence or nonexistence of any then present fact. They were promises or opinions concerning future transactions. The stock had not then been issued, and the complainant knew it. Not only this, but the plan which the complainant had examined and under which he subscribed and paid for his securities clearly portrayed the method which was afterwards pursued of issuing the stock and bonds, of delivering them to the contractors for the construction of the bridge, and then of selling the bonds and a majority of the stock to the subscribers for less than the par value of the bonds alone. This disclosure was ample notice to a man of ordinary prudence that an owner of stock thus secured might incur liability to pay for it, and notice sufficient to put a person of ordinary prudence and diligence on inquiry is notice of all the facts which a reasonable investigation would disclose. The rule, *caveat emptor*, portrayed the duty and the obligation of the complainant, and ample time and opportunity intervened between the dates of these representations and the payment of his subscription to have enabled him to ascertain how the stock was issued and what the legal liabilities of the holders thereof became.

The statements that the stock would be full-paid and nonassessable present no basis for a rescission of the complainant's purchase, because they were not statements of the existence or nonexistence of any then present fact, but mere promises or prophecies concerning future events. *Union Pac. R. Co. v. Barnes*, 12 C. C. A. 48, 50, 64 Fed. 80, 82; *Chicago & N. W. R. Co. v. Wilcox*, 54 C. C. A. 147, 116 Fed. 913; *Daniels v. Benedict*, 97 Fed. 367, 380, 38 C. C. A. 592, 605.

The second representation upon which reliance is placed was that in April, 1902, the bridge company had an extremely valuable contract with the railroad company whereby the latter had agreed that the bridge company should receive 5 cents for every passenger which the

railroad company carried across the bridge. No damage, however, resulted to the complainant from the absence of this contract, because on June 3, 1902, and more than a year before the bridge was constructed, the railroad company made such a contract with the bridge company for the term of 50 years, and a misrepresentation which causes no damage presents no ground for an action for fraud and no basis for equitable relief.

The third alleged misrepresentation is that the bridge company had a contract with the railroad company that it would not charge or collect more than 5 cents for the transportation of each passenger over the bridge. The claim of this statement rests upon the sentence, "The bridge company through its contract gets all the 5-cent arbitrary over the river," in the letter of April 21, 1902, and upon the averment in the bill that the Colonial Trust Company in its letter of April 24, 1902, "stated that said bridge company held an extremely valuable contract with said railroad company securing to said bridge company an arbitrary charge of 5 cents per passenger on all passengers taken across said bridge by the cars of said railroad company, and (that said 5-cent arbitrary was the entire fare to be charged for such carriage of passengers, of which said railroad company should receive no part)." Counsel disagree in the interpretation of this sentence of the bill. The complainant's counsel insist that the averment here is that the provision in the clause inclosed in a parenthesis above was secured by the contract, while counsel for the defendants argue that it is an allegation that this statement was contained in the letter. The grammatical construction of the sentence and the relation of its parts sustain the latter contention. The participle "securing" governs the word "charge" which follows it, and whatever the pleader averred that the contract evidenced. He did not write, and did not intend to write, "and (securing) that said 5-cent arbitrary was the entire fare to be charged"; but he wrote, and must have intended to write, that the trust company "stated that said bridge company held," etc., and that (it stated) "that said 5-cent arbitrary was the entire fare to be charged." The averment of the bill, therefore, is that this statement was not of an existing fact, but of an opinion or belief of the writer of the letter concerning a future course of action, and for that reason it presents no cause for a rescission of the purchase.

The only ground remaining to sustain the claim that the trust company stated that the railroad company had agreed that it would not charge or collect more than 5 cents per passenger for transportation over the bridge is the averment in the letter of April 21, 1902, that "the bridge company, through its contract, gets all the 5-cent arbitrary over the river." Here is no statement that the railroad company will not receive more. If there is any representation here that the railroad company had agreed that it would never charge or collect more than 5 cents per passenger for transportation over the bridge, it is not expressed, but arises by implication from the statement that the bridge company gets all the 5-cent arbitrary. Proof of fraudulent representations requisite to avoid a contract or a sale and of their

materiality must be clear and satisfactory, and it is by no means clear that any implication that the railroad company would not collect more than 5 cents per passenger for carrying the passengers over the bridge arose from the statement under consideration. Nor is it plain that such an implication, if it existed, constituted a material inducement to the complainant's subscription or purchase. It is rather a possibility than an established material fact, and its existence is too doubtful, its materiality too shadowy and uncertain, to invoke an avoidance of an executed sale.

There were other questions presented in the briefs and arguments of counsel, but none that are material to the decision of this case, in view of our conclusion that there is no substantial equity in the bill.

The decree below is accordingly affirmed.

SENA v. UNITED STATES (two cases).

(Circuit Court of Appeals, Eighth Circuit. September 4, 1906.)

Nos. 2,289, 2,321.

1. COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals for the Eighth Circuit has appellate jurisdiction to review the judgments of the Supreme Court of the territory of New Mexico in cases of conviction of crime not capital.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1101.

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475; *Salmon v. Mills*, 13 C. C. A. 374.]

2. SAME—CRIMINAL CASES—MODE OF REVIEW.

Criminal cases are reviewable by the Circuit Court of Appeals in all cases by writ of error, and not by appeal.

3. APPEAL—JURISDICTION OF SUPREME COURT OF NEW MEXICO—EFFECT OF REPEAL OF STATUTE.

The organic act of the territory of New Mexico (Act Sept. 9, 1850, c. 49, § 7, 9 Stat. 446), after providing that the legislative power of the territory shall extend to all rightful subjects of legislation "consistent with the Constitution of the United States and the provisions of this act" and for Supreme and district courts, provides in section 10 that "writs of error, bills of exceptions and appeals shall be allowed in all cases from the final decisions of said district courts to the Supreme Court, under such regulations as may be prescribed by law." *Held*, that the right to an appeal or to a writ of error in all cases was given by such organic act and could not be taken away by any action of the Legislature, whose power was restricted to the making of reasonable regulations prescribing the procedure: that where a defendant in a criminal case after conviction in a district court took and perfected an appeal within the time and in accordance with the provisions of an existing statute, the repeal of such statute without a saving clause before the hearing of the appeal did not deprive the Supreme Court of jurisdiction in the case.

4. SAME—DISPOSITION OF CAUSE—WANT OF JURISDICTION.

Where an appellate court is without jurisdiction of the subject-matter of an appeal, the only judgment it can enter is one dismissing the appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3123.]

Appeal from the Supreme Court of the Territory of New Mexico.
In Error to the Supreme Court of the Territory of New Mexico.
For opinion below, see 78 Pac. 58.

John H. Knaebel (Frank W. Clancy, on the brief), for appellant and plaintiff in error.

E. L. Medler, Asst. U. S. Atty. (W. H. H. Llewellyn, U. S. Atty., on the brief), for the United States.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The appellant and plaintiff in error (hereinafter for convenience designated as "the defendant") was indicted in the first judicial district court of the territory of New Mexico, in four counts, charged with having forged or caused to be forged and presented a certain receipt and a certificate purporting to have been given by one Arthur J. Tinker to Pedro Sanches, supervisor of census, for services as interpreter. He was convicted and sentenced, under the provisions of section 5421, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3667], on each count, to imprisonment at hard labor for one year and one day in the territorial penitentiary at Santa Fé, which sentences were made cumulative. Being in doubt as to whether the proper procedure to have this judgment reviewed was by appeal or writ of error, the defendant's counsel pursued both remedies, and has brought the case here on separate records; No. 2,289 being on appeal, and No. 2,321 on writ of error. The two cases will, therefore, be disposed of in one opinion.

The government has interposed motions in this court to dismiss the appeal and writ of error for reasons which will appear in the following discussion. The United States Attorney makes contention that this court has no appellate jurisdiction to review the judgments of the Supreme Court of the territory of New Mexico in criminal cases, like the one at bar. Since Act Jan. 20, 1897, c. 68, 29 Stat. 492 [U. S. Comp. St. 1901, p. 549], there can be no question of the jurisdiction of this court over appeals and writs of error from the Supreme Court of the territory of New Mexico in cases not within the exception in the act creating United States Circuit Courts of Appeal. This court exercised jurisdiction from this territory in the case of *Haynes v. United States*, 101 Fed. 817, 42 C. C. A. 34, *nem. con.* It is no longer an open question that the proper method of reviewing judgments in criminal cases by this court is by writ of error and not by appeal. *Bucklin v. United States*, 159 U. S. 680, 16 Sup. Ct. 182, 40 L. Ed. 304, 305; *De Lemos v. United States*, 107 Fed. 121, 46 C. C. A. 196. The appeal, therefore, taken in this case, must be dismissed.

The Supreme Court of New Mexico dismissed the appeal for want of jurisdiction, based upon the contention that the statute under which the appeal was taken was repealed before the cause was reached for final hearing in that court. This renders it necessary to examine the act of Congress and legislation touching the right of appeal in the ter-

ritory. In the organic act of the territory, approved September 9, 1850 (9 Stat. 446, c. 49), it is provided in Section 7:

"That the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act."

After providing that the judicial power of the territory is vested in a Supreme Court, district courts, probate courts, and justices of the peace, section 10 of the act declares that:

"Writs of error, bills of exceptions and appeals shall be allowed in all cases from the final decisions of said district courts to the Supreme Court, under such regulations as may be prescribed by law."

From which it is clear that the right to an appeal or writ of error from the final decision of the district court to the Supreme Court is mandatory and imperative. It does not depend upon the sanction or approval of the territorial Legislature. The only power conferred upon the Legislature is to make regulations, prescribing the manner of taking and prosecuting such appeals. It may make such regulations as to it may seem essential and proper, prescribing the time within which such appeals may be taken, or writs of error sued out, and when they may be heard in the Supreme Court; provided always, such prescription shall not unreasonably interfere with or hinder the free and full exercise of the granted right.

In the exercise of its authority to make such regulations an early Legislature of the territory enacted the following law:

"All appeals taken thirty days before the first day of the next term of the Supreme Court shall be tried at that term; and appeals taken in less than thirty days before the first day of such term shall be returnable to the next term thereafter. The appellant shall file in the office of the clerk of the Supreme Court, at least ten days before the first day of such court to which the appeal is returnable a perfect transcript of the record and proceedings in the case. If he fail to do so, the appellee may produce in court such transcript, and if it appear thereby an appeal has been allowed in the cause, the court shall affirm the judgment unless good cause be shown to the contrary." Now Section 3140, Comp. Laws N. M.

In the further exercise of its privilege of mere regulation, on March 21, 1901, the territorial Legislature enacted the following statute (Sess. Laws N. M., 1901, p. 190, c. 99):

"Section 1. In all causes finally determined in any of the district courts of this territory, and where an appeal or writ of error has been or may be sued out or taken to review said cause in the Supreme Court of the territory, the appellant or plaintiff in error shall have the right to docket such appeal or writ of error at any time before a motion by appellee or defendant in error to docket and affirm judgment. When such cause shall be docketed by the appellant or plaintiff in error, the record may be perfected within thirty days thereafter, or the said appeal or writ of error may be dismissed by such appellant or plaintiff in error filing with the clerk of the Supreme Court, a written dismissal, and thereafter at any time such appellant or plaintiff in error may take a new appeal or sue out a writ of error anew in said cause, provided the same be so taken or sued out within one year from the date of the judgment sought to be reviewed became final."

While these statutes were in force, and after final judgment of conviction, the defendant took an appeal therefrom to the Supreme Court

of the territory, and docketed the case in the office of the clerk, according to the practice, before any motion made by the appellee for leave to docket the case and move for affirmance of the judgment. Not having perfected the record within 30 days, he availed himself of the alternative provision, and dismissed the appeal by filing a written dismissal with the clerk of the Supreme Court; and thereafter, within one year from the date of the judgment, he took an appeal and filed a transcript with the clerk of the Supreme Court before the term at which the appeal was returnable. While the cause was thus pending in the Supreme Court, before the time for final hearing, the territorial Legislature repealed said act of March 21, 1901, "in all its parts and provisions," without any saving clause. Laws N. M. 1903, c. 26. Although holding that the repeal of said statute deprived it of jurisdiction of the cause, the Supreme Court nevertheless went further and adjudged that the sentence of the district court be carried out, and ordered the marshal to execute it by delivering the body of the defendant to the warden of the penitentiary.

It is a recognized rule of law that all powers drawn from a statute and dependent thereon for their exercise are extinguished by its repeal, where such repeal precedes actions concluded and judgments entered while the statute was an existing law. Sutherland on Statutory Con. §§ 163-168; *Key v. Gooswin*, 4 Moore & Payne, 341; *Norris v. Crocker et al.*, 13 How. 429, 14 L. Ed. 210; *Insurance Company v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Ex Parte McCardle*, 7 Wall. 506, 19 L. Ed. 264; *Railroad Company v. Grant*, 98 U. S. 398, 25 L. Ed. 231; *Campbell v. Iron-Silver Mining Company*, 83 Fed. 643, 27 C. C. A. 646. It will be found upon an examination of the adjudged cases, touching this rule of practice and principle of law, that the rule announced only obtains where the act repealed gives the right of appeal. In such case the right of appeal, being a mere creature of the statute, dependent for its existence upon the legislative will, can be withdrawn by the authority which created it at any time *pendente lite*. The case of *Norris v. Crocker et al.*, *supra*, rested upon an act of Congress giving a penalty to the owner, under the fugitive slave law, for the abduction or detention of his slave. It was held that the repeal of the enabling statute, *pendente lite*, destroyed the right of action. The court said:

"As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter; and in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law."

In *Insurance Company v. Ritchie*, *supra*, where jurisdiction was conferred on the federal court by act of Congress in a suit between citizens of the same state in internal revenue cases, it was held that the repeal of the statute put an end to suits predicated thereon. In the *McCardle Case*, *supra*, the exercise of jurisdiction by the Supreme Court was made to depend upon the act of Congress. The court said that while the powers of the Supreme Court were, in a general way, derived from the Constitution, yet as the Constitution gave it appellate jurisdiction "with such exceptions, and under such

regulations as the Congress shall make," where Congress had provided for jurisdiction in the given case, and pending the suit repealed the statute, it had, within the meaning of the term employed in the Constitution, excepted from the jurisdiction of the court the subject-matter of the suit, and its jurisdiction fell with the repeal of the statute. The same is true of the case of Railroad Company v. Grant, *supra*.

Jurisdiction by appeal or writ of error was conferred by act of Congress. As the right depended alone upon the statute, the will of the Legislature, its repeal, *pendente lite*, ousted the jurisdiction of the Supreme Court. Had it been written, however, into the Constitution that writs of error and appeals shall be allowed, in all cases from final judgments, or decisions, of the Circuit, or district courts to the Supreme Court, under such regulations as may be prescribed by law, and after Congress had by statute prescribed the method of procedure, the party aggrieved, pursuant to such regulation, had taken his appeal to the Supreme Court, his right to have the decision reviewed by the Supreme Court would be a vested right, which Congress could not arrest by any post legislation. The right, in such case, would not depend upon the legislative will, or caprice, but upon the supreme law of the land, beyond the reach of the legislative arm.

In the case at bar the right of appeal to have the judgment of the district court reviewed by the Supreme Court of the territory was written into the very bone-work of the political organism of the territory; and it had the same force and effect as if incorporated into the Constitution of an organized state. Under no guise, and by no act, direct or indirect, could the Legislature of the territory unduly embarrass, much less take away, this fundamental right of the defendant. The only function it could perform was to make such reasonable regulations respecting the exercise of the right as would be consistent with its existence and effective operation. It might alter such regulations from time to time as experience demonstrated its wisdom, but at all times subject and subordinate to the paramount right of securing to the litigant the full benefit of the provision of the organic act. This must be so for the palpable reason that the right of appeal in this case was not conditioned upon the will or action of the territorial Legislature, but it existed independent thereof. Though not essential to the decision of this case, we incline to the opinion that had the Legislature of the territory failed or refused to prescribe any regulation respecting the matter of taking appeals or suing out writs of error, the congressional grant of the right could not thereby be rendered useless. The grant itself carried with it the implied power in the court to enforce its effective exercise. The method of procedure in securing a review of the decisions of inferior by superior courts was provided for in existing statutes and usage, well known to Congress at the time, which the courts could have easily adapted to the necessities of the situation. In other words, the principle grant of the congressional act is the right of appeal—the matter of procedure is the mere incident which

the territorial Legislature, if it saw fit, might regulate, consistently with the full enjoyment of the congressional grant.

Had the defendant perfected his appeal under the provisions of the original territorial act, could it for a moment be entertained that pending the appeal the Legislature could have denied him the right to the judgment of the Supreme Court by repealing the statute before the Supreme Court reached final judgment? Of what avail would be the guaranty of the organic act, that from every decision of the district court an appeal shall be allowed to the Supreme Court, if after it had been allowed, in the manner prescribed by law, the Legislature could oust the jurisdiction by its simple fiat, declaring the regulation, pursuant to which the appeal had been taken, *functus officio*? The act of March 21, 1901, was as much a part of the system of regulations prescribed by the Legislature for taking appeals as the original act. It is a well-recognized rule of law that where a statute is supplementary and in addition to another statute on the same subject the provisions are in *pari materia*, and are to be construed together. In contemplation of law the two acts stand as if embraced in one and the same statute. The later, supplemental act, offered and accorded to the defendant the alternative course, which he had the right to adopt and pursue as much so as under the first provision. After the territorial Legislature had thus declared its system of regulations, as to the manner and time of taking appeals, inviting the defendant to avail himself of it, and he had acted thereon, his right to the judgment of the Supreme Court became vested under the congressional enactment, beyond the power of the Legislature to revoke. It seems to us that no subtlety of argument or legislative legerdemain can escape this conclusion without subverting the organic law of the territory.

After holding that it had no jurisdiction over the subject-matter of the appeal, the Supreme Court not only dismissed the appeal, but proceeded to enter judgment that the sentence of the district court be carried out by directing the marshal to take the body of the defendant and deliver him to the warden of the penitentiary for execution of the sentence. The only judgment it could render, if its jurisdiction was at an end, was one dismissing the appeal. *Ex parte McCardle*, *supra*; *Hornvall v. The Collector*, 9 Wall. 566, 567, 19 L. Ed. 560. Whether the bill of exceptions contained in the record was not timely made and approved by the proper judge, as suggested on behalf of the government, or whether there be any reversible error on the face of the record outside of the bill of exceptions, the Supreme Court of the territory did not decide. Primarily, these questions should be considered and determined by that court, and until then we ought not to be asked to consider them.

The judgment dismissing the appeal and ordering the defendant into custody of the marshal to be delivered to the warden of the penitentiary is reversed, and the case remanded to the Supreme Court of the territory, with direction to proceed in the exercise of jurisdiction over the subject-matter of the appeal.

CHICAGO WALL PAPER MILLS v. GENERAL PAPER CO.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,260.

1. MONOPOLIES—UNLAWFUL COMBINATION—EFFECT ON COLLATERAL CONTRACT.

A contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust or monopoly organized in violation of law, either federal or state; the contract of sale being collateral and having no direct relation to the unlawful scheme or combination.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 16.]

2. SAME—ENFORCEMENT OF SALE CONTRACT—ILLINOIS STATUTE.

Sections 1 and 2 of the Illinois anti-trust law of June 11, 1891 (Laws 1891, pp. 206, 207), prohibit any pool or combination between persons or corporations to fix the price or limit the production of any article or commodity. Section 4 (page 207) provides for the punishment of a violation of section 1 by fine or imprisonment. Section 5 (page 208) makes any contract in violation thereof void, and section 6 (page 208) provides that "any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment." *Held*, that sections 4, 5, and 6 provide cumulative or alternative penalties for a violation of sections 1 and 2, and have no other purpose or effect; that sections 1 and 2 can have no extraterritorial effect, and hence the fact that a seller of merchandise in Illinois is a corporation formed for the prohibited purposes cannot be pleaded as a defense in an action to recover the price unless such corporation was organized in Illinois and was therefore unlawful under the statute.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 16.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The suit is in assumpsit brought by the General Paper Company, a Wisconsin corporation, against the Chicago Wall Paper Mills, a corporation organized under the laws of Illinois, to recover something over \$4,000 for certain wall paper sold and delivered by the plaintiff corporation to the defendant below in the year 1905. The declaration contains the common counts.

To this declaration the defendant interposed the general issue, and also 16 pleas. These pleas set up with great elaboration a defense under the "Anti-Trust Law," so called, of Illinois. The facts set up in the pleas appear more at large in the opinion of the court. Thereafter, by leave of court, another plea was interposed, numbered 17, which substantially reproduced the averments of the 16 pleas, and also set out certain alleged "confessions" of the plaintiff company made since the suit was brought, which are certain answers made under oath in response to interrogatories which the officers of non-resident corporations were compelled to make pursuant to an act of the General Assembly of Illinois, entitled, "An act to regulate the admission of foreign corporations for profit to do business in the state of Illinois." Laws 1891, p. 206. The plea of the general issue was withdrawn, and the defense was rested solely upon the 17 special pleas.

Demurrers were interposed to each of the said 17 pleas, which demurrers were sustained by the Circuit Court, and judgment nihil dicit was rendered in favor of the plaintiff and against the defendant below for the agreed price of the paper, and thereupon the case was brought to this court by writ of error.

The sections of the statute that are material are as follows:

"Pools, Trusts and Combines Prohibited.

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly: If any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act.

"Sec. 2. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article."

(Section 3 imposes a fine upon the corporation, firm or association.)

"Sec. 4. Any president, manager, director or other officer or agent or receiver of any corporation, company, firm or association, or any individual found guilty of a violation of the first section of this act, may be punished by a fine of not less than two hundred dollars (\$200), nor to exceed one thousand dollars (\$1,000), or be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court before which such conviction may be had.

"Sec. 5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

"Sec. 6. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.

"Sec. 7. The fines hereinbefore provided for may be recovered in an action of debt in the name of the people of Illinois. If, upon the trial of any cause instituted under this act to recover the penalties as provided for in section 3, the jury shall find for the people, and that the defendant has been before convicted of the violations of the provisions of this act, they shall return such finding with their verdict, stating the number of times they find defendant so convicted and shall assess and return with their verdict the amount of the fine to be imposed upon the defendant in accordance with said section 3. Provided, that in all cases under this act, a preponderance of evidence in favor of the people shall be sufficient to authorize a verdict and judgment for the people.

"Sec. 8. It shall be the duty of the prosecuting attorneys in their respective jurisdictions, and the Attorney General, to enforce the foregoing provisions of this act, and any prosecuting attorney of any county, securing a conviction under the provisions of this act, shall be entitled to such fee or salary as by law he is allowed for such prosecution. When there is a conviction under this act, the former shall be entitled to one-fifth of the fine recovered, which shall be paid to him when the same is collected. All fines recovered under the provisions of this act shall be paid into the county treasury of the county

in which the suit is tried, by the person collecting the same, in the manner now provided by law to be used for county purposes."

Approved June 11, 1891. Laws 1891, pp. 206-208.

The rulings of the court below in sustaining the demurrers to each of said 17 pleas, are assigned as errors.

Almon W. Bulkley, for plaintiff in error.

William Brace, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and QUARLES, District Judge.

QUARLES, District Judge (after stating the facts). We deem it unnecessary to consider the question of pleading with respect to the technical character of the seventeenth plea, whether it should be construed as a *puis darrein* continuance, and whether, therefore, it supplants all defenses theretofore interposed, because the seventeenth plea substantially embodies all the material averments of the first 16 pleas, and is sufficient to raise the vital question of law upon which this case must turn. The material facts set out in the several pleas may be put in brief concrete form as follows: The plaintiff corporation is alleged to have been organized on the 26th day of May, 1900, in the state of Wisconsin, for the purpose, as stated in its charter, of acting as exclusive sales agent for the paper and paper products thereafter to be produced by 21 certain manufacturing corporations located in the states of Wisconsin and Michigan, engaged in the paper industry; that its board of directors consisted of representatives of the 21 paper mills, so that for trade purposes there was a practical amalgamation of the 21 producing companies; that thereupon, on the same day, pursuant to such confederation, the plaintiff corporation became the exclusive sales agent of all such paper mills, with exclusive power to determine the extent of the output, and to fix prices arbitrarily, and that by such confederation, competition between the 21 producing corporations was stifled, and the plaintiff corporation as such sales agent, put in control of 90 per cent. of the paper and paper products manufactured west of the Alleghany Mountains; that immediately after such plaintiff corporation had been so organized and equipped, it came to the city of Chicago, complied with the requirements of the local law, secured a place of business, and has since that time continued to handle and sell such combined product of the 21 mills in Wisconsin, Michigan, Illinois, and other Western states, as contemplated by the agreement of confederation; that the alleged combination is violative of the statute of Illinois, entitled "An act to provide for the punishment of persons, copartners or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases," approved June 11, 1891, in force July 1, 1891 (Laws 1891, p. 206).

It cannot be successfully contended that the contract in suit falls within the sanction of the fifth section. The contract thereby denounced as void is plainly one which directly contravenes the earlier sections; one in which the trust takes root, or by which the illicit scheme is organized. The defendant below purchased the paper in the ordi-

nary course of business. It was a stranger to the alleged unlawful combination. The sale of the merchandise had no direct relation to the prohibitions of sections 1 and 2. The same distinction has been drawn under the federal anti-trust act (*Hopkins v. United States*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 615, 19 Sup. Ct. 50, 43 L. Ed. 300), and this court has several times held that contracts founded upon a good consideration are collateral to the unlawful scheme or combination and not tainted thereby. *Dennehy v. McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609; *Star Brewery Co. v. United Breweries*, 121 Fed. 713, 58 C. C. A. 133; *Harrison v. Glucose Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915.

The real defense tendered by the several pleas is bottomed upon section 6, and it becomes material to analyze this part of the enactment. It will be noted at the outset that the structure of sections 5 and 6, is almost identical. Both hinge upon "violation of any provisions of the preceding sections of this act." Section 4 metes out punishment to officers of the offending corporation for any violation of section 1. So here there are three distinct consequences that flow from infringement of earlier sections: Under section 4, fine and imprisonment; under section 5, the avoidance of contract; and under section 6, denial of civil remedy in the courts. They partake of the same nature. They are penal inflictions of different kinds, consequent upon a single transgression. The violation contemplated in either case must be such as will sustain the penalty imposed by either section. In other words, if the combination effected in Wisconsin constituted such a violation of section 1 as to warrant the exclusion of the plaintiff company from the courts of Illinois under section 6, then a direct proceeding might have been instituted under section 4 to punish the officers of such offending corporation.

The penal character of section 6 sufficiently appears upon its face. To debar trading corporations from all redress in the courts is a drastic infliction. The same conclusion as to the nature of the section is reached by a legal inference. The title of the statute deals only with punishments and the manner of their infliction. If, therefore, section 6 were of a different character, it would contravene section 13 of article 4 of the Constitution of Illinois and be of no effect. It is fundamental and elementary that the General Assembly of Illinois has no jurisdiction to provide any punishment for an act done outside of the territorial limits of the state. It cannot project its public policy into another sovereignty. The dereliction charged against the plaintiff below by the several pleas inheres in its contract relations with the 21 producing companies whereby, as claimed, it was intended to suppress competition, restrict the output, and arbitrarily fix the price of paper. This illicit combination culminated in the organization of the plaintiff corporation and the agreement by which it was to officiate as exclusive sales agent. Thereby the combine became an accomplished fact which, for aught that appears, may not have infringed the public policy of Wisconsin. All these things happened five years before the contract in suit, and took place within the state of Wisconsin, before

the plaintiff entered upon any business in Chicago. Since that time nothing has happened, certainly nothing within the state of Illinois, of which section 1 takes cognizance. It is argued that the Illinois statute is unconstitutional, and that a combination formed in one state to control prices in another state affects interstate commerce and therefore is not subject to state regulation. We are not concerned with the constitutionality of this act, if it can, in no event, be applicable to the case at bar. The Supreme Court of Illinois has had occasion to interpret this statute, and the doctrine which it lays down is decisive of the issues here.

In *People v. Butler Street Foundry Co.*, 201 Ill. 236, 66 N. E. 349, the court say:

"It is fundamental that the Legislature of this state is powerless to pass an enactment making an act committed in a foreign state punishable in that state, or the Legislature of a foreign state to pass an enactment to make an act committed in this state a crime punishable in this state. It is therefore evident that a violation of the statute above set forth in this state cannot be punished as an original offense in a foreign state, and that the immunity afforded by the statute is complete against a prosecution under the law of the other states of the Union. The anti-trust statute of 1891 has no extraterritorial effect. While its terms may be broad enough to include trusts, pools, combines, etc., formed with parties residing outside of this state, the courts, in construing it, must necessarily confine it to those matters upon which the General Assembly has power to act, viz., trusts, pools, combinations, etc., formed within the state of Illinois. In the construction of the statute the courts will exclude from the operation thereof subjects or classes upon which the state Legislature has no power to legislate, though comprehended within the general terms of the act, unless the different parts of the statute are so connected that they cannot be separated without destroying the evident intention of the Legislature. * * * If the statute be confined to its legitimate constitutional scope its proper construction only requires the affidavit to state whether or not the corporation upon whose behalf it is made had violated the statute by performing some one or more of the acts therein prohibited within the state of Illinois, and would not include, but would exclude all acts which would connect it with any trust, pool, combination, etc., formed outside of the state, and which would violate the anti-trust statute of the United States. * * * In making the affidavit the affiant is only required to take into consideration the acts of the corporation while engaged in business wholly within the state, and if, in connection with that business, it has not been connected with any trust, pool, or combination within the state, or otherwise violated the Illinois anti-trust statute, he can truthfully make the affidavit to that effect, although the corporation at the same time, in its business outside the state, has been connected with trusts, pools, combinations, etc., in violation of the United States anti-trust statute; that being a matter exclusively within the jurisdiction of the United States and over which the state has no control and to which the statute of this state does not apply. * * * We conclude, therefore, that the officer making the affidavit, and the corporation in whose behalf the same is made, are fully protected by the statutory immunity from a prosecution by any other state or by the federal authorities."

We are reminded that section 6 was not specifically involved in that case. This is immaterial. The discussion above recited was vital to the very questions before the court, so that the opinion is authoritative and applies with full force to every portion of the act.

There is nothing decided in *Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770, which is inconsistent with the doctrine of the earlier case.

It may be conceded that if a foreign corporation enter into a combine within the state of Illinois which is forbidden by the statute, it must stand upon the same footing as a domestic corporation, and be liable to all the pains and penalties of the act, without regard to the place of its origin. It is therefore apparent that a direct proceeding could not be sustained to subject the officers of the General Paper Company to the penalties of section 4 for an alleged transgression occurring in Wisconsin. The same reasoning must be fatal to a defense based upon section 6.

We adopt and follow the conclusion of the Supreme Court of the state. It results, therefore, that the Illinois anti-trust act, so called, is not available as a defense to this action, and the judgment of the Circuit Court is affirmed.

ST. LOUIS & S. F. R. CO. v. BISHARD.

(Circuit Court of Appeals, Eighth Circuit. July 30, 1906.)

No. 2,286.

1. RAILROADS—NEGLIGENCE OF COMPANY—CONSTRUCTION OF TRACK.

The fact that a passing track at a railroad station was not so constructed as to take a rapidly moving train in safety is not of itself proof of the company's negligence, where it was sufficient for the use for which it was intended and safe for the passage of trains under control and moving slowly.

2. MASTER AND SERVANT—ACTION FOR DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

A railroad passenger train, moving at a speed of 55 miles an hour in the night, ran upon a side track at a station, which had been connected for the passage of trains owing to an obstruction on the main track near the station, but which was unsafe for the passage of trains at such speed, and was wrecked, the engineer and fireman being killed. In an action to recover for the death of the fireman, it was shown that those on the train had not been notified of the obstruction on the main track, and a flagman, sent back to warn approaching trains, negligently failed to perform his duty. There was a switchstand at the junction of the two tracks carrying a lamp, which showed a red light to approaching trains when the passing track was connected; but whether such lamp was lighted was in dispute. Among the duties of the fireman was that of keeping a lookout for signals at stations. *Held*, that the court properly refused to direct a verdict for defendant, or to charge the jury that it was the paramount duty of deceased to keep such lookout and to warn the engineer either of the red light or the absence of a light at the switch, and if he failed in such duty he was guilty of contributory negligence, and correctly charged that it was his duty to keep such lookout if not otherwise necessarily engaged; the requested instruction being further inapplicable because there was no evidence to show whether deceased did or did not perform such duty, and he was not chargeable under the state statute with the negligence of his fellow servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1122.]

3. TRIAL—RECALLING JURY FOR FURTHER INSTRUCTION—LIMITS OF COURT'S AUTHORITY.

While it is within the discretion of a trial judge to recall a jury, after they have been in deliberation for a considerable time without reaching an agreement, for inquiry as to their difficulty and for further instruction

If deemed advisable, it is not permissible to inquire of them in what proportion they are divided, and any instruction in respect to their duty to agree if possible should be carefully guarded, so as not to unduly press such duty upon the minority.

[Ed. Note.—For cases in point, see vol. Cent. Dig. Trial, § 747.]

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action under a Kansas statute by Augusta Bishard, as administratrix, to recover damages of the railroad company for the death of her husband, alleged to have been caused by its negligence and that of its employes. The plaintiff had judgment in the trial court, and the railroad company prosecuted this writ of error.

James Black (L. F. Parker and W. F. Evans, on the brief), for plaintiff in error.

J. I. Sheppard and A. M. Keene, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The plaintiff's intestate was a locomotive fireman and at the time of his death was in the service of the railroad company upon a passenger train called the "Meteor." About 5 o'clock in the morning of December 21, 1903, the Meteor, north-bound, was wrecked near Godfrey, a small station in Kansas, and the fireman and engineer were killed. The contention of the company that the trial court should have directed a verdict in its favor requires a consideration of the conditions surrounding the accident. We may say, however, without reciting all of the evidence, that it was abundantly sufficient to establish negligence on the part of the employes of the company and that the case turns more particularly upon the question whether the fireman was himself guilty of negligence contributing to his death.

The station house at Godfrey is on the west side of the main track. There was no telegraph operator or agent there in the nighttime. To the eastward of the main track is a passing track about 2,000 feet in length, which connects with the main track about 1,200 feet south of the station. There is also a connection at the north, but with this we have little concern as the wreck occurred near the other end. At the south connection there is a switch stand about 6 feet east of the main track surmounted by a lamp which, when lighted, shows green on two opposite sides, and red, the usual signal of danger, on the other two. The mechanism is so arranged that when the switch is thrown to let a north-bound train from the main track onto the passing track the lamp shows red northward and southward. The lamp is between 7 and 8 feet above the ties. Commencing near the south end of the station the main track curves to the westward for nearly a half of a mile. During the night and several hours before the accident occurred a north-bound freight train with a leaking engine became stalled upon the main line a short distance north of the station, and it became necessary that trains running in either direction should use the passing track to avoid the blockade. The duty therefore devolved upon the trainmen of the stranded train to advise the other trains

of the situation by appropriate signals. Several trains made the passage in safety. The Meteor, north-bound, was running under special orders which required it to maintain a speed of about 55 miles an hour. Those in charge of it were not advised by telegraphic orders of the obstruction at Godfrey. The passing track was not designed or so constructed as to take a rapidly moving train in safety. It was clearly insufficient for such traffic and hence the necessity of warning signals to other trains including the Meteor. We may at this point say that we do not regard the physical condition of the passing track, concerning which considerable testimony was given, as in itself primary evidence of the negligence of the company. It seemed to be sufficient for its ordinary use as a passing track for trains under control or moving slowly. Its structure, however, was one of the conditions of the situation, and the negligence of the company consisted, so far as this case is concerned, in allowing the Meteor, running under special orders at a high rate of speed, to run on to the passing track without sufficient warning of the thrown switch. A rule of the company, applicable to such an emergency, required the conductor of the stranded freight train to send a flagman back with stop signals, and it was the duty of the flagman to place torpedoes upon the rail at certain distances from the point of danger. There was sufficient proof of quite a satisfactory character that the flagman who was sent back wholly neglected to perform this duty and also proof that he did not otherwise warn the engineer and fireman of the approaching Meteor. There was evidence tending to show that the lamp at the switch stand was not lighted at the time of the accident; also that it had not always theretofore been kept burning in the nighttime. The Meteor, approaching from the south at high speed, took the passing track at the switch and the wreck occurred; the engine being derailed when it had proceeded about 90 feet from the point of entrance.

The company claims that, as the switch was thrown for the passing track, the lamp, if burning, must have shown the red sign of danger, and that if it was not burning when the Meteor approached, the mere absence of a light at that customary place was in itself a sufficient warning under a rule of the company to that effect. Here arises the principal contention of contributory negligence on the part of the fireman. It is said that it was his duty, especially in approaching stations, to keep a lookout for signals, and that as his train was moving on the curve his position on the west side of the engine would have enabled him to look along the chord of the arc and to detect either the presence of the red light at the switch stand or the absence of any light as the case may have been, and that in either event it was his duty to immediately notify the engineer of the result of his observations. Counsel for the company requested the trial court to charge the jury that it was the paramount duty of the fireman to keep this lookout and to warn the engineer in time to avoid the danger, and that if he could have seen the signal in time to warn the engineer and did not keep the lookout, then the verdict should be for the defendant. The request was denied. The trial court in lieu thereof

charged the jury that it was the duty of the fireman to keep the lookout when not otherwise necessarily engaged. We are of the opinion that the trial court was right. There were other important and imperative duties which the fireman was required by the rules of the company and the nature of his position to perform. Those rules expressly placed him under the supervision and direction of the engineer and required him to obey the orders of the latter respecting the performance of his duties. In keeping a lookout on the track for signals he was merely an assistant acting under the direction of the engineer, and it cannot be said that upon the occasion in question it was his paramount duty to be on the lookout at any particular moment. The rules did not so provide, and we cannot infer that the engineer so ordered. Other duties of moment may have demanded his attention elsewhere. Having due regard to that presumption which obtains in the absence of evidence a court would not be justified in declaring from the record before us that the deceased was not, during the approach of the Meteor, engaged in the performance of some duty of his position or of some order of the engineer that prevented him from observing either the presence or absence of a red light at the switch stand. Moreover, the evidence showed that even if the lamp had been burning and the fireman had been on the lookout at the precise instant, he could have seen the light just about four seconds before it came into the view of the engineer. Nor can we assume, in the absence of evidence, that if the fireman was on the lookout and observed that there was no light at the switch stand he did not seasonably notify the engineer who was in charge of the engine. It is not necessary for us to determine in this case whether the engineer was or was not remiss in the performance of his duties. Even if he was it does not follow that his negligence is imputable to the fireman or that the right of the latter or his personal representatives to recover for the injury so caused is in any wise impaired thereby. The negligence of the engineer, if there was such, cannot be visited upon the fireman unless he concurred therein, and there must be proof, not mere surmise of such concurrence. The fellow-servant rule does not obtain in Kansas so far as concerns employes of railroad companies. Section 5858, Gen. St. of Kan. 1901.

It is also claimed that the red lights at the rear end of the stranded freight train as it stood upon the main track north of the station were a sufficient warning of danger. What we have already said applies to this contention. But, aside from it, the evidence leaves it doubtful that those lights could have been seen in time to be of service owing to the curve of the track and the presence of the station house as an obstacle in the line of vision. The evidence as to the conduct of the fireman, whether negligent or not, presented a fair question for the determination of the jury and they found against the contention of the company. The trial court was right in refusing to direct a different conclusion.

After the cause had been submitted to the jury and they had deliberated without result over one night they were brought into the court room on the following morning. In answer to questions

propounded by the court, the foreman of the jury said that they had not agreed upon a verdict; that he thought that it was impossible for them to agree; that they stood ten to one (one having been excused by consent) and that there had not been any change since the first ballot. Thereupon the court charged the jury as follows:

"I want to say to you, gentlemen of the jury, that this has been a very expensive trial to the litigants. It has consumed three days of the court's time, and that in justice to both parties, a verdict should be rendered if possible. The juror who is standing out against the other ten should listen to their arguments and should try and look at the case from their view point. As I charged you and now charge you, you are the exclusive judges of the evidence in this case."

An exception was preserved by the company to this action of the court. The jury again retired and a day later returned a verdict for the plaintiff.

The proper limits of the authority of a trial court when a jury is having difficulty in reaching a verdict were expressed by the Supreme Court in *Allis v. United States*, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91, in *Allen v. United States*, 164 U. S. 492, 501, 17 Sup. Ct. 154, 41 L. Ed. 528, and in *Burton v. United States*, 196 U. S. 283, 307, 25 Sup. Ct. 243, 49 L. Ed. 482. It is true these were criminal cases but we know of no reason why their doctrine is not equally applicable to cases of a civil character. When the *Allis* case was tried at the circuit, Judge Sanborn of this court presided. After the jury had deliberated for 24 hours without reaching a verdict the following carefully guarded instruction was given them (*United States v. Allis*, 73 Fed. 165, 182):

"This is an important case. The trial has been long and expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. The court is of the opinion that the case cannot be again tried better or more exhaustively than it has been on either side. It is therefore very desirable that you should agree upon a verdict. The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. In the present case the burden of proof is on the United States to establish its case beyond a reasonable doubt, and if, upon any count of the indictment submitted to you, you have a reasonable doubt, based upon the evidence, of the guilt of the defendant, you ought to acquit him on that count. But, in conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself,

who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

On appeal the Supreme Court said:

"It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at the bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given."

In the Allen Case it was said:

"The seventeenth and eighteenth assignments were taken to instructions given to the jury after the main charge was delivered, and when the jury had returned to the court, apparently for further instructions. These instructions were quite lengthy and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. These instructions were taken literally from a charge in a criminal case which was approved of by the Supreme Court of Massachusetts in *Commonwealth v. Tuel*, 8 Cush. (Mass.) 1, and by the Supreme Court of Connecticut in *State v. Smith*, 49 Conn. 376, 386."

In the Burton Case the trial court asked the foreman how the jury were divided, not how many were for conviction and how many for acquittal, but the bare proportion of their division; and the answer was "eleven to one." The court then charged them in the words of the Allen Case. Of the inquiry how the jury stood the Supreme Court said.

"We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the pre-

siding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain."

In view of the foregoing rules we are of the opinion that error was committed in the case at bar in the inquiry of the foreman of the jury as to their division and in the succeeding charge. The charge itself was not sufficiently guarded. Its tendency was to bring the one juror to an agreement with the others even against the dictates of his own judgment.

The judgment is reversed, and the cause remanded for a new trial.

OMAHA WATER CO. v. SCHAMEL.

(Circuit Court of Appeals, Eighth Circuit. August 27, 1906.)

No. 2,068.

1. NEGLIGENCE—WHEN QUESTION OF FACT FOR JURY.

The question whether it was an act of negligence for an employé of defendant to use lighted matches in producing a light in the basement of a building near the bottom of an elevator shaft, and in close proximity to a large amount of highly combustible material, was one of fact for the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 277–353.]

2. SAME—EVIDENCE—SUFFICIENCY—CIRCUMSTANTIAL EVIDENCE.

Where a fire started in combustible material in the basement of a building almost immediately after an employé of defendant admittedly lighted matches near such combustible material, a finding that the fire was caused by such matches may be sustained by circumstantial evidence tending to exclude any other cause.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 272.]

3. SAME—CONTRIBUTORY NEGLIGENCE—CHOICE OF ALTERNATIVE INVOLVING RISK.

Where one is placed by the negligent act of another in a position of such imminent peril that he is compelled to choose upon the instant between two hazards, and he makes such a choice as persons of ordinary prudence, placed in a like situation, would be likely to make, and injury results, the fact that if he had chosen the other hazard he would or might have escaped injury does not establish contributory negligence, nor relieve the other whose negligent act caused the perilous situation from responsibility for the injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 99, 100.]

4. SAME.

Plaintiff's intestate, with a number of other women, was in a room on the third floor of a building, when it took fire in the basement through the alleged negligence of defendant's employé; the fire passing swiftly up an elevator shaft and catching the walls of the hall, which were of inflammable material. There was a stairway in the hall but flames came through the door leading from the room to the hall when opened. Some of the women ran through such flames and escaped by means of the stairs, but were more or less severely burned. Others jumped or dropped from the windows; some without loss of life, and others being killed. Among the latter was plaintiff's intestate. *Held*, that she was not chargeable as

matter of law with contributory negligence in seeking such method of escape from the building.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 99, 100.]

5. DEATH—ACTION FOR WRONGFUL DEATH—DAMAGES RESULTING TO NEXT OF KIN.

In an action for wrongful death, under Comp. St. Neb. 1901, § 2504, which authorizes the recovery of pecuniary damages resulting to the next of kin, where there was some evidence that deceased earned money with which she aided her married daughters, such evidence was properly submitted to the jury to be considered in the assessment of damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 83, 112, 113].

6. ADOPTION—JUDICIAL PROCEEDINGS—NOTICE UNDER NEBRASKA STATUTE.

In computing time, under the provision of Comp. St. Neb. 1901, § 6322a, requiring that notice of hearing on a petition for the adoption of a child shall be published "at least 10 days prior to said day of hearing," under the rule of decision in Nebraska, the day of last publication is to be excluded, and the day of the hearing included, so that notice of a hearing on the 18th of the month was sufficient under the statute where it was published the required number of times, and the last publication was on the 8th.

7. SAME.

Comp. St. Neb. 1901, § 6322a, relating to proceedings for the adoption of children, authorizes the court to direct notice to be given to all parties interested by publication, "provided further that in the event that the parents or either of them reside within the state and personal service can be had upon them, such service shall in all such cases be had upon such parent or parents." The record in an adoption proceeding showed that the petition was granted and judgment entered on service by publication; that the child was at the time two years old, and both the sworn petition, and the written consent of the person in whose exclusive custody and control the child had been since her birth, contained statements that her parents were unknown to the persons making such statements. *Held*, that such statements constituted evidence tending to show that the parents could not be personally served, sufficient to sustain the judgment when collaterally attacked.

8. SAME—CONSENT—PERSONS AUTHORIZED TO GIVE.

Comp. St. Neb. 1901, § 6318, relating to the adoption of minor children, specifies those who may consent to such adoption, among them being "any person, corporation, or association that shall have had the lawful custody or control of any minor child for the period of six months last preceding for the support of which neither parent shall without just cause or fault have contributed anything whatever during said period." A written consent to an adoption stated substantially that the child was about two years old, and had been abandoned at birth by its parents, which abandonment had continued since that time; that the person giving such consent had assumed and retained the care and control of the child, and had no knowledge as to who its parents were. *Held*, that such statements were sufficient to sustain a finding by the court, as against a collateral attack, that the consent was given by one authorized to give it under the statute.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adoption, §§ 7-10.]

9. DEATH—ACTION FOR WRONGFUL DEATH—DAMAGES TO INFANT CHILD.

In an action for wrongful death, based on Comp. St. Neb. 1901, §§ 2503, 2504, which authorize the recovery of the pecuniary damages to the next of kin, where the evidence showed that deceased, who was a woman, had an adopted daughter three years old, to whom she had been a good mother, an instruction was proper which permitted the jury to take into considera-

tion as an element of damages the loss to the child of a mother's care, nurture, training, and instruction.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 115, 119.]

10. WRIT OF ERROR—AMOUNT OF RECOVERY—CONCLUSIVENESS OF VERDICT.

In the federal appellate courts, where no error of law appears upon the record, a verdict is conclusive in respect to the amount of damages.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3944-3947.]

In Error to the Circuit Court of the United States for the District of Nebraska.

R. S. Hall and J. H. McCulloch, for plaintiff in error.

W. H. De France, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action by an administrator, on behalf of the next of kin, to recover from the Omaha Water Company damages for the death of his intestate, Mrs. Annie Schamel, alleged to have been caused by the negligence of that company. The plaintiff obtained a verdict and judgment which the defendant seeks to have reversed because of errors said to have occurred upon the trial.

Mrs. Schamel and others were holding a committee meeting in a third-story room of a building in Omaha, called the "Patterson Block," when a fire, originating in the basement, was quickly communicated to the upper stories through an elevator shaft, and, in an effort to escape, she leaped or dropped from a window and was killed. The court's refusal to direct a verdict for the defendant makes it necessary to consider whether there was any evidence from which the jury could properly find that the fire was caused by any of the negligent acts charged against the defendant, which included that of using matches as a means of producing an artificial light in the basement of the building near the bottom of the elevator shaft in circumstances where ordinary care required the use of a lantern or other inclosed light. Upon this point the testimony of the plaintiff tended to show these facts: The defendant was engaged in supplying water to its patrons, including the occupants of the Patterson block. The water used by each patron was measured by a meter placed upon his premises by the defendant, and one of its employes, B. A. Karr, was required periodically to inspect these meters and to take note of the amount of water used. In the discharge of this duty Karr went to the Patterson Block, and proceeded to inspect two meters located in the basement. They were close to the bottom of the elevator shaft and at and about them was much highly combustible material, including many light wooden frames and crates covered with cheesecloth. The character of this material was known and appreciated by Karr. The basement was not well lighted, and he used matches to produce a better light while he cleared away some of the material and inspected the meters. He then left the building and in a very brief time

the fire started in the frames and crates at the place where the matches were used. The testimony for the plaintiff also tended to exclude any other origin of the fire than this use of lighted matches. Karr was called as a witness for the defendant and admitted the presence of the combustible material and the use of matches, but stated that he used a lesser number than was otherwise indicated, and that he used them and disposed of the remnants in a manner calculated to prevent any communication of fire from them.

The questions presented by this evidence were properly left to the determination of the jury. The use of lighted matches in the circumstances described, considering the disastrous consequences which would almost certainly flow from igniting so much highly combustible material in such a place, if not an act which all reasonable men in the exercise of an impartial judgment would pronounce negligent, was yet attended with such a degree of danger as to make it a question of fact for the jury, rather than of law for the court, whether the exercise of ordinary care forbade the use of matches and required the use of a lantern or other protected light, which would have been attended with no danger. The evidence indicating the almost immediate occurrence of the fire at the place at which the matches were lighted, and tending to exclude any other reasonable theory respecting its origin, also tended persuasively to show that an ember from a burning match must have fallen in the combustible material and have caused the fire, and was, therefore, in conflict with the testimony of Karr. It was not essential that the connection between the use of the matches and the fire be traced by the testimony of an eyewitness; it could equally be shown by proof that the surrounding facts and circumstances were such that the fire must have originated in that way. It is said that the case should have been taken from the jury because Mrs. Schamel leaped or dropped from a window and was killed when she could have descended a stairway in safety. There was evidence tending to show that when the members of the committee were apprised of the fire they were instantly confronted with the necessity of choosing between two modes of escape—one by going into the hall and then down a stairway, and the other by leaping or dropping from a window. Each was apparently attended with great peril, and was altogether uncertain of accomplishment. The hall, the walls of which were boards covered with cheesecloth and paper, was afire and a stream of burning gas was issuing from a pipe near the head of the stairway, a leaden joint in which had been melted by the flames ascending the elevator shaft. When the door from the committee room to the hall was opened the flames at once entered the room. Some of its occupants made their way through the flames in the hall to the stairway and escaped, but not without being severely burned. Others leaped or dropped from the windows; some without loss of life and others being killed. The imminence of the peril from which Mrs. Schamel attempted to escape is illustrated by the fact that her face, neck, hands, hair, and clothing were badly burned. The rule applicable to such a state of facts is this: Where one is

placed, by the negligent act of another, in a position of such imminent peril that he is compelled to choose, upon the instant, between two hazards, and he makes such a choice as persons of ordinary prudence, placed in a like situation, would be likely to make, and injury results, the fact that if he had chosen the other hazard he would or might have escaped injury does not establish contributory negligence or relieve the other, whose negligent act caused the perilous situation, from responsibility for the injury. *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 336, 55 N. W. 872, 20 L. R. A. 853; *Stokes v. Saltonstall*, 13 Pet. 181, 193, 10 L. Ed. 115; *Wilson v. Northern Pacific R. R. Co.*, 26 Minn. 278, 3 N. W. 333. The evidence certainly did not warrant the court in saying, as matter of law, that persons of ordinary prudence would not have been likely to do just as Mrs. Schamel did, if placed in a like situation.

Complaint is made of the court's refusal to instruct the jury that there was no evidence of any pecuniary injury to two married daughters. The ruling was right. While the evidence upon this point was somewhat meager, it sufficiently disclosed that the deceased had been in the habit of earning money and extending pecuniary assistance to these daughters to justify the submission to the jury of the question whether there was a reasonable expectation that a continuance of her life would be of pecuniary benefit to them. If there was, it was cut off by the death, and was an element to be considered in the assessment of the damages. *Comp. St. Neb. 1901, § 2504*; *Johnson v. Missouri Pacific Ry. Co.*, 18 Neb. 690, 700, 26 N. W. 347. One of the next of kin whose pecuniary injury the jury was charged to consider was an adopted daughter, and it is said that this was error because the adoption was void. The entire record and files in the adoption proceeding were produced in evidence, and show that it was had in the county court of Douglas county, Neb., under a statute of that state. *Comp. St. 1901, §§ 6317-6322f*. The objections urged against the adoption are (1) that notice of the hearing was not published for the requisite period; (2) that the required number of days did not intervene between the completion of the publication and the time fixed for the hearing; (3) that personal notice was not given to the parents, or either of them, and facts dispensing therewith were not shown; and (4) that written consent to the adoption was not given by any one authorized to consent. The first three objections are grounded upon section 6322a, which reads:

"Upon the filing of said petition said court shall fix a time for hearing the same, which shall be at least fourteen days subsequent to the filing thereof. Said court may require notice of said hearing to be given to all parties interested by personal service or by publication; provided, that it shall not be necessary to give notice of said hearing to the said minor child to be adopted, unless said minor child shall be over the age of fourteen years, if notice shall be given by publication, said notice shall be published at least four consecutive weeks in some newspaper in general circulation in said county, which publication shall be at least ten days prior to said day of hearing. Provided further, that in the event that the parents or either of them reside within the state, and personal service can be had upon them, that such service shall in all such cases, be had upon such parent or parents."

The petition was filed March 14th, and the court thereupon entered an order fixing April 18th as the time for hearing the same, and directing that notice be given to all parties in interest by publication. The notice was published in four successive issues of a weekly newspaper, dated, respectively, March 18th, March 25th, April 1st, and April 8th. Tested by the rule of decision in Nebraska, the notice was published "four consecutive weeks" and was complete on the day of the last issue. *Davis v. Huston*, 15 Neb. 28, 16 N. W. 820. The publication being complete April 8th, was this "at least ten days prior to" April 18th, the day fixed for the hearing? The answer is given in *White v. German Insurance Co.*, 15 Neb. 660, 20 N. W. 30, where, in construing a general statute (Comp. St. 1901, § 6416) relating to the computation of time, and in applying it to a statute requiring service to be had "at least three days before the time of appearance" (Code Civ. Proc. § 911) it was held that service upon June 26th, when the time of appearance was June 29th was good; the general statute having the effect of excluding the day of service and including the day of appearance. See, also, *McGinn v. State*, 46 Neb. 427, 440, 65 N. W. 46, 30 L. R. A. 450, 50 Am. St. Rep. 617. This ruling, when applied to the case before us, requires that the day on which the publication was completed be excluded in the computation, and the day fixed for the hearing included, and when this is done the publication is seen to have been 10 days prior to the day of hearing. The statute, although at first clothing the court with a discretion to say whether the notice of the hearing shall be by personal service or by publication, qualifies or restrains this by the provision, "in the event that the parents or either of them reside within the state, and personal service can be had upon them, such service shall in all cases be had upon such parent or parents." The record in the adoption proceeding does not disclose that either parent resided within the state, or that personal service could have been had upon either, but it does disclose that the minor was then but two years old; that Mrs. Schamel and her husband, in their petition for adoption, which was sworn to by both, stated that the names, residence, and identity of the parents were unknown to them; and that Frances P. Clark, whose written consent to the adoption accompanied the petition, declared therein that she had had exclusive, actual, and lawful custody and control of the minor from the time of its birth, and that its parents were unknown to her. The judgment recites that witnesses were examined at the hearing and finds that notice by publication was "duly given," and that "the statements set forth in said consent and petition are true." The claim now made is, not that these statements were any of them untrue, or that either parent resided in the state or could have been personally served, but only that the statements had no legal tendency to prove that the parents could not be personally served, and therefore did not authorize the court to render judgment upon notice by publication alone. We think the contention is not well founded. Apart from the consideration that the evidence presented upon the hearing was not preserved or re-

quired to be preserved, and apart from any presumptions which possibly might be indulged in respect of that evidence, we are of opinion that the statements in the petition and in the written consent tended to prove that personal service could not be had. It hardly needs statement that personal service upon a child's parents, as such, is not possible when its parentage is unknown, and yet such was the situation which these statements tended to disclose. They were that neither the one in whose exclusive, actual and lawful custody and control the child had been from the time of her birth, nor those who were seeking to adopt her, knew who were her parents; and, of course, the child, being only two years old, did not know. While it may be doubted whether more persuasive evidence of unknown parentage, and, therefore, of inability to make personal service, could have been presented, it is sufficient for us to hold, as we do, that there was some evidence of that character, because that is sufficient when the question is raised upon a collateral attack.

The remaining objection to the adoption is that Frances P. Clark, who gave written consent thereto, was not shown to possess authority under the statute to give consent. The statute makes written consent executed in a prescribed manner by a person authorized to consent a prerequisite to the judgment of adoption and with much particularity specifies those who may consent (sections 6318, 6322), among them being:

"Any person, corporation or association that shall have had the lawful custody or control of any minor child for the period of six months last preceding, for the support of which neither parent shall without just cause or fault have contributed anything whatever during said period."

The consent of Frances P. Clark stated, *inter alia*:

"That said Leone Louise Schamel is a minor of the age of about 2 years, having been born on March 15, 1896, at Omaha, Neb. That your petitioner, ever since the birth of said minor, has had the exclusive and actual and lawful custody and control of said minor, and, during all of said period of time neither of the parents of said minor has contributed anything whatever to its support, and that the failure to so contribute has been without just cause on their part. That the parents of said minor are unknown to your petitioner."

The court found that these statements were true, and that consent to the adoption was "executed as required by the statute," which means, not merely that the consent was executed in the manner specified in the statute, but, also, that it was executed by one authorized to give consent. But, notwithstanding this, it is said that the statements of Frances P. Clark were necessarily inconsistent and nugatory, because, if the parents were unknown, her custody could not have been lawful, and she could not have known whether the failure to contribute to the child's support was with or without just cause or fault. The contention cannot be sustained. If it were, it would preclude the adoption of a child abandoned at its birth, and whose parentage was not disclosed. The statute, which is very comprehensive, shows in various ways that it was intended to provide for the adoption of "any minor child," and the provision last quoted, when contrasted with other portions of section 6318, shows that it was intended to provide for, among others, the very case de-

scribed in the statements of Frances P. Clark, the purport of which was that the child was abandoned at its birth and that the abandonment had continued to the time of adoption. If in these circumstances she assumed and retained custody of it, giving it a home, care and protection, her custody was lawful, though not sustained by a grant from the parents, and their abandonment and continued neglect were most unnatural and impossible of justification. The statements were, therefore, not necessarily inconsistent or nugatory, but were plainly sufficient to sustain, as against a collateral attack, the court's finding that the written consent was executed by one authorized under the statute to give consent.

Referring to the fact that the adopted daughter was but three years old at the time of Mrs. Schamel's death, and to the evidence tending to show that the latter had been a good mother, and had expended part of her earnings, before mentioned, in supporting the child, the court told the jury that under the statute (Comp. St. Neb. 1901, §§ 2503, 2504), the loss of a mother's care, nurture, training, and instruction was an element to be considered in determining the pecuniary injury to a child of tender years as one of the next of kin. Complaint is made of this, but as the instruction was applicable to the case made by the evidence, and as it gave effect to the decisions of the Supreme Court of the state so far as it has spoken upon the subject (*Missouri Pacific Ry. Co. v. Baier*, 37 Neb. 235, 246-251, 55 N. W. 913; *Chicago, Rock Island & Pacific Ry. Co. v. Zerneck*, 59 Neb. 689, 697, 82 N. W. 26, 55 L. R. A. 610), as well as to what we deem to be the better rule (*Tilley v. Hudson River R. R. Co.*, 24 N. Y. 471, 475; *Id.*, 29 N. Y. 252, 285-287, 86 Am. Dec. 297), the complaint cannot be sustained. The damages are claimed to be excessive, but this is a subject which is not open to consideration in the federal appellate courts. *Southern Pacific Co. v. Maloney*, 69 C. C. A. 83, 136 Fed. 171; *Illinois Central R. R. Co. v. Davies* (C. C. A.) 146 Fed. 247.

Other contentions are presented by the assignments of error, and have been discussed by counsel, but, upon careful consideration, they have been found to be untenable.

The judgment is affirmed.

SHUTE et al v. PATTERSON et al.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1906.)

No. 2,275.

1. BANKRUPTCY—DEATH OF BANKRUPT—PROCEEDINGS—ABATEMENT.

Bankrupt Act July 1, 1898, c. 541, section 1, subd. 4, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418] defines a bankrupt as a person against whom an involuntary petition has been filed, and subdivision 10 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]) defines the terms "date of bankruptcy," "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, to mean the date when the petition is filed. Section 8 (30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]) declares that the death of a bankrupt shall not abate the proceedings. *Held*, that the

death of a bankrupt after the filing of an involuntary petition against him, though prior to service, does not abate the proceedings.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 134.]

2. COURTS — FEDERAL COURTS — PROCEDURE — PARTIES — DEATH OF DEFENDANT—EXECUTOR OR ADMINISTRATOR—JOINDER—STATUTES.

Rev. St. § 955 [U. S. Comp. St. 1901, p. 697], providing for bringing in by scire facias the executor or administrator of the defendant in any court of the United States who dies before final judgment, is confined to personal actions.

3. BANKRUPTCY—DEATH OF BANKRUPT—HEIRS AND PERSONAL REPRESENTATIVES—JOINDER.

Where an alleged involuntary bankrupt died after the filing of the petition, but before service of process, his heirs and personal representatives should be brought in and made parties to the proceeding before adjudication.

4. SAME—SUBPŒNAS.

Where heirs of an alleged bankrupt were sought to be made parties to the bankruptcy proceeding a recital in the subpœnas issued to them that the purpose of the proceedings was that they be adjudged bankrupt is erroneous.

5. SAME—TIME FOR APPEARANCE.

Where subpœnas were served on the heirs of an alleged involuntary bankrupt in Oregon, it was improper to require their appearance in Iowa within four days.

Appeal from the District Court of the United States for the Southern District of Iowa.

Saul & Helmer and Mayne & Hazelton, for appellants.

Lee & Robb, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. An involuntary petition in bankruptcy was filed against J. G. Caton of Dedham, Iowa, and a subpœna was issued and placed in the hands of the marshal for service. Afterwards, but before the subpœna was served, Caton died. At the instance of the petitioning creditors the court of bankruptcy ordered that service be made upon his heirs, a widow and two sons, all adults, and that the proceedings continue. Upon service so made an adjudication was had and two objecting creditors who became parties to the proceedings before the adjudication have appealed.

Two questions arise: (1) Did the death of the bankrupt before the service of the subpœna work a complete abatement of the cause so that the court could proceed no further? (2) If it did not, was service upon the heirs alone sufficient, and was it made as required by law?

The pertinent provisions of the bankruptcy act of July 1, 1898, are as follows: The term "bankrupt" includes a person against whom an involuntary petition has been filed (section 1, subd. 4, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]); the terms "date of bankruptcy" or "time of bankruptcy" or "commencement of proceedings" or "bankruptcy," with reference to time, shall mean the date when the petition was filed (section 1, subd. 10, 30 Stat. 544 [U. S. Comp. St. 1901, p.

3419]); "the death or insanity of a bankrupt shall not abate the proceedings but the same shall be conducted and concluded in the same manner so far as possible as though he had not died or become insane provided that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence" (section 8, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]). These provisions plainly indicate that proceedings in bankruptcy are deemed to be commenced when the petition is filed, and that they do not abate with the death of the bankrupt. By the act of 1898 Congress went further than the English act of 1883, section 8 of which provides that "if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive." See *In re Walker*, 3 Morrell, Bankr. Cas. 69, and *In re Easy*, 4 Morrell, Bankr. Cas. 281. It is the exclusive province of Congress to say when such a proceeding shall be deemed to be commenced and pending in a court of bankruptcy, and what effect thereon the subsequent death of the bankrupt shall have, and it does not appear that its purpose was left in doubt. When the proceedings are once commenced the further continuance thereof after the death of the bankrupt is mandatory; it is not left to the discretion of the court. See *In re Hicks* (D. C.) 107 Fed. 910; *Scheuer v. Smith, etc., Co.*, 50 C. C. A. 312, 112 Fed. 406. It is not denied that the provision of the bankruptcy act in respect of the death of the bankrupt prevents the abatement of a proceeding which has once been commenced and is pending, but it is said that it does not apply in a case in which, although the petition has been filed, process has not been served upon the bankrupt. But here again we are met with the express provision of the act that when the petition is filed that is the commencement of the proceedings; and when proceedings have been commenced they must be said to be pending. In actions that do not abate by the death of the defendant, and the one before us is of that character, it is not always necessary to their continuance that service of process shall have been previously made upon the defendant.

In re Connaway, as Receiver, 178 U. S. 431, 20 Sup. Ct. 951, 44 L. Ed. 1134. In this case the petitioner, a receiver of a national bank, had commenced an action to recover from a stockholder an assessment made by the Comptroller of the Currency. The defendant stockholder died testate before service was made upon him. His executor was summoned into the suit by writ of scire facias. Upon the objection of the executor the Circuit Court decided that no service of process having been made on the deceased it had acquired no jurisdiction over him and therefore it could acquire none over his executor in that action. The receiver applied to the Supreme Court for a writ of mandamus commanding the judges of the Circuit Court to take jurisdiction and to proceed against the executor, and it was held that notwithstanding lack of service the cause was pending in the Circuit Court at the death of the defendant, and that it was proper to bring in his representatives so that it might continue.

In *Railroad v. Joy*, 173 U. S. 226, 229, 19 Sup. Ct. 387, 43 L. Ed. 677, it was said:

"Whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced. If an action be brought in a federal court, and is based upon some act of Congress or arises under some rule of general law recognized in the courts of the Union, the question of revivor will depend upon the statute of the United States relating to that subject."

For the same reason the question whether at the time of the death of a party an action may be said to be pending against him in a court of the United States must be determined by the same test. As we have observed, the bankruptcy act expressly declares that when the petition is filed the proceedings are commenced. The proceedings are then pending in the court. In *re Lewis* (D. C.) 91 Fed. 632; In *re Appel* (D. C.) 103 Fed. 931; In *re Stein*, 45 C. C. A. 29, 105 Fed. 749. The court below was therefore right in ordering their continuance.

As to the service upon the heirs alone. It is necessary that upon the death of the bankrupt before adjudication there should be brought into the proceedings, by personal or substituted service as conditions require, those who in law represent his estate. A bankruptcy proceeding is not a mere personal action against the bankrupt for the collection of debts. Its purpose is to impound all of his nonexempt property, to distribute it equitably among his creditors and to release him from further liability. It operates both in personam and in rem and affects both the personalty and realty. If the bankruptcy proceedings now under review had not supervened the personal representatives of Caton would have succeeded to his personal estate and his heirs to his realty (at least conditionally, *Laverty v. Woodward*, 16 Iowa, 1, 5), and they should therefore have been made parties and jurisdiction of them obtained by proper process. Section 955 of the Revised Statutes [U. S. Rev. St. 1901, p. 697] which provides for bringing in by scire facias the executor or administrator of a defendant in any court of the United States who dies before final judgment, is confined to personal actions. (*Macker's Heirs v. Thomas*, 7 Wheat. 530, 5 L. Ed. 515.) It was applied by the Supreme Court in the case *In re Connaway*, supra, in which a defendant died before service of process. So far as bankruptcy proceedings may be considered as in equity and as involving real property, Equity Rules 56 and 57 authorize the bringing in of parties who should be present during their continuance (see *Currell v. Villars* (C. C.) 72 Fed. 330), but the methods there provided are not well adapted to the quick moving machinery which the act of Congress has authorized courts of bankruptcy to employ. General Order 37 promulgated by the Supreme Court applies here. It provides for the use of the equity rules and the practice and procedure in cases at law, as nearly as may be, and authorizes the modification thereof and a change in the time allowed for return of process, for appearance and pleadings, etc.

We are of the opinion that the heirs and personal representatives of the deceased bankrupt should be brought in before adjudication, and that in doing so the court of bankruptcy may after the appropriate orders frame its process, personal or substituted, in analogy to the rules prescribed by the bankruptcy act for process to a bankrupt. The subpoenas to the heirs appearing in the record erroneously indicate that the purpose of the proceedings is that they be adjudged to be bankrupt. Again, service was made upon two of them in Oregon but four days before their appearance was required in Iowa.

The order of adjudication is therefore vacated, and the cause is remanded for further proceedings in conformity with this opinion.

TRAFTON v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. August 15, 1906.)

No. 600.

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—PRACTICE OF FEDERAL COURTS.

Independently of some statutory provision, the practice of the federal courts with reference to granting new trials in criminal cases follows the common law, and the court has no jurisdiction over such a motion made after the term expires at which sentence was pronounced. Whether a state statute regulating such proceedings passed since the original federal judiciary act is cognizable by a federal court, *quære*.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2352; vol. 13, Cent. Dig. Courts, § 933.]

2. SAME—WRIT OF ERROR—AFFIRMANCE—LEAVE TO MOVE FOR NEW TRIAL.

In the case at bar the petitioner asks leave to proceed further in the District Court after the term at which sentence was pronounced, and relies on a local statute of Massachusetts; so that, notwithstanding the general rule, the Court of Appeals deems it suitable in this particular instance to grant the petition and to remit all questions either as to the jurisdiction or the merits to be first investigated by the District Court, without any implication from the Court of Appeals pro or con with reference to either the jurisdiction or the merits.

In Error to the District Court of the United States for the District of Massachusetts.

On petition of John W. Trafton for leave to file a motion for a new trial in the District Court.

See 145 Fed. 81.

Everett W. Burdett and Joseph H. Knight, for plaintiff in error.

William H. Garland, Asst. U. S. Atty., and John H. Casey, Sp. Asst. U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. The particular matter before us grows out of a criminal conviction of John W. Trafton in the District Court for the District of Massachusetts, followed by sentence and this writ of error. On the 27th of April last, we entered a judgment affirming the conviction in the District Court, and subsequently, on the 25th of June,

Trafton petitioned us for leave to file in that court a motion for a new trial. In his petition he sets out to a very considerable extent the reasons in support of the motion which he proposes to submit to the District Court.

We have so often and so lately stated the practice on petitions of this character that we need only observe that, except for a single point, we should grant this application without hesitation, letting it appear, however, that we remit to the District Court without prejudice the investigation of the merits of the petitioner's propositions. We have hesitated, however, to grant the petition in this particular case because it comes after judgment in the District Court, and after the term expired at which the sentence was given. Independently of some statutory provision, it is thoroughly settled that the practice of the federal courts with reference to granting new trials in criminal cases follows the common law, so that the court has no jurisdiction over such a motion after the term expires at which the sentence was pronounced. *Chitty's Criminal Law* (*651); *Indianapolis Railroad Company v. Horst*, 93 U. S. 291, 301, 23 L. Ed. 898; *Newcomb v. Wood*, 97 U. S. 581, 584, 24 L. Ed. 1085; *Belknap v. United States*, 150 U. S. 588, 590, 14 Sup. Ct. 183, 37 L. Ed. 1191; *Kingman v. Western Manufacturing Company*, 170 U. S. 675, 678, 18 Sup. Ct. 786, 42 L. Ed. 1192; *Capital Traction Company v. Hof*, 174 U. S. 1, 9, 19 Sup. Ct. 580, 43 L. Ed. 873.

According to the course of the common law, the only relief which the petitioner could obtain on the facts set out in his petition and the accompanying papers would be through an application for a pardon. The petitioner, however, apparently relies on a local statute of Massachusetts, by virtue of which a motion for a new trial in a criminal case is justifiable if made within a year after sentence, whether before or after the term has expired. *Revised Laws of Massachusetts of 1902*, c. 219, § 33. We doubt whether any state statute regulating criminal proceedings passed since the original judiciary act is cognizable by the federal courts. *United States v. Reid*, 12 How. 361, 363, 13 L. Ed. 1023; *Tennessee v. Davis*, 100 U. S. 257, 298, 25 L. Ed. 648; *Camden Railway Company v. Stetson*, 177 U. S. 172, 175, 20 Sup. Ct. 617, 44 L. Ed. 721. However, on the record before us, we do not feel ourselves required to investigate with the view of reaching a final conclusion any questions raised by the petition we are considering, and it is more convenient, and we deem it suitable, to leave all the topics involved, whether of jurisdiction or the merits, to be first investigated by the District Court, without any implication pro or con, either from our order or this opinion, which should be held as limiting that investigation.

Ordered: The petition of John W. Trafton for leave to proceed on a motion for a new trial in the District Court, filed on June 25, 1906, is granted; but this order is without any implication as to any question of jurisdiction or merits.

WOOSTER et al. v. CRANE & CO.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1906.)

No. 2,011.

1. COURTS—FEDERAL COURTS—JURISDICTION—SUIT ARISING UNDER COPYRIGHT LAWS.

A suit, the primary and controlling purpose of which is to enforce a right secured by the copyright laws which is being infringed by the defendants, is a suit under those laws, and within the jurisdiction of the federal Circuit Courts, although it incidentally draws in question the validity, interpretation, and effect of a contract through which the complainant derives title.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 833.]

2. COPYRIGHT—SUIT BY EQUITABLE OWNER FOR INFRINGEMENT.

The owner of the equitable title to a copyright may in equity in his own name sue for infringement, where the holder of the legal title is one of the infringers and occupies a position hostile to him.

3. SAME—LACHES.

Failure to institute suit for infringement until the defendants have been proceeding openly therewith for about a year does not constitute laches, barring a right to relief in equity, when during that time the complainant was actively engaged in the defense of a suit to cancel his title prosecuted by one of the defendants.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 70.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Kansas.

Charles C. Linthicum (T. F. Garver, on the brief), for appellants.

A. B. Quinton (E. S. Quinton, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This is an appeal from an order granting a preliminary injunction restraining the infringement of copyrights in certain elementary arithmetics. The case made by the bill, and which the proofs submitted on the motion for the injunction tended to sustain, is this: The defendant, Lizzie E. Wooster, is the author of the books and has the legal title to the copyrights. The equitable title, however, is in the complainant, Crane & Co., by virtue of a written contract with Wooster whereby, before the copyrights were completed, she transferred to that company the exclusive right to print, publish, and vend the books during the full terms of the copyrights and of any renewals of them, and agreed to defend the copyrights in case of adverse claims or infringements. After the completion of the copyrights Wooster, without the consent of the complainant, prepared other elementary arithmetics, which were largely copied from the copyrighted books, and caused them to be printed and put on the market. The defendants Alford and Shirer are book-sellers and are engaged in selling the infringing books without the

consent of the complainant, and with notice of its rights. The prayer of the bill is for an injunction against further infringement of the copyrights and for such other relief as may be agreeable to equity.

Of the contentions made by the appellants, those which we deem it appropriate to notice at this time are: (1) That the suit is one arising out of the contract and not under the copyright laws; (2) that the complainant, not having the legal title to the copyrights, cannot maintain the suit in its own name, or at least not against others than Wooster; (3) that the complainant has been guilty of laches, barring its right to relief in equity.

1. A suit, the primary and controlling purpose of which is to enforce a right secured by the copyright laws which is being infringed by the defendants, is a suit under those laws, and within the jurisdiction of the federal Circuit Courts, although it incidentally draws in question the validity, interpretation, and effect of a contract through which the complainant derives title. *Littlefield v. Perry*, 21 Wall. 205, 222, 22 L. Ed. 577; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 290-295; 22 Sup. Ct. 681, 46 L. Ed. 910; *Atherton Mach. Co. v. Atwood-Morrison Co.*, 43 C. C. A. 72, 102 Fed. 949; *Victor Talking Machine Co. v. The Fair*, 61 C. C. A. 58, 123 Fed. 424. This is such a suit. The bill, like ordinary bills for infringement, sets forth the facts showing the validity of the copyrights, the title of the complainant, and the infringement by the defendants, and then prays for an injunction against a continuance of the infringement. The contract is set forth for the purpose of showing the complainant's title, and not as the basis or foundation of the suit.

2. It is the general rule that a mere licensee cannot in its own name sue strangers who infringe. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768. Here, however, the complainant is not a mere licensee, but has the full equitable title, and Wooster, who has the legal title, is one of the infringers and occupies a position altogether hostile to the complainant. Its right in this situation to sue in equity in its own name is plain in principle and well established by authority. *Littlefield v. Perry*, 21 Wall. 205, 223; 22 L. Ed. 577; *Waterman v. Mackenzie*, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910; *Root v. Railway Co.*, 105 U. S. 189, 216; 26 L. Ed. 975; *Little v. Gould*, 15 Fed. Cas. 604, 610, No. 8,395; *Id.*, 15 Fed. Cas. 612, 614, No. 8,395; *Ruggles v. Eddy*, 20 Fed. Cas. 1317, No. 12,177.

3. The laches sought to be imputed to the complainant consists in its failure to institute the suit until the defendants had been proceeding openly with their infringement for about a year. The delay, however, is satisfactorily explained. The complainant was actively engaged in the defense of a suit prosecuted by Wooster in one of the courts of the state of Kansas to obtain a cancellation of the contract which made it the equitable owner of the copyrights. It obtained a judgment in its favor in that suit, and shortly thereafter commenced the present one, and at once applied for a temporary injunction. The

circumstances, therefore, refute rather than suggest an acquiescence in the infringement or an abandonment of the copyrights.

Other matters are discussed in the briefs, but careful consideration of them does not persuade us that the court acted improvidently in granting the injunction.

Affirmed.

HORSESHOE MINING CO. v. MINERS' ORE SAMPLING CO.

(Circuit Court of Appeals, Eighth Circuit. July 19, 1906.)

No. 2,092.

1. ATTORNEY AND CLIENT—WHEN AUTHORITY NOT PRESUMED FROM ITS ASSUMPTION.

The assumption by an attorney at law, even if generally retained, of authority to act for his principal outside of the due and orderly prosecution, defense, or conduct of litigation or proceedings in courts does not create any presumption of actual authority so to act, but, as in the case of other agents, his acts must be shown to be within the scope of his authority, else they will not bind his principal.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 95.]

2. EVIDENCE—ATTORNEY AND CLIENT—ADMISSIONS BY ATTORNEY—EVIDENCE AGAINST PRINCIPAL.

The statements and admissions of an attorney at law in respect of his principal's business are inadmissible against his principal unless it is specially shown that they were authorized or that they were made in the due and orderly conduct of a case for the distinct purpose of dispensing with formal proof of the facts to which they relate.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 945-949.]

3. CORPORATIONS—CONTRACT—EXECUTION—EVIDENCE.

In the trial of an issue as to whether a stated contract was made with A. Company or with B. Company, the persons who negotiated the contract on behalf of one or the other of them being officers or agents of both, evidence that A. Company was a large stockholder of B. Company is inadmissible.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

Richard McKnight (W. C. Kingsley, on the brief), for plaintiff in error.

E. W. Hurlbut (H. A. Hicks, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment obtained by the Miners' Ore Sampling Company against the Horseshoe Mining Company in an action to recover a balance alleged to be due for ores and metals sold and delivered under a verbal contract. The trial was to a jury. One of the questions aris-

ing under the pleadings, and in respect of which the evidence was particularly conflicting, was whether the Sampling Company's contract was with the Horseshoe Company or with the National Smelting Company. The question seems largely to have arisen out of the fact that some of the persons who participated in negotiating the contract, as also in its partial execution, were officers or agents of both the Horseshoe Company and the National Company. Over the objection of the defendant the plaintiff was permitted to read in evidence two letters containing statements and admissions which, if made or authorized by the defendant, might well be regarded as a recognition of the plaintiff's claim. The letters were written before the commencement of the action by one whose only relation to the defendant was, that he was its resident attorney at Deadwood, S. D., in the vicinity of which its business was principally transacted. Complaint is made of the admission of these letters, and we think it was erroneous. The assumption by an attorney at law, even if generally retained, of authority to act for his principal outside of the due and orderly prosecution, defense, or conduct of litigation or proceedings in courts does not create any presumption of actual authority so to act, but, as in the case of other agents, his acts must be shown to be within the scope of his authority, else they will not bind his principal. *Stone v. Bank of Commerce*, 174 U. S. 412, 421, 19 Sup. Ct. 747, 42 L. Ed. 1028. And particularly are his declarations, statements, and admissions in respect of his principal's business inadmissible against his principal unless it is specially shown that they were authorized or that they were made in the due and orderly conduct of a case for the distinct purpose of dispensing with formal proof of the facts to which they relate. 1 *Greenleaf, Ev.* (14th Ed.) § 186; 2 *Wharton, Ev.* (3d Ed.) § 1184; 2 *Wigmore, Ev.* § 1063; *Weeks on Attorneys* (2d Ed.) § 223; *Saunders v. McCarthy*, 8 Allen (Mass.) 42; *Durnford v. Clark's Estate*, 3 La. 199; *Treadway v. S. C. & St. P. R. R. Co.*, 40 Iowa, 526; *McGarry v. McGarry*, 9 Pa. Super. Ct. 71; *Wagstaff v. Wilson*, 4 Barn. & Adol. 339. See, also, *Miller v. United States*, 66 C. C. A. 399, 133 Fed. 337. As the letters were not written by an attorney defending the action with the purpose of dispensing with proof otherwise required of the plaintiff, and as there was no evidence that the attorney who wrote them was authorized to make the statements and admissions which they contain, it follows that the letters were inadmissible. The case is essentially different from that of *Brown v. Arnold*, 67 C. C. A. 125, 131 Fed. 723, relied upon by counsel, wherein we held that:

"The retainer of an attorney at law to conduct an action confers upon him authority to stipulate with opposing counsel after the rendition of a judgment in favor of his client and after the close of the term of court at which it is rendered, but within the time for procuring a writ of error, that the case shall abide the final decision of another action which involves the same question and is conducted by the same attorneys."

Evidence was also admitted over the defendant's objection to the effect that it was a large stockholder in the National Smelting Com-

pany. We think this was error. Whether the plaintiff's contract was with the defendant or with the other company must be determined by ascertaining for which of these companies the persons who negotiated the contract with the plaintiff, and who occupied the dual relation before described, were acting in that transaction, and evidence that the defendant was or was not a stockholder in the other company is altogether apart from that question and without probative value in its solution. The court evidently came to this conclusion before the completion of the trial, because in its charge to the jury this evidence was in effect withdrawn from their consideration. We would, therefore, have taken no notice of the matter, but for the continued insistence of the plaintiff that the evidence was admissible.

The judgment is reversed, with a direction to grant a new trial.

FIRST NAT. BANK OF LINCOLN, NEB., et al. v. PENN MUT. LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. August 27, 1906.)

No. 2,314.

EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.

Where a written contract was entered into between two corporations for the settlement of all matters between them, in relation to which a number of suits were pending, which contract specified in full detail the things each was to do, and what money was to be paid, evidence is inadmissible to establish a contemporaneous parol contract requiring one of the parties to pay an additional sum as a part of the settlement.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2030.]

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action by the First National Bank of Lincoln, Neb., and the heirs of John L. Carson against the Penn Mutual Life Insurance Company to recover the amount of a judgment they had previously obtained against the New Lincoln Hotel Company. It was charged that the insurance company had obligated itself by an oral contract with the hotel company to discharge the judgment, and that the latter had assigned its rights under the contract to the plaintiffs. At the conclusion of plaintiffs' case the trial court directed a verdict for the insurance company, upon the ground that the evidence of the oral contract relied on was inadmissible because its effect was to alter and contradict a written contract between the insurance company and the hotel company which was clearly the repository of all of the agreements between them. The plaintiffs then obtained this writ of error.

The following facts were not disputed. The insurance company had secured decrees foreclosing mortgages upon a hotel owned by the hotel company, and for the personal liability of its officers upon part of the mortgage indebtedness. The insurance company was seeking to obtain possession of the property and to enforce the deficiency judgments. The hotel company was resisting, and much litigation ensued. There were suits in the Supreme Court of the United States, the Circuit Court of the United States for the district of Nebraska and the local state court. Part of the furniture and equipment of the hotel belonged to the hotel company, and part to some former tenants. The latter was claimed by the plaintiffs here, under a chattel mortgage and by the hotel company under a landlord's lien created by the lease to the tenants. The plaintiffs and the hotel company were litigating over their con-

dicting claims. The hotel company commenced a suit against the tenants to foreclose its landlord's lien and also an action in replevin to obtain possession. The plaintiffs here intervened in the replevin action and claimed the personalty in dispute under their chattel mortgage. The insurance company was not a party to the replevin action, and had no interest in it. Its claims related to the remainder of the personalty, which was concededly the property of the hotel company, and to the hotel itself and the deficiency judgments. Such were the relations of the parties.

After a course of preliminary negotiations looking to a settlement, representatives of the insurance company and hotel company came together February 10, 1900. The directors of the latter were present. After a continued discussion a settlement was agreed upon, and counsel for both parties were directed to prepare a contract accordingly. The board of directors of the hotel company met on the same day and adopted a preamble reciting that "it is desired to settle the pending litigation and all liability between the Penn Mutual Life Insurance Company and the New Lincoln Hotel Company and its sureties and there is a prospect that such settlement can be made," and also a resolution "that the president or vice-president and secretary or treasurer, or a majority of them, be authorized and empowered to execute any and all papers necessary to consummate such settlement." A contract was drawn and executed by both companies. It recited the judgment in ejectment obtained by the insurance company for the possession of the hotel, the pendency of litigation between the parties "concerning said hotel, and the possession thereof, and certain property therein contained, and it is desired to make a full settlement of the litigation." The hotel company agreed to dismiss its various actions. Each party was to pay its own costs, certain fees being waived. The hotel company agreed to pay the insurance company \$8,532.74, out of which the latter was to discharge certain bills of the former contracted in the operation of the hotel and aggregating \$2,550.83. An itemized list of these bills was set forth in the contract. The hotel company also agreed to deliver to the insurance company, free from incumbrance, certain hotel fixtures, supplies, and furniture, the items being specified, valued at \$8,303.38; also all other personal property pertaining to the hotel and not included in plaintiffs' chattel mortgage, the outstanding hotel accounts, the keys and the possession of the hotel. It also agreed to transfer to the insurance company its cause of action against the tenants above referred to and all its right in the personal property described in the suit brought to foreclose the landlord's lien, and the license for operating a saloon in the hotel. This contract was carried out; the papers necessary to that end were executed and exchanged by March 1, 1900. When the plaintiffs first intervened in the replevin action brought by the hotel company to recover possession of the personal property placed in the hotel by the tenants, they claimed a special ownership under a chattel mortgage and damages for wrongful detention in the sum of \$500. They were successful in defeating the landlord's lien in the other suit of the hotel company and by proceedings in that suit the property involved, being the same as that in the replevin action, was sold to the insurance company for \$5,600, which, less a small amount of costs, was paid to the plaintiffs. The replevin action, however, was not dismissed. In May, 1900, about two months after the settlement between the two companies was closed up, the plaintiffs amended their intervening demand in the replevin action and increased their claim for the wrongful detention of the property involved to \$7,000; and about 18 months later they took judgment against the hotel company for \$9,494.09. The hotel company, by an undated writing, assigned to the plaintiffs the right to collect this judgment from the insurance company, based upon the assertion of an oral contract on the part of the latter to pay it, made at the time of the settlement of February 10, 1900. It was evidence of this alleged oral contract that the trial court excluded.

J. H. Broady (W. E. Blake and L. C. Burr, on the brief), for plaintiffs in error.

Field, Ricketts & Ricketts and Montgomery & Hall, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There was a written contract in clear, unambiguous and comprehensive terms, showing upon its face that it was designed to evidence a settlement of all matters in dispute between the parties who executed it. It specified in full detail the things each was to do and what moneys were to be paid. The plaintiffs desired to show by oral evidence that there was a contemporaneous unwritten contract imposing upon one of the parties an obligation to pay an additional sum of money as part of the settlement. The action of the trial court in rejecting the evidence was manifestly correct. The relations of the parties, the subject-matter and language of the contract and the circumstances surrounding its execution show that the parties intended it to be a complete memorial of their mutual agreements.

The judgment is affirmed.

ROBERT H. INGERSOLL & BRO. v. SNELLENBERG et al.

(Circuit Court, E. D. Pennsylvania. October 6, 1906.)

No. 18.

PATENTS—INFRINGEMENT—RESTRICTIONS ON SALE OF ARTICLE—RIGHT OF LICENSEE TO IMPOSE.

An exclusive license to sell a patented article, granted by the owner of the patent who is also the manufacturer of the article, does not vest the licensee with the right to impose a valid restriction upon the future selling price of the article under penalty of liability for infringement of the patent.

In Equity. Suit for infringement of patents. On final hearing.

C. Bradford Fraley and A. Bell Malcomson, for complainant.

R. W. Archbald, Jr., Hector T. Fenton, and Simpson & Brown, for defendants.

J. B. McPHERSON, District Judge. The complainants are Robert H. Ingersoll & Bro., a joint stock association of the state of New York, and the Waterbury Clock Company, a corporation of the same state. The defendants are the firm of N. Snellenberg & Sons, a Pennsylvania partnership, doing business in the city of Philadelphia. The facts out of which the controversy arises are as follows:

On February 7, 1890, two applications were made by Archibald Bannatyne for improvements in the escapement mechanism of clocks, and for an improved clock-pinion, respectively. The applicant's rights were afterwards assigned to the Waterbury Clock Company, one of the complainants, to whom the patents (Nos. 443,248 and 444,684) were duly issued in December, 1890, and January, 1891. Within a year or two thereafter, the partnership of Robert H. Ingersoll & Co.—the predecessor of the joint stock association, complainant—began to sell at wholesale watches that contained the patented improvements, and in 1895 or 1896 endeavored to impose upon the retail trade a schedule of prices, at which the watches should be sold to the ultimate purchasers. The nature and object of this effort is thus described by one of the witnesses, a member of the joint stock association complainant:

"We have established what we consider proper retail prices at which the goods should be sold, and which would give the dealer, as well as ourselves, a proper margin of profit, and have compelled the trade to adhere to that schedule."

About 1900, the partnership began to send out the following notice, which was printed upon the pasteboard box in which each watch sold by them to the retail trade was inclosed.

"Yankee Watch. Nickel. Notice.

"As manufacturers of the Yankee Watch under various United States patents and trade-marks owned and controlled exclusively by us, which according to recent court decisions establish our right and privilege to fix the retail price, we do hereby fix such price at one dollar (\$1.00), and we sell this watch only on condition that the retail dealer will not sell it for less than one dollar (\$1.00).

"The retail dealer acknowledges that the receipt and acceptance of this watch shall be an assent to the above terms and an agreement directly with the manufacturers to sell subject to the above fixed price.

"163 Washington St., Robt. H. Ingersoll & Bro., Manufacturers,
 "67 Cortlandt St., New York,
 "111 Nassau St., U. S. A."

Several kinds of watches containing the patented improvements were sold by the firm, but it is the "Yankee" watch alone that is involved in this dispute. Accompanying each watch, also, and usually inclosed in the case, was a printed guaranty in the following form:

"Guarantee. Date.

"We guarantee this watch to keep good time for one year from above date. provided it has not been misused, and if it fails to do so under the above conditions, we will, on its return to us, together with 5c. for re-mailing and this guarantee, repair it free of charge.

"R. H. Ingersoll & Bro., Makers,

"163-165 Washington Street,

New York City.

"Option. It requires about ten days to repair. If, instead of waiting for your watch to be repaired, you prefer a new one, enclose us 10c. in addition to the 5c. postage and we will, if not misused, send you a new watch at once. Pack carefully, put your name and address on package for identification."

On February 5, 1903, the joint stock association having meanwhile been formed, the partnership conveyed to the association, complainant, all the assets of the firm, including the right to sell watches containing the patented improvements. This right had been previously acquired by an agreement made on July 1, 1899, with the Waterbury Clock Company, of which the following is a copy:

"Whereas, two several letters patent of the United States were granted to the Waterbury Clock Company for inventions made by Archibald Banatyne and assigned to said Waterbury Clock Company; which said letters patent are numbered and dated as follows:

"No. 443,248, dated December 23, 1890.

"No. 444,684, dated January 13, 1891.

"Now therefore, for and in consideration of one dollar and other valuable considerations, the said Waterbury Clock Company has granted to Robert H. Ingersoll and Charles H. Ingersoll, composing the firm of Rob't H. Ingersoll & Bro., their heirs, successors or assigns, the sole right to sell watches made containing the inventions covered by said letters patent, the said watches to be made by the Waterbury Clock Company, and this exclusive license to sell to continue until formal notice of withdrawal is served by either party on the other."

After the joint stock association acquired the partnership business and assets, it continued to sell the watches in question in the same manner and under the same notice as had been previously followed by the partnership. On April 30, 1902, the defendants, who own and conduct a large department store in Philadelphia at Twelfth and Market streets, put the following advertisement in one of the city newspapers:

"Bargain No. 8.

Main floor.

"Ingersoll \$1.00 Yankee Watch

"Retailled at \$1.00 all over the world.

79c.

"Today's price 79c.

"Designated by special red price tickets."

On January 16, 1903, and on February 3, 1903, other advertisements were inserted as follows:

"At 85c. Ingersoll Yankee Watches—Nickel or gun-metal. Regular price \$1.00. Friday price 85c."

"\$1. Ingersoll Watch, 79c. The Ingersoll Yankee Watches are good time-keepers: we have them in nickel or gun-metal."

Sales were made at the defendants' store on Twelfth street at the reduced prices named in these advertisements, namely, 79 cents and 85 cents. At the time when these prices were offered to the public, the defendants were aware of the restriction which Robert H. Ingersoll & Bro. were seeking to impose upon the retail price at which the Yankee watch should be sold, and the subsequent sales made by the defendants were intended to violate this restriction. There is no evidence that the Waterbury Clock Company, by any direct action of its own, ever attempted to impose any restriction upon the selling prices of the Yankee watch, or that it ever gave to Robert H. Ingersoll & Bro. any authority to impose such a restriction.

Upon these facts it will be observed that a question arises which I think has not yet been decided by the courts, namely, whether a person, who is an exclusive licensee to sell, but has no other interest in a patent, may impose a valid restriction on the future selling price of the patented article, solely by virtue of the right to sell given to him by the license. It is no doubt the fact that Robert H. Ingersoll & Bro. declare in their notice and guaranty that they are the makers of these watches, and that they own and control exclusively the patents under which the watches are manufactured; but these statements are not true, and the undisputed testimony shows that every Yankee watch sold by the joint stock association is manufactured by the Waterbury Clock Company, and not by Robert H. Ingersoll & Bro., and that the only right of the joint stock association is the right to sell that is given by the contract of January 1, 1899. The extent of this right is perhaps not clearly defined by the contract. It may be an exclusive right to sell merely as agents for the clock company under some undisclosed agreement concerning compensation, or it may be an exclusive right to sell the watches after they have been bought outright from the clock company at such prices as the parties may have fixed. In either event, however, the right of the licensee to restrict the future selling price must find its warrant, if any warrant exists, in a grant of authority by the owner of the patent, and, if no such grant has been proved, the licensee's right to restrict cannot be implied. As the case presents itself to my mind, the proper conclusion does not seem to be difficult to reach. The decisions that support the right of a patentee to impose restrictions upon the future sale or use of the patented article are based upon his ownership of a monopoly, and his consequent right to declare upon what terms he will admit the public to share in such ownership, or to profit by the use of the article. This principle is now thoroughly established, and it is unnecessary to do more than refer to the following cases on the subject: *Bement v. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Victor Talking-Machine Co. v. The Fair*,

123 Fed. 424, 61 C. C. A. 58; Edison Phon. Co. v. Kaufman (C. C.) 105 Fed. 960; Same v. Pike (C. C.) 116 Fed. 863; and Heaton Co. v. Eureka Co., 77 Fed. 228, 25 C. C. A. 267, 35 L. R. A. 728. But it is equally well established, that, when the owner of a patent sells the article containing the invention without imposing any restriction upon its future sale or use, the article passes at once out of the protection of the monopoly and becomes irrevocably a part of the general property of the community, which may thereafter be bought and sold as freely as any other article that has never been patented. 2 Robinson, Patents, § 824, and cases cited in notes.

I do not think that these principles need to be enlarged upon. Their application to the present dispute seems to be plain. The bill is expressly put upon the theory—and the evidence supports the position—that Robert H. Ingersoll & Bro., merely as exclusive licensees to sell, and in no other character, have imposed a valid limitation upon the right of those who buy from them to fix the price at which the Yankee watch thus bought may be sold to the ultimate purchaser at retail. As already intimated, I do not think that this ground can be successfully maintained. So far as appears, the Waterbury Clock Company has neither imposed any such restriction itself, nor has authorized Robert H. Ingersoll & Bro. to impose it; and, failing these two supports for the restriction, I think it must necessarily fall.

If this conclusion is correct, the validity of the patents need not be considered, nor the other defenses that have been argued by counsel.

A decree may be entered, dismissing the bill, with costs.

WILLS v. SCRANTON COLD STORAGE CO.

(Circuit Court, M. D. Pennsylvania. July 14, 1906.)

No. 8.

1. PATENTS—INFRINGEMENT.

Upon the question of infringement the structure itself is to be looked to and not the results obtained, except as they may go to the question of identity, and infringement is not avoided because the patented device is not utilized to the full extent possible nor because a feature is retained which might be dispensed with to advantage and which it was one of the purposes of the patented device to render unnecessary.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 370-376.]

2. SAME—INVENTION—UTILITY AS EVIDENCE.

The utility of a patented device is not necessarily a proof of invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 59, 52.

Utility, extent of use, and commercial success as evidence of invention, see note to *Doig v. Morgan Mach. Co.*, 59 C. C. A. 620.]

3. SAME—PATENTABLE INVENTION—WHEN NOTICE TAKEN OF WITHOUT PROOF.

Even though the point is not made in the proofs that the device does not disclose patentable invention, it is not to be disregarded when it is plain.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 35, 543.]

4. SAME—INVENTION.

The Wills reissued patent No. 12,300 (original No. 742,540) for a refrigerator building, the essential feature of which is a device to prevent drafts up and down elevator shafts in such buildings, is void for lack of invention, the advantages being so manifest and the means used for obtaining them so obvious that only mechanical skill was required to supply them.

In Equity. Suit for infringement of reissued letters patent No. 12,300 (original No. 742,540) for a refrigerator building, issued January 3, 1905, to James Wills. On final hearing.

Herbert Knight, for complainant.

Ralph L. Levy, for defendants.

ARCHBALD, District Judge. The question of infringement is not difficult. The patent is for a device to prevent drafts up and down elevator shafts in cold-storage buildings. It is not exactly so expressed, but that is the substance. To accomplish this, flexible strips or flaps, extending beyond the edges of the elevator carriage at top, bottom, and sides, are set about the front or face, left open for the reception and delivery of goods, which close up the intervening spaces and make a comparatively tight fit with the shaft at all times. This is the precise character of structure employed by the defendants which thus to all intents and purposes infringes. It is claimed, however, that infringement is avoided, because the defendants retain, between the cold-storage chambers and the elevator, the anteroom or vestibule, which according to the specifications, it is the object of the invention to dispense with. The doing away with an anteroom, with the consequent saving of place for additional cold storage, and the removal of the musty and unwholesome conditions which are thereby entailed, are no doubt advanced by the inventor as among the advantages of his invention, and form a part of the grounds which prompted it. But the benefits which reside in or flow from it, are not to be confounded with the device itself, nor is infringement escaped because it is not utilized to the extent which it might be, or a feature retained which could, with profit, if desired, be dispensed with. The structure, in other words, is to be looked to, and not the results obtained, except as they go, perchance, to the question of identity; and an elevator shaft, made air-tight by means of flexible or extensible edges, plus a dispensable anteroom, just as much infringes upon the patent as one with the anteroom left out. Nor is this changed by the fact that the elevator carriage so equipped is spoken of in the patent as a traveling anteroom, and the flexible edges, as providing a vestibule, both being merely functions of the device, existing as well in the one structure as the other.

The real question in the case is whether the device shows patentable invention. No point of this, it is true, was made in the proofs, but there was at the argument; and it lies too plainly on the surface to be disregarded. As already stated, the alleged invention consists simply and essentially in providing flexible edges about

the elevator carriage which adapt themselves to the sides of the shaft, and so close the spaces necessarily left open between the two. The problem to be met, having regard to the state of the prior art is thus explained in the specifications:

"Heretofore in refrigerating plants and cold-storage buildings it has been customary, where elevators were employed to convey merchandise from one floor to another, to provide a vestibule or anteroom between the elevator-shaft and the coldrooms in order that the cold air in the latter compartment should not escape up or down the elevator-shaft while the entrance thereto was open. This escape of the cold air was made possible because the cab did not fit the shaft and the shaft-openings with sufficient closeness to prevent a free and extensive movement of air at and around its sides or edges and also because during the rush hours of business the doors between the rooms were often left open. To obviate these difficulties as much as possible, the anteroom was provided as a sort of air-lock or buffer, and the space so employed was by reason of the shifting temperature rendered useless for storage, and was consequently a loss of space. This room was also by reason of the differing temperatures wet and musty and always unsanitary."

The means employed to obtain this, and the advantages derived therefrom are stated as follows:

"My present invention is designed to utilize this space and make it clean and wholesome and, in fact, to absorb the space in the general storage-room and make the cab a traveling anteroom, and to this end I make the cab practically air-tight, except the open face or faces or fronts, and provide flexible flaps, which bridge over and between the edges of the cab and the corresponding opening in the elevator-shaft and provide a vestibule. The result will be that while the cab is discharging or taking on goods the air in the adjoining room cannot escape through or around it. The room and space heretofore rendered unavailable for storage purposes can thus be utilized. In the employment also of the old form of anteroom as an air-lock or buffer it implied and required a double handling of the goods. It constituted an intermediary room only. This room in connection with my invention I eliminate and dispense with and absorb into the general storage-room. Air-locks are established by merging the air in the elevator-car and each floor when they are thrown together in my present invention."

And again:

"It will be seen that my invention not only prevents the cold air from rushing out, which has always been a source of substantial loss, but it also prevents an inrush of warm and moisture-laden air. This warm air is not only harmful in itself, but deposits snow, which is very undesirable. * * * The intent and purpose of my invention, as will be seen, is to establish an air-lock or a system of air-locks by means of the traveling anteroom and the openings from the elevator-shaft, and this air-lock is accomplished whether the cab or car is provided with one opening or whether it has two or more openings. In each and every instance or embodiment of my invention the air-lock is to be established when the opening of the traveling anteroom registers with the opening in the elevator-shaft."

"It is to be understood," says the inventor, defining the scope of his invention, "that where in the specification and claims I employ the term 'air-lock' I refer to and call for any means for preventing the escape of air from the cooled room to any other place than into the elevator-car which is opening into that particular cooled room at the time—that is to say, the bodies of air in the said cooled room and the said elevator-car or traveling anteroom at the particular time when the two stand opposite each other and the door between them is opened merge and become one body of air, and any passage of such body of air beyond these compartments will for the time being be rendered impossible—and, as above stated, I employ the expression 'air-lock' as applying to this condition. This cab or car becomes and operates as a traveling anteroom."

The quotations thus made from the specifications show the exact character of the invention and insure that no injustice is done it. The patent has six claims, all of which are relied upon. It is conceded, however, that the first may possibly be too broad, comprehending, as it does, every means by which an air-lock, so-called, is established between the elevator cab and the different floors or rooms of the warehouse. But without dwelling upon that, the objection goes deeper and applies to all. Given the problem set forth in the specifications, the question is whether it involved inventive skill to close the air spaces about the elevator carriage and cut off the draft up and down the shaft with adjustable flaps or edges not far removed in character from ordinary weather strips. To this, as it seems to me, there can be but one answer. It is not the simplicity of the means adopted that condemns it; many valuable inventions are most simple. But the disadvantages to be overcome are so manifest, and the means for doing this so obvious, that it does not rise above the level of ordinary mechanical skill to perceive and supply them. Almost any one, in other words, could appreciate the trouble, and practically any carpenter could remedy it. It did not require the peculiar insight of an inventor. It is not as though there had been previous unsuccessful efforts by others to overcome the difficulty, or other prior and more primitive devices which were supplanted. It might be different, also, if an ingenious form of adjustable flap, such, perhaps, as the spring-actuated sidepieces of the defendants, were in question. The whole ingenuity claimed for the device resides in the idea of closing up the air spaces about the carriage by means of edges sufficiently flexible not to interfere with the running of it, and at the same time leave no crevices. Undoubtedly the device is useful. But utility is not necessarily a proof of invention. *Daylight Glass Co. v. American Prismatic Light Co.* (C. C. A.) 142 Fed. 454. And I can find none here. It is a delicate matter to declare a patent void for want of patentable invention, but in the view taken no other course seems to be open to me.

The bill will be dismissed with costs.

PLECKER v. POORMAN.

(Circuit Court, S. D. Ohio, W. D. April 3, 1905. On Rehearing,
September 14, 1905.)

No. 5,495.

1. PATENTS—SUIT FOR INFRINGEMENT—LACHES.

The owner of a patent is not barred by laches from maintaining a suit in equity for its infringement because of a delay of six years in bringing such suit after the alleged infringement commences where it appears that during such time another suit was pending for infringement by a machine substantially the same as defendant's.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 467-469.]

Laches as a defense in patent infringement suit, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

2. SAME—INFRINGEMENT—CORRUGATING MACHINE.

Claim 1 of the Plecker patent, No. 473,019, for a corrugating machine discloses patentable invention in the seaming roll therein described. Also *held* infringed. Claim 8 is void for lack of invention.

3. SAME—RECOVERY IN PART—DISCLAIMER.

Where, in a suit for infringement of a patent, one claim involved is *held* valid and infringed, and another void for lack of invention, while under Rev. St. § 973 [U. S. Comp. St. 1901, p. 703], the complainant cannot recover costs unless a disclaimer is filed as to the claim adjudged invalid, such disclaimer will not be required as a condition precedent to the recovery of profits or damages for infringement of the valid claim.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 228.]

In Equity.

THOMPSON, District Judge. Suit to enjoin the alleged infringement of letters patent No. 473,019, issued to William J. Plecker April 19, 1892, for an improvement in corrugating machines, and for damages, etc.

The claims of the patent alleged to be infringed are:

"(1) In a machine for forming closed corrugated tubes, the combination of the stationary frame, the corrugation forming rolls mounted on the stationary frame, and the seam-locking roll in a transverse plane behind that of the corrugating-rolls, but in close proximity thereto, and situated substantially as set forth, whereby while one part of the tube is having the seam locked, the other part is being simultaneously corrugated."

"(8) The combination of the frame, the longitudinally-moveable corrugated mandrel, the pressing-rolls mounted on the frame, and a vertically-swinging detent-lever mounted on the frame and adapted to engage with the pipe on the mandrel, substantially as and for the purpose set forth."

The defenses relied on are: Lack of patentable invention, lack of utility, anticipation, prior use, noninfringement, laches.

The function of the seaming-roll of claim 1 and its position in the machine were new in the art and useful, and its employment involved patentable invention. The seaming-roll of the defendant's machine, although in a separate frame and further back of the corrugating-rolls than the complainant's, and supported underneath by a roller not found in the complainant's machine, nevertheless perform the same functions, in the same manner, for the same purpose and with the same beneficial result as that of complainant's and therefore infringes complainant's patent. The complainant is not barred from relief because of laches in the enforcement of its rights under the patent. The stipulation of the parties shows that in 1894, the company which the defendant succeeded in business built and sold a machine essentially "the same as that illustrated in the complainant's exhibit drawing of the defendant's machine placed in evidence," six years before the bringing of this suit, and that the defendant has since "made and sold numerous machines of the same general construction," but the testimony of the defendant's witness, Fowler, shows that during that time the complainant brought suit against the Universal Machine Company

for using a machine which was the same, or substantially the same, as the defendant's machine; and, in view of this fact, the admissions of the stipulation are insufficient to warrant the inference of laches.

The combination described in claim 8 presents nothing new in the art which entitles it to recognition as an invention.

There will be a decree for the complainant in accordance with these findings.

On Motion to Correct Decree and on Motion for a Rehearing.

1. The motion for a rehearing will be overruled.

2. The bill charged the infringement of claims 1 and 8 of letters patent 473,019. The court found that the defendant had infringed claim 1, but that claim 8 presented nothing new in the art which entitled it to recognition as an invention. No disclaimer of claim 8 has been presented, and compliance with section 973 of the Revised Statutes [U. S. Comp. St. 1901, p. 703] requires that the decree entered herein be corrected by striking therefrom paragraph 7 thereof, which adjudges that the complainant recover of the defendant his costs, etc.

The court will not require that a disclaimer be entered as a condition precedent to the recovery of profits and damages. To do so would deprive the complainant of the benefit of an appeal from the decree of the court holding that claim 8 is without invention. *Meyer v. Medicine Co.*, 58 Fed. 884, 7 C. C. A. 558; *Williams v. McNeely* (C. C.) 64 Fed. 766.

PLECKER v. POORMAN.

(Circuit Court, S. D. Ohio, W. D. April 3, 1905.)

No. 5,556.

PATENTS—INFRINGEMENT—MACHINE FOR SHAPING SHEET METAL PIPES.

The Carr patent, No. 402,140, for a machine for shaping sheet metal pipes, is limited by the action of the Patent Office, in which the patentee acquiesced, to the specific construction of frame described. As so limited, *held* not infringed.

In Equity. Suit to enjoin an alleged infringement of letters patent No. 402,140, issued to James A. Carr for a machine for shaping sheet metal pipes, and which was assigned by Carr to William J. Flecker.

THOMPSON, District Judge. The claim of the patent reads as follows:

"The combination, in a pipe-shaping machine, of open top and bottom bolting-pieces, AA, roll-carrier D, shaping-rolls C, stationary mandrel F, and suitable mechanism for operating the same, for the purpose shown and described."

Various defenses are set up in the answer, but it is only necessary to consider the question of infringement. The claim made in the original application for this patent reads as follows:

"The combination of a stationary mandrel D with a traveling frame for rollers, having suitable mechanism for operating the same, substantially for the purpose shown and described."

This claim was rejected by the Patent Office; that office holding that the applicant should be "confined to the specific construction of frame" which he had invented. This ruling was acquiesced in by the applicant who amended his claim in conformity therewith, and the complainant, therefore, is now estopped from having the benefit of the broad terms of the rejected claim. *Thomas v. Rocker Spring Co.*, 77 Fed. 420, 23 C. C. A. 211.

The machine of the Carr patent, when confined to the specific construction described in the claim, is not infringed by the defendant's machine, and the bill, therefore, will be dismissed.

R. L. GINSBURG & SONS v. UNITED STATES.

(Circuit Court, W. D. New York. February 28, 1906.)

No. 1,566.

CUSTOMS DUTIES—CLASSIFICATION—OLD FISHPLATES—SCRAP STEEL.

Old fishplates, which are so worn as to have lost their usefulness for railway purposes and are suitable for use only as scrap steel, are not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 130, 30 Stat. 160 [U. S. Comp. St. 1901, p. 1637], as "railway fishplates," but under paragraph 122, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], as "scrap steel * * * fit only to be remanufactured."

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,398 (T. D. 24,605).

John C. Collins and William F. Mackey, for importers.

Charles H. Brown, U. S. Atty., and Wesley C. Dudley, Asst. U. S. Atty.

HAZEL, District Judge. The collector of the port of Buffalo, N. Y., classified the importation in question as old railway fishplates dutiable at the rate of four-tenths of 1 cent per pound under paragraph 130 of the existing tariff act. Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 160 [U. S. Comp. St. 1901, p. 1637]. The protestants claim that the merchandise is dutiable at the rate of \$4 per ton as scrap steel under paragraph 122 (30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]). This is a review of the decision of the Board of General Appraisers sustaining the classification of the collector.

Evidence was taken in this court by which it satisfactorily appears that the articles in fact are scrap steel and fit only for remanufacture. Counsel for the government at the hearing, and in his brief submitted, conceded that the single question to be determined by the court is whether the condition of the fishplates as to shape and form has been so changed that it is impossible to again use them for the purpose for which they were manufactured. The testimony, which was not considered by the board, preponderatingly shows that to again use the articles as fishplates was wholly impracticable. Three disinterested witnesses experienced in the construction of railroads testified

that the articles were in such a bad and worn condition that they were wholly useless for rail or track purposes, that they were fit only to be remanufactured, and had no commercial value except as scrap steel. This uncontradicted showing is persuasive of the claim asserted by the importers, and the suggestion by the government that the fishplates could still be used by contractors and others engaged in mining and logging for the purpose originally intended is beside the point. No such evidence is in the record, the exhibits being insufficient to establish the suggestion.

It is further contended by the government that the principle of *Downing v. United States*, 122 Fed. 445, 58 C. C. A. 427, and *Dwight v. Merritt*, 140 U. S. 213, 11 Sup. Ct. 768, 35 L. Ed. 450, controls the disposition of the question presented. In the *Downing Case*, the evidence showed that some of the cannon were old and useless while others were valuable as relics and souvenirs and, in fact, were salable as such. In the classification for the purpose of imposing a tariff tax there was no separation between the cannon that were salable as relics and such as were of no value. Furthermore, it appeared in that case that the cannon were "composition metal" and that cannon really were included within the commercial designation "composition scrap." The Circuit Court of Appeals held that as a manufactured article the cannon have not "lost their character as manufactured articles by their age or their unfitness for their normal use." The pith of the decision is found in the language which claims that the articles retained their "original characteristics" sufficiently to cause them to be a vendable commodity; that is, that the cannon had a market value in addition to their value as old metal. So, also, in the case of *Dwight v. Merritt*, *supra*, where the rails concededly were not suitable for use in the United States in the condition in which they were imported. There was no evidence, however, that the rails prior to their importation had ever been used for any purpose whatever. They were new rails in the sense that they were in an unaltered state; they were simply old and covered with rust. These adjudications, therefore, are not precedents for the facts disclosed by the record, it being here shown that the articles have lost their utility as fishrails, and are useful solely for scrap iron, having no value other than the metal value.

The decision of the Board of General Appraisers is reversed and the articles are held dutiable under paragraph 122. So ordered.

EMPIRE CIRCUIT CO. v. JERMON.

(Circuit Court, E. D. Pennsylvania. August 2, 1905.)

No. 4.

INJUNCTION—BREACH OF CONTRACT—PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL.

Where, in a suit to restrain the breach of an alleged contract, the proof on an application for a preliminary injunction left the question of the existence of the contract in doubt, and it was also doubtful whether

a determination of the suit on its merits in plaintiff's favor was reasonably probable, the preliminary injunction will not be granted.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 309.]

Hearing for Preliminary Injunction.

R. W. Archbald, Jr., Rankin D. Jones, and Simpson & Brown, for complainant.

James F. Campbell and Julius C. Levi, for respondent.

HOLLAND, District Judge. This is a motion for a preliminary injunction to restrain the respondent from hindering or preventing the use of the Lyceum Theater, in the city of Philadelphia, for burlesque shows by companies with which the plaintiff contracted to appear thereat, and from the use of said theater for any other show or theatrical business of any and every other character than as arranged and contracted by the plaintiff.

The plaintiff's right to such an order depends upon the question of whether a certain writing, dated May 23, 1905, is an existing contract between the parties. It is set forth as such by the plaintiff in its bill, and the defendant denies that it is an existing contract; that it never was consummated, but was only a proposal by defendant, and, while signed by him and the president of the plaintiff company, was not approved by the plaintiff company's board of managers.

The defendant offered in evidence a letter as follows:

"Cincinnati, Ohio, June 1, 1905.

"Mr. John C. Jermon, Philadelphia, Pa.—Dear Sir: Subject to approval of George W. Rife and J. Bolton Winpenny, will arrange to give you burlesque shows at Lyceum Theater, Philadelphia, Pa., for one year, renewable from year to year for four additional years, conditioned upon your putting up \$15,000.00 cash, at beginning of each and every year, and complying with terms of your proposition of May 22, 1905. In case of destruction of Lyceum Theater, said shows can be transferred to Bijou Theater on terms agreeable to J. Bolton Winpenny and George W. Rife.

"Yours truly,

Empire Circuit Company.

"James J. Butler, Pres."

This letter refers to "terms of * * * proposition of May 22, 1905," but from the evidence it is clear that Mr. Butler was referring to the writing of May 23, 1905, set forth in plaintiff's bill. Plaintiff claims there had been a meeting in Philadelphia at which the writing of May 23d was drawn and signed as a binding contract. The defendant avers that subsequently plaintiff and defendant went to Cincinnati to place the matter before the board of directors of the plaintiff company. The latter refused to accept the contract unless defendant put up the \$15,000 in cash at the beginning of each year, and that the president wrote the letter above set forth to defendant.

It is a very fortunate circumstance that the documentary evidence submitted is sufficient to enable the court to dispose of this motion. From the evidence it appears that the action of both parties in the matter was not such as to enable the court to rely upon the statement of either. While the plaintiff claims the letter of June 1st

refers to some other contract, this is denied by defendant. Whichever may be right in this contention, the existence of the letter leaves the question of the existence of the contract in such doubt that an injunction will not issue. High on Injunctions, § 1106.

A preliminary injunction will not be granted where the proofs leave the court in serious doubt respecting the plaintiff's asserted right, or where, upon hearing upon the motion, it is not apparent that the ultimate determination of the suit in favor of the plaintiff is reasonably probable. Pepper & Lewis Digest, vol. 9, col. 14089; Home Insurance Company v. Nobles (C. C.) 63 Fed. 642; Brooklyn Baseball Club v. McGuire (C. C.) 116 Fed. 782; Mitchell v. Colorado Fuel and Iron Co. (C. C.) 117 Fed. 723.

THE NEWCASTLE.

(District Court, E. D. Pennsylvania. August 29, 1906.)

No. 19.

SHIPPING—SINKING OF SMALL BOAT—DISPLACEMENT WAVES OF TUG.

Evidence considered and *held* not to sustain the claim of a libellant that a small boat which he was towing across the Delaware river, loaded with six tons of wheat, was sunk by the displacement waves of a passing tug, but to show by a preponderance that she was swamped and sunk before such waves reached her by waves caused by the wind, owing to being overloaded, and having too little freeboard.

In Admiralty.

Willard M. Harris, for libellant.

H. Alan Dawson, Howard H. Yocum, and J. Rodman Paul, for respondent.

J. B. McPHERSON, District Judge. The libellant is the owner and master of the gasoline launch, or power boat, the Mary S. Dalbow, and of her consort, the Captain Smith, this being a small boat without power of her own, which is towed by the launch in prosecuting the owner's business of carrying cargo upon the river Delaware. The launch is 25 feet long, 8 feet beam and 21 inches deep, partly roofed over, and her consort is an open boat 21 feet 4 inches long, 8 feet 2 inches beam and 33 inches deep. The Newcastle is a large steam tug, 86 feet long, 21½ feet beam, and draws from 8 to 9 feet of water. She is capable of a speed of about 12 miles an hour, but upon the occasion now in question she was not running at more than two-thirds of this speed. Both the launch and the tug were in charge of experienced men. The libellant had been engaged to carry 300 bushels of wheat across the river from Port Penn on the western, or Delaware bank, to Alloway creek, on the eastern, or New Jersey bank; and on October 23, 1903, he set out upon the voyage, carrying one-third of the cargo upon the launch, and two-thirds upon her consort. He was the only person upon the launch, and his brother was the only person upon the consort. Both boats were apparently in good condition. The wheat

was loaded in bags, each bag containing two bushels and weighing 120 pounds. The launch was, therefore, carrying 6,000 pounds, all of which seems to have been loaded aft, and her consort was carrying 12,000 pounds. Upon the latter, the 100 bags were piled in a row, rising in height about her gunwale at least the thickness of one bag, and were covered by a tarpaulin to protect them from water, either rain or the water of the river. The voyage was begun at Port Penn about 2 o'clock in the afternoon, and the course lay in a diagonal direction above the head of Reedy Island, and thence eastwardly across the ship channel and the rest of the river, the whole width of the stream at this point being about 2 miles, to the point of destination on Alloway creek. The tide was about high-water slack. After Reedy Island had been passed, and the ship channel had been entered upon, the "Newcastle" was discovered about a mile up the river, coming down (as afterward appeared) in company with another tug, the Juno, some distance behind her, to pull off a steamship that had run aground at the lower end of Reedy Island. At this time (between 3 and 4 o'clock) the launch and her tow were somewhat on the starboard bow of the tug, but as the launch proceeded across the river the relative position of the vessels changed, and when they were about 500 feet apart the tug was headed directly for the launch and her tow, the three vessels being then on the westerly side of the channel, in water 5 or 6 fathoms deep. In this situation, the tug very properly ported her helm and changed her course to starboard, in order to pass astern of the tow. This maneuver was successfully carried out, and the tug was about to pass at a distance of 70 or 80 feet, when the tow was seen to be in trouble. The launch stopped her engine; the libelant hastened to pull the consort up to the launch, the towing line being only about three fathoms long, the libelant's brother ran forward over the bags to the bow of the consort, and barely succeeded in getting upon the launch when the consort went down, nearly abreast of the tug's fire-room door. She remained under water a very short time, however, and then reappeared, bottom upward, having turned over under water and spilled out her cargo, and in this position the launch began at once to tow her to the point of destination. This was reached in due season, and the wheat that had been stowed upon the launch was delivered to the consignee, but the libelant avers that the lower bags, containing 36 bushels, were so wet that the grain was not even fit to be fed to chickens. This suit is brought by the master, as bailee of the cargo, to recover for the loss and damage to the wheat, on the theory that the consort was sunk, and water was forced aboard the launch, by the displacement waves of the tug, and that the latter vessel was negligent in failing to keep off, in obedience to the gestures that were made by the libelant and his brother, and in continuing her dangerous course at undiminished speed after the tow was seen to be in a position where the displacement waves would be likely to do harm.

As might be expected, the testimony as to the cause of the damage is in direct conflict. From the libelant's point of view, it would appear that the day was calm and the water smooth; that no wind was blowing and no waves were endangering the safety of his craft; that

the consort was not overloaded, but was showing a freeboard of 10 or 12 inches; and that no injury whatever would have happened if the tug, in its impatience to reach the stranded steamship before the tide should go down, had not proceeded at a reckless speed, and passed the launch and her tow so close as to sink one vessel and damage the cargo of the other by the force of her displacement waves. According to the libelant's theory, it was the second, or aft, wave that did the real damage, the bow wave merely contributing thereto by putting both boats in a perilous situation. The respondent's witnesses declare, that there was a stiff breeze blowing from the southwest, and that the waves on the river were of considerable height; that they were certainly high enough to be a source of danger to a small boat, obviously overloaded with a cargo heavier than she had ever carried before, and showing a freeboard of not more than 4 or 5 inches; that she must have been shipping water before the tug approached, and that the libelant's brother, instead of making gestures to the tug to keep off, was using his hands to work the pump; and finally, that the boat went down bow first instead of stern first, as the libelant avers—and sank before the displacement waves of the tug had reached the tow at all.

Of course, if this latter statement is true—that the consort sank before she was touched by the waves from the tug—the libelant's case fails utterly, and it is not material to consider other questions of fact, such as the height of the tug's waves, the distance from the vessel at which they meet, and their ability to do damage on a calm day and on smooth water to boats showing so high a freeboard as would appear from the libelant's testimony. Concerning the truth of this vital fact, therefore, I have carefully considered all the evidence, and have come to the conclusion that the libelant has failed to make out his case. The weight of the evidence seems to me to be against him, and to indicate that his tow was overloaded, that she was too low in the water for safety, that she encountered both wind and waves, and shipped so much water from this cause as to sink her before the tug's waves came near enough even to contribute to the injury. The consort had carried 5 tons of cargo before, with a freeboard of 8 inches; but now, with a heavier cargo, the court is asked to accept the proposition that she was showing from 2 to 4 inches more. Further, the libelant's testimony is somewhat discredited by his failure to corroborate his averment that part of the grain on the launch was injured. The consignee was available for this purpose, but he was not called, although the relevance and the importance of his testimony are clear. I have no disposition to diminish the obligation of larger vessels to exercise proper and reasonable care toward small craft, whose right upon the water is as clear as theirs, and it is common knowledge that there is too much disregard by large ships of the safety of smaller boats, but, of course, unless the damage done to the boat can be directly traced to the improper conduct of the ship, the latter cannot be held liable.

One further word concerning the alleged failure of the tug to stand by and offer assistance. The evidence satisfies me that she intended to do so, as soon as she saw the consort go down; but, when that boat

reappeared in a moment, and was promptly towed away by the launch, I do not see that the tug was under any obligation to remain and offer aid that could do no real good. No life was in danger; the cargo of the consort was past saving, and she herself was not in peril, although it was no doubt more inconvenient to tow her bottom upward than if she had been righted.

A decree may be entered, dismissing the libel, with costs.

UNITED STATES v. CRUCIBLE STEEL CO.

(Circuit Court, S. D. New York. June 20, 1906.)

No. 4,150.

CUSTOMS DUTIES—CLASSIFICATION—POLISHED STEEL.

In paragraph 141, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640], relating to steel strips "cold rolled, * * * brightened, * * * or polished by any process to such perfected surface-finish, or polish better than the grade of cold-rolled, smoothed only," these words were employed by Congress with the meaning theretofore given them by customs authorities under earlier acts, and they, therefore, do not include strips whose only polish or brightening is incidentally acquired during the cold-rolling, and which were not included in similar former provisions.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 6213 (T. D. 26,870), reversing the assessment of duty by the collector of customs at the port of New York.

The case relates to steel strips, which were returned by the appraiser as cold-rolled and brightened. The collector imposed the appropriate rate of duty provided in paragraph 135, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638], on steel in this form; also, the additional duty provided in paragraph 141, § 1, Schedule C, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640]: "All strips * * * of iron or steel, * * * which are cold-rolled, * * * brightened, * * * or polished by any process to such perfected surface-finish or polish better than the grade of cold-rolled, smoothed only." The importers objected to the imposition of this additional duty, on the authority of the decision of the United States Circuit Court of Appeals for the Second Circuit, in *U. S. v. Crucible Steel Co.*, 137 Fed. 384, 69 C. C. A. 576, sustaining a similar contention on like merchandise. In that case the court found that the expression "cold-rolled, smoothed only," had at the time of the enactment of the tariff no general, well-recognized commercial meaning, and held that as it had been the customs practice under former legislation not to apply a similar provision to such merchandise, it would be assumed that Congress in re-enacting that provision in the tariff act of 1897, "fully understood what dividing grades had been adopted by the customs authorities under the earlier act, and by the use of the same language intended to provide that the same grade should be the criterion for determining in which group future importations should be classified for duty purposes."

The government made a new case before the Board of General Appraisers, endeavoring to prove, by evidence additional to that before the Circuit Court of Appeals, that said expression had a meaning which did not include the merchandise in controversy. This contention was overruled, the board observing as follows: "Fischer, General Appraiser. After all is said and done, the existence of a well-established, generally recognized commercial signification of the descriptions 'cold-rolled, smoothed only,' remains undemonstrated. Several witnesses, it is true, gave their impressions as to what it meant;

but they admitted that the ordinary process of cold-rolling steel produced on its surface a certain amount of polish, the result of the attrition of the rolls, and they could not say at what stage of the process, or after how many passes, the article ceased to be 'cold-rolled, smoothed only,' and became 'better than' the same."

Charles Duane Baker, Asst. U. S. Atty.
William J. Gibson, for importers.

LACOMBE, Circuit Judge. I cannot see that the additional evidence as to trade-designation differentiates this case from that which was before the Court of Appeals. That court disposed of the questions presented upon the theory that Congress used the terms it employed with the meaning which has been theretofore given them by the customs authorities under earlier acts. There is nothing in this record to induce a contrary conclusion.

The decision of the Board of General Appraisers is affirmed.

In re HOME DISCOUNT CO.

In re ROSE.

(District Court, N. D. Alabama, S. D. July 3, 1906.)

1. **BANKRUPTCY—ORDERS OF REFEREE—REVIEW.**

A party to an order made by a referee in bankruptcy after hearing on the merits cannot have it reviewed, as provided by Bankr. Act July 1, 1898, c. 541, § 38, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], unless he pursues the mode prescribed by General Orders No. 27 (89 Fed xi; 32 C. C. A. xxvii).

2. **SAME—DISOBEDIENCE.**

A party to an order made by a referee in bankruptcy cannot ignore the order until the referee certifies his disobedience to the judge, as authorized by Bankr. Act July 1, 1898, c. 541, § 41, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437], and then, on the summary hearing for which the statute provides, set up in defense matters contested before the referee, unless they show he was without jurisdiction to make the order.

3. **CONSTITUTIONAL LAW — POLICE POWER — REGULATION OF LOANS — CLASS LEGISLATION.**

Act Ala. March 9, 1901 (Acts 1900-01, p. 2685), regulating the business of money brokers, and providing that all persons engaged in loaning money on security of bills of sale, etc., shall express in the instrument securing such loan the rate of interest, the date of the loan, the fact that the instrument is taken for a loan of money, a minute description of the property, and within five days shall file the instrument for record in the office of the probate judge, and that contracts for the loan of money made in violation of the act shall be void, was a valid exercise of the state's police power, and was not unconstitutional for inequality, although its provisions do not "apply to the business of banking and loans, when the amount exceeds seventy-five dollars."

4. **BANKRUPTCY—FUTURE WAGES—ASSIGNMENT—DISCHARGE.**

A bankrupt's right to earn wages in the future and dispose of the fruits of his labor is not "property," as that term is used in Bankr. Act, July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], vesting all the bankrupt's property not exempt in his trustee, etc.; and hence the bankrupt's discharge operated to avoid an assignment of future wages given to secure a provable debt earned after the filing of his petition.

5. SAME—ASSIGNMENT—WITHDRAWAL—ORDER OF REFEREE.

Where a creditor of a bankrupt took an assignment of future wages to secure a loan, which was contrary to public policy, and prior to the debtor's adjudication in bankruptcy, the lender took no steps to reduce the wages to its constructive possession, and did not notify the employer until after the intervention of bankruptcy proceedings, when the assignment was filed with the employer, the steps taken by the lender subsequent to adjudication were invasive of a possession which was already in the bankruptcy court, and hence the referee had power to summarily compel the lender to restore the status quo with reference to the bankrupt's wages by withdrawing the notice of assignment.

6. SAME—INSTITUTION OF PROCEEDINGS—PARTIES.

Since the wages earned by the bankrupt after the filing of a petition, in the event of his discharge, passed to the bankrupt in his own right, the referee's order was not erroneous because the proceeding was begun at the instance of the bankrupt.

7. SAME—FALSE PRETENSES.

Where a statute provides that all contracts for the loan of money made in violation of its provisions shall be invalid and void, and the loan to the bankrupt is made in violation of its provisions, the fact that the bankrupt obtained the loan by false pretense does not create any debt which the court can recognize, and does not prevent the referee's ordering the lender to withdraw notice of the assignment of wages filed by him with the bankrupt's employer to tie up the bankrupt's wages after adjudication and pending discharge.

8. SAME—REVIEW.

In the absence of statutes or rules of court, a petition to review or revise an order of a referee in bankruptcy does not of itself operate as a supersedeas, and whether or not it shall have that effect rests in the discretion of the reviewing or reviewed authority in the particular case.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

9. SAME—TRIAL DE NOVO.

A petition for review of a referee's order in bankruptcy proceedings does not contemplate a trial de novo.

10. SAME—SECURITY FOR COSTS.

There is nothing in the bankruptcy statute, or the rules prescribed by the Supreme Court to carry it into effect, which forbids the District Court from providing by rule that the filing of a petition for review shall not operate as a supersedeas of the order made by the referee, unless bond be given to indemnify the opposite party in such sum as may be prescribed by the referee or by the judge, or from requiring the petitioner to give security for the costs of the review. A party certified for contempt for refusing to obey an order, who has not superseded it and given security for the costs of the petition for review, cannot justify his disobedience, if the order is not absolutely void, on the ground that it is no offense to disobey the order until after the court has confirmed it.

11. SAME—CONTEMPT—VIOLATION OF REFEREE'S ORDER—ADVICE OF COUNSEL.

Where, after a referee in bankruptcy had ordered a creditor of the bankrupt to withdraw an assignment of wages filed with the bankrupt's employer, the creditor intended to violate the order and continued to do so until the bankrupt was compelled to pay the claim as his only means of obtaining sustenance from future wages, advice of counsel was no defense to a proceeding against the creditor for contempt.

12. SAME—LIABILITY.

Where, after a referee in bankruptcy had ordered a creditor to withdraw an assignment of wages which had been filed with the bankrupt's employer, the creditor took no steps either to obey or supersede it, but

the creditor's manager for three weeks, in the face of the referee's order, continued to tie up the bankrupt's wages until he was compelled to pay the claim, the creditor was subject to punishment for contempt.

In Bankruptcy.

On March 2, 1906, Referee Birch, at Birmingham, certified that Mrs. J. Huff, the manager of the Home Discount Company, a money broker, stood in contempt for refusing to obey an order made by the referee on February 15, 1906, directing her to withdraw an assignment of the wages of one A. J. Rose, a bankrupt, adjudged on the 13th of February, 1906, which she filed the next day after hearing of the adjudication, with his employer, the Alabama Great Southern Railroad Company. The certificate stated, among other things, "that the assignment was served on his present employer for the purpose of harassing and annoying the bankrupt, and forcing him by unlawful methods to pay an outlawed debt, with the hope that, unless said assignment was withdrawn, the bankrupt would lose his position under the rules and regulations of the railroad company by whom he was employed." It also certifies "all pleadings and papers filed in this case," and that a rule was issued by the referee to Mrs. Huff, who appeared, and on the hearing, her answer being adjudged insufficient, she was directed to withdraw the assignment; but neither the rule, nor the pleadings, nor the order to Mrs. Huff is contained in the papers so certified. The pleadings and papers certified show that on the 15th of February, 1906, the referee issued a rule to the Home Discount Company to show cause why it should not dismiss the assignment proceeding, and propound its claim in the court of bankruptcy; that it appeared specially, protesting against the jurisdiction and not waiving its objection, filed an answer, which was sworn to by Mrs. Huff, setting up that the bankrupt, for a present valuable consideration, had transferred the money in controversy; that the assignment was accepted in good faith, and not in fraud or in contemplation of the bankrupt act; that the property therein assigned was within the exemption limits of the state of Alabama, in which state the bankrupt resides, and in which the contract was to operate and take effect; "that the bankrupt, in order to obtain the money paid for the assignment, falsely represented that he was not insolvent, and that his indebtedness amounted to nothing; that the representation was made in writing and relied on by the company, and by means of it the bankrupt obtained the consideration for the wages, and is therefore not entitled to discharge. The record further shows that the bankrupt entered a general and special denial, and set up specifically that the assignment was void, under a local statute, and, further, that Mrs. Huff, the manager of the Home Discount Company, and the bankrupt, both testified on the hearing before the referee. The referee found that the assignment was void, and on February 15, 1906, made the following order: "February 14, 1906, being the day set for the hearing on the petition of above-named bankrupt, filed on the 12th day of February, 1906, and it appearing that notice has been duly given as required by the order of the court thereon, and answer of Home Discount Company having been deemed insufficient, it is ordered that the Home Discount Company do immediately cause to be withdrawn notice of the assignment and the assignment proceeding pending thereon upon the claim against the said bankrupt, and the Alabama Great Southern Railroad Company discharged, and that he propound his claim, if any he has, against said bankrupt in no other than in this court." On March 3, 1906, the attention of the District Judge, who was then holding court in the Middle district at Montgomery, was called to the failure of Mrs. Huff to obey the order directed to her, and he ordered the issue of a rule to her to show cause, etc. The matter came on further to be heard at the adjourned March term at Birmingham in June, 1906.

Some of the original papers in the proceedings before the referee as to Mrs. Huff are missing from the files, but a copy of the order to her is set forth in her answer to the rule nisi from the District Court as Exhibit C, which shows that on the proceeding before the referee, the answer of

the Home Discount Company having been deemed insufficient, it is "ordered that Mrs. J. Huff, agent of the Home Discount Company, do immediately cause to be withdrawn notice of the assignment and the assignment proceedings pending thereon upon the claim against said bankrupt, and the Alabama Great Southern Railroad Company discharged, and that he propound his claim, if any he has, against the bankrupt in no other than this court." Upon the coming in of Mrs. Huff's answer to the rule from the District Court, and in view of the statements that the cause was submitted for final order on the pleadings, without oral testimony, or "any other evidence;" that she was only an employ  , and had no authority to withdraw notice of the assignment without instructions from the attorney of the company, who advised her not to obey until petition for review had been passed upon, the District Court, then sitting at Birmingham, ordered the issue of a rule to the Home Discount Company to show cause why it should not be punished for its disobedience to the order of the referee directed to it on the 15th of February, 1906. The company appeared specially for the purpose of the motion, and moved to strike from the files the petition on which the rule was issued, and to discharge the rule, on the ground that the court was without jurisdiction in a summary proceeding to determine the rights of the respondent, an adverse possessor, to the money in controversy. It insisted upon the defenses made in its answer before the referee, as to the validity of the assignment, etc., and set up a false pretense by the bankrupt in obtaining the loan, and averred that he was not entitled to a discharge. It also alleged that within five days after the making of the referee's order it filed a petition for review with the referee; that the filing of this petition was a matter of right, and operated as a supersedeas and transfer of the matter appealed from to the District Court; that the proceeding was instituted by the bankrupt, who was not interested, and could not assail the transfer of wages. It stated as a further defense that on the 10th of April, 1906, the bankrupt himself and counsel proposed to have the proceedings dismissed and respondent discharged, without cost or damage to it, upon the payment by the bankrupt of the actual amount obtained, together with a reasonable attorney's fee, which the company accepted in good faith, etc., and insisted, the bankrupt being the only party complaining, that the matter ought to be treated as settled. The company also made a separate motion to dismiss the proceedings on account of the settlement, which motion was joined in by Messrs. Lamkin & Watts, attorneys, who it would seem were specially employed to negotiate the settlement for the bankrupt, and did so. These gentlemen did not appear before the referee, or before the District Court; the bankrupt being represented on these occasions by his attorneys, Messrs. Truss & Howlett. It being denied, when the matter came on for hearing, that any petition for review had been filed in this case, and asserted that the settlement made by the bankrupt in April was not voluntary, the District Court had a subpoena issue to Mrs. Huff to testify in the case. The marshal reported that she was too ill to attend court. Rose, the bankrupt, a locomotive engineer, was absent from the district on one of his runs. Other witnesses were heard, and proved that the paper in the file certified, giving the substance of the testimony of Mrs. Huff and the bankrupt before the referee, was substantially correct. Both of them testified before the referee that the assignment was taken to secure a loan for \$40.00, made in December, 1905, the company taking a paper for that amount, and loaning him \$36.00, and that this loan was renewed in January. The bankrupt's testimony, on that occasion, was that the words "February and March" were not in the instrument when he signed it, and that nothing was said about them, nor was he asked how much he owed, and that the word "nothing" was not in the contract when he signed it. Mrs. Huff on the same occasion testified that the words "February and March" were put in the assignment when the loan was renewed, with the bankrupt's consent, and that the word "nothing" was in the contract when he signed it. The body of the instrument was a printed paper. The only writing was the figures "\$40.00," the name of the railroad company to whom it was addressed and in whose service the wages were to be

earned, the words "January, February, and March," the word "nothing," the signature of the bankrupt, A. J. Rose, and the signature of the witness, Mrs. J. Huff. The assignment when filled in, read as follows:

"\$40.00

Birmingham, Ala., Dec. 14, 1905

To the A. G. S. R. R. Company, Birmingham, Alabama: For value received, the receipt whereof is hereby acknowledged, I, the undersigned do hereby transfer, sell, assign and set over unto Home Discount Company, all wages, salary or money now due or to become due to me from the said A. G. S. R. R. Company, during the months of Jan. Feb. March, 1906. In order to obtain the consideration paid for the above wages, salary or money, receipt whereof is hereinabove acknowledged, I state that I am employed, regularly, by the firm, individual or corporation to whom this instrument is addressed or directed, and that they, he, or it are, or is, indebted to me in an amount in excess of the consideration as recited for the months set forth above, and that there are no judgments, judgment liens, garnishments, orders, attachment liens, assignments or liens or claims of any other kind or character upon or against said wages, salary or money on me in favor of any person, firm or corporation; that I am solvent; that my total indebtedness does not exceed the sum of nothing, which I have ample property to pay off and satisfy in full, outside of any exemption rights which I have under the laws of the state of Alabama. For value received, I, the said undersigned, do hereby irrevocably constitute, authorize and empower G. E. Horton, or any other agent for said Discount Company, my true and lawful attorney in fact, to execute or sign any other transfer, or assignment or different instrument necessary or proper, or which may be required or deemed necessary by him, for the purpose of collecting said money, or any part thereof, including receipts, vouchers, drafts, and pay rolls, etc., in my name, or otherwise, at his pleasure. If for any reason the said Home Discount Company should fail to collect or receive all of said wages, money or salary, set forth above, for the said consideration, I the said undersigned, do hereby further transfer, sell, assign and set over unto the Home Discount Company all other wages, salary or money which may hereafter accrue to me from the same person, firm or corporation to whom this instrument is directed, or from any other person, firm or corporation for a number of months equal to the number set forth above, to be selected by the said Home Discount Company, or any authorized agent, and I hereby constitute and appoint any agent of said Home Discount Company my true and lawful attorney in fact, in my name or otherwise, to execute such other or further instruments necessary or which he may see fit to execute for the purpose of collecting all or any part of said money, or wages, including signing checks, pay rolls, and indorsing checks in my name. I hereby agree to act as the agent of the said Home Discount Company for the collection of the said money or wages, and account to it for every cent of the same immediately upon the collection thereof, and hereby acknowledge the constitution and appointment of myself as such agent or bailee of said Discount Company for such purpose. In the event of the employment of an attorney for any purpose in relation to this instrument or the money herein assigned, I hereby agree to be taxed with his fee, and waive the right of exemption as to any judgment recovered on account of any matter connected herewith, or growing out of same.

"Witness: Mrs. J. Huff.

A. J. Rose."

Repeated efforts were made by the bankrupt and Truss & Howlett, his attorneys, after the referee made his order, to induce the respondent to pay the money into court, or to the bankrupt, and they procured the rule nisi from the district judge in March to Mrs. Huff. Howlett testified that Mrs. Huff, the manager of the company, told him that "her attorneys had advised her to hold onto the money, and she intended to hold it, and there is no use for you to come around here any more." Rose was a locomotive engineer in the service of the Alabama Great Southern Railroad Company. In February and March he earned \$184.65 wages, and the amount stated to be due him for January in Rose's petition was \$72. When the assignment was filed,

like assignments of wages in favor of the Southern Trust Company for \$15 and W. C. McCarty for \$28.75 were filed with the railroad company. It was shown that efforts were made, by the bankrupt and his attorneys, at different times, shortly after the referee's order, to get the railroad company to hold back enough of the money involved in these several assignments to pay the claims under them, and turn over the balance to the bankrupt. The railroad company was unwilling to do this unless the bankrupt gave bond to hold the railroad company harmless, which the bankrupt was unable to do. About that time, or shortly before, the referee had also issued a rule to the railroad company to show cause why it should not pay the wages into court. The garnishment clerk of the railroad company testified as to this, and that he "was holding the money on the garnishment." The bankrupt's wages for the months of January, February, and March were held by the railroad company until April 10, 1906. An affidavit of the bankrupt was filed, which, after stating that he paid \$117.25 in settlement of the claims of the Home Discount Company, W. C. McCarty, and the Southern Trust Company, which loans originally amounted to \$79.75, all of which were then in the hands of W. T. Ward, who was the attorney for the Home Discount Company, stated "that he was forced to enter into the settlement because of the fact that the said parties had failed and refused to obey the orders of the referee made in the case of A. J. Rose, bankrupt; that he was without the necessities of life; that his family was in actual need; and that his supply men were cutting him off from further credit."

When the referee's order was made in this case, like orders were directed to the Southern Trust Company and W. C. McCarty as to assignments by Rose in their favor of wages to be earned with the same railroad company. In those cases petitions for review were filed, and the orders of the referee were passed on the pleadings. The attorney of the Home Discount Company testified that a petition for review was filed in this case. The referee's docket shows no such filing, and no such paper was filed in the clerk's office. In view of these facts, and the statement in the alleged petition for review that the order was made without "the hearing of any testimony," although it is undisputed that on the hearing before the referee Mrs. Huff did testify for the company and the bankrupt for himself, and the company was then represented by the same attorney who now represents it here, it is clear that the attorney has confused this case with the other cases, in which he was of counsel, in which petitions were filed, and which went off on the pleadings, and in which witnesses were not heard. The referee testified that he had never seen any such paper. The attorney for the company also testified that on the making of the settlement with the bankrupt the latter "was represented by Griffin Lamkin, a schoolmate and personal friend of his; that he did not wish to make the settlement, as there were certain questions he proposed to have reviewed by the District Court; that his friend insisted on a settlement, to which he finally consented, the bankrupt agreeing to pay the amount he obtained, with costs and a reasonable attorney's fee, this being \$10.00 in each of the three cases, or \$30.00 in all; that he did not consider this a reasonable fee, but consented to it, for the reasons already stated." It was not claimed that the costs of the petition for review were either paid or secured, or that any application for supersedeas was made to the referee or to the judge.

Truss & Howlett, for the rule.

Ward & Ward, opposed.

JONES, District Judge. A party to an order made by the referee after hearing on the merits cannot have a review of it, under section 38 of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]), unless he pursues the mode prescribed by General Orders No. 27, 89 Fed. xi, 32 C. C. A. xxvii. He cannot ignore the order until the referee, under section 41 (30 Stat. 556

[U. S. Comp. St. 1901, p. 3437]), certifies his disobedience to the judge, and then bring forward again, in his defense, matter contested before the referee prior to the making of the order, provided the order itself be not void. "The method of correcting error is by appeal, and not by disobedience." *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Passamore Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374. The hearing "in a summary manner," for which the latter section provides, has no reference to errors intervening in the proceedings which led up to the order, and cannot be converted into an appellate proceeding to determine their correctness. The court heard evidence as to the contentions of the parties because matters occurring subsequently to the making of the order, were set up in defense or abatement of the contempt proceedings. As respondent insists that the matters upon which it seeks to go behind the referee's order render it void, and the same questions are involved in other cases now pending, the court will consider the correctness, as well as the validity, of the order made in respondent's case.

1. The assignment of wages was taken in December, 1905, by a money lender in Jefferson county, to secure a loan under \$75 in amount. On March 9, 1901, the General Assembly of Alabama passed "An act regulating the business of money brokers and persons who loan money for themselves or others on bills of sale, notes or mortgages or personal property or other personal security in Jefferson, Morgan, Walker and Etowah counties." Approved March 9, 1901; Acts 1900-01, p. 2685. It provides, among other things, "that all persons engaged in the business of money brokers or loaning money or taking security therefore by bills of sale, mortgages on or conveyances or liens of any kind on personal property of [or], personal effects or other personal security," in the counties named, "shall when such loan is made, express in the instrument securing such loan, the rate of interest at which said loan is made, the date of said loan, the fact that the instrument is taken for a loan of money, a minute description of said property securing the loan, and if household goods from whom purchased, the date when said loan is due, and shall within five days thereof file said instrument for record in the office of the probate judge of the county in which the property or instrument securing said loan is situated." etc. In one section, the act provides "that all contracts for the loan of money made in violation of this act, shall be invalid," and in another "that any contract made for the loan of money in violation of this act shall be void." Another section provides that the moneylender, if a nonresident, "shall give bond conditioned to pay all damages that any person may sustain by reason of the enforcement, or the attempt to enforce any security taken for a loan in violation of this act." Another section provides, if the claim is put in the hands of an attorney for collection, the attorney's fee "shall not exceed ten per cent. of the original loan." The fifth section provides that "nothing in this act shall apply to the business of banking and loans, when the amount exceeds seventy-five dollars." The exact scope of this last section is not clear. Does this proviso take loans in the business of banking, no matter how small the amount, wholly

without the operation of the statute, and restrict it to loans made by other persons under \$75; or does it intend merely that loans over \$75 made in that business, as well as all other loans over that amount, no matter by whom made, are excepted from the operation of the act? It is insisted that the first is the true construction, and that the exception of the business of banking renders the statute unconstitutional. Assuming, without deciding, that loans by banks and bankers, though under \$75 are excepted, and that all loans by others under \$75 are left within the grasp of the statute, we will consider the matter in that aspect.

Perfection is no more to be exacted in legislation than in other human work. The motives and interests animating men, and the economic, industrial, social, and moral conditions which affect the welfare of society, are almost infinite in number and character, so that it is impossible, in practice, without creating evil and injustice, to apply the same unbending rule to all of these varying situations in dealing with concrete human affairs. Legislative power, therefore, must frequently indulge in marked differences between persons and things in its attempts to remedy particular evils. Neither the state nor the federal Constitution exacts perfect equality in the apportionment of the burdens which the state finds it necessary to impose upon men to advance the public weal. Mere want of equality in the burdens imposed, or varying rules for the conduct of different persons, even in relation to the same general subject-matter, will not avail to overthrow a statute, if the differences it makes are not merely arbitrary. If its distinctions are based upon some just reason, and it does not attempt, under the guise of regulating an evil, to deprive of liberty or property without due process, or unjustly to confer special or exclusive privileges upon one class at the expense of others, or to put burdens and penalties upon persons beyond the extent to which their conduct and relations to an evil fairly subject them, in view of the principle upon which the regulations are rested, the statute is not objectionable on constitutional grounds.

The mischief which called forth the statute is well known. It arose in the contracting and collection of small loans in dealings with necessitous borrowers and small wage-earners, who as a rule had no security except the pledge or assignment of wages to be earned and household goods. The borrowers agreed to whatever rate of interest was demanded. In this case, the rate was 120 per cent. per annum. As an assignment or hypothecation of wages, generally, without regard to some subsisting contract is not valid here, lenders took an assignment of wages to be earned under some particular contract. When disputes arose between borrower and lender as to the date or amount of payments made, or the date or the amount of the loan, or the borrower was slow in meeting his promises, the lender would file with the employer the instrument assigning the wages. The laborer was thus prevented from receiving his wages, although he continued to work, until the dispute was settled. Cut off from his means of subsistence, the borrower was almost invariably forced to succumb to the demands of the lender. Much suffering ensued among laborers, and great harassment

and injury resulted to employers, who could not determine with any certainty how long their employes or laborers would remain in their service under contracts which had already assigned their earnings as to which disputes were likely to arise at any time. Railroad companies, owners of furnaces and mills, and other large employers of labor, made and enforced rules, for their own protection, that employes who had unsettled disputes about an assignment of their wages should be laid off, and if the dispute were long-continued, should be discharged. Lenders became, in fact, the controllers and dictators of the labor of the borrowers. The differences between lenders and borrowers, and the steps which employers felt compelled to take in consequence, brought on conditions which were yearly reducing hundreds of laborers and other small wage earners to a condition of serfdom in all but name. In the "business of banking," these small loans were seldom, if ever, made to this class of borrowers on the security named in the statute. The profits from these loans attracted another and different class of lenders, who, as the Legislature knew, monopolized the loans of this class of borrowers and engaged in evil practices, in which banks and bankers did not indulge in the rare instances in which they made such loans. Loans by banks and bankers under \$75, and loans over that amount, no matter by whom made, were rarely secured by an assignment of future wages or a lien upon household goods, and were not productive of the evil which the statute seeks to cure. The Legislature knew that the taking of the security named by one class of lenders had almost invariably brought forth evil, while the same loans, on the same security, by another class in "the business of banking," had seldom, if ever, been harmful to the public welfare. The lawmakers, in devising a remedy, had to consider the different habits and conduct of men in these occupations as to these loans, in order to apply an intelligent and just preventive, and in doing so, necessarily discriminated between these classes, according to their well-known habits and customs in the matter. No discrimination is made by the statute between those classes as to the right to contract. All alike are permitted to make these small loans on the security named. No class is licensed or taxed for anything done in connection with them. All classes are left to stand on the same footing in all these respects. The only discrimination is that one class of lenders is required to state, while the others are not, the truth in certain simple particulars as to the actual transaction in the instrument which evidences it and to record that instrument. The statute is a police regulation pure and simple, to check usury and promote fair dealing in loans between one class of money lenders and one class of borrowers on a particular kind of security, by requiring certain statements to be put in their contracts and that they be recorded. If the practice of one class of money lenders makes such precaution necessary as to them, it would be going an unwarranted length to hold that the state police power must either leave them entirely alone or else provide the same regulations, regardless of any need for them, for like loans made by all other classes of money lenders. *St. John v. New York*, 201 U. S. 637, 26 Sup. Ct. 554, 50 L. Ed.

— Such a contention has met with almost universal disapprobation in the courts, both state and federal. If the court should strike down the statute for the reason here urged, it would be a bald invasion by the judiciary of the legislative prerogative, in a matter over which the Constitution has left the lawmaker almost boundless discretion, simply because the meshes of the statute have not been woven so fine as to gather in every possible offender in every other branch of the money lending business.

The presumption is that the Legislature acts in good faith. The statute shows beyond peradventure that the lawmaker had a bona fide purpose to cure a wrong and had no design to unjustly discriminate, and has not done so, between the class whose conduct it regulates and those whose conduct it leaves unregulated, as regards these small loans. The Legislature could well regulate the conduct of one class and leave the other unregulated, and discriminate between loans under and those over \$75. *Commonwealth v. Danziger*, 176 Mass. 290, 57 N. E. 461. This statute clearly does not fall within the principle which vitiates legislation forbidding one set of men to take usury and at the same time permitting others to do so. The laws regarding usury are not changed by the local statute, and still bear alike on all classes, whether they fall within or without the regulations of the statute, and it does not give any class any advantage whatever over the other in this respect. The statements exacted in the written contract and that it be registered are not burdensome, and do not deprive the lender of any right or property. They are only reasonable regulations of a right. Save as denied by the express prohibitions or necessary implications of state and federal Constitutions, the Legislature has boundless power over such matters. *Dorman v. State*, 34 Ala. 216; *M. K. & T. Ry. Co. v. May*, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971; *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Holden v. Hardy*, 169 U. S. 391, 18 Sup. Ct. 383, 42 L. Ed. 780.

2. The effect of the assignment, without regard to its infirmities under the local statute, is avoided by the provisions of the bankruptcy law as to wages earned after the filing of the petition. The power or ability of the debtor to earn wages in the future under a subsisting contract, standing apart from anything which it has brought into existence as property, is the mere right of the debtor to create property in the future. One dominant purpose of the bankruptcy statute is to prevent creditors from seizing, directly or indirectly, upon this right of the bankrupt, after his adjudication, by applying its subsequent fruits to anterior obligations. This right of the bankrupt falls neither under the head of lands, chattels, nor choses in action, and it is not vendible. It is not subject to seizure on execution at law, or equitable attachment, and equity will not appoint a receiver to intercept the expected fruits of its exercise. Specific performance of a contract as to future personal services will not be decreed. In a broad sense, the right of a man to render personal services under an existing contract may be said to be his property; but the nature of the right is such that no one can compel him to exercise it, or get title

to or lien upon it. The law, except as a punishment for crime, can never take this right away from a man, or confer any property in the right itself upon another man. It can affect the right only by dealing with the property it brings into existence. Whether it can then be taken depends upon the man's status at the time, and whether the law then gives a remedy for the enforcement of his contract concerning the thing his labor has brought into existence. The debtor's right to earn wages in the future and to dispose of the fruits of his labor is not "property" in any sense in which the bankruptcy statute uses the term, but constitute rather rights and privileges which go to make up a man's liberty and freedom. The plain purpose of the statute is that the title and right to all things and rights which do not fall within the vesting words of section 70 of the bankruptcy statute (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) shall remain in the bankrupt, and that as to the rights or things thus saved to him he shall be released from all liability to answer for prior debts and contracts, with certain exceptions not here material. The right of the debtor to work and contract for future service is not mentioned, directly or inferentially, in the rights or things required to be sold, appraised, or scheduled, or which pass to the trustee for the benefit of creditors. The studied enumeration of the particular rights and things which the bankrupt is required to surrender takes all other rights and things not named without the definition, thus fixed, of the "property" which the statute intends to take from the bankrupt or to pass to his creditors. Whatever he is not required to surrender is his absolutely, freed from the enforcement of the obligation of his prior contracts, unless at the time of the filing of the petition it has taken the form of property, upon which a lien has fastened. In that event only does he take it subject to the performance of prior contracts concerning it. If a debtor should solemnly contract for a present valuable consideration not to avail himself of the benefit of a discharge against the enforcement of a contract as to wages to be earned when they do actually come into existence, his undertaking would be void on grounds of public policy. *Nelson v. Stewart*, 54 Ala. 115, 25 Am. Rep. 660. Equity, therefore, cannot import into the obligation of the assignment any promise of the assignor, upon which to build an equity to a lien, that the power will be exercised after the adjudication, to bring wages into existence to satisfy the terms of a prior assignment, or that the bankrupt will not avail himself of a release from the obligation, when it is sought to enforce it after his discharge. The adjudication of a debtor, followed by a discharge, takes away all remedy for the enforcement of the obligation of the contract concerning wages earned after his bankruptcy, precisely as the discharge releases the debtor from the performance of the obligation of his promissory note made prior to the adjudication. *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77; *In re West*, 11 Am. Bankr. Rep. 782, 128 Fed. 205. As well said by Judge Bel-linger, *In re West*, supra.

"The discharge in bankruptcy operated a discharge of these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does

not continue an obligation in order that there may be a lien, but does so because there is one. The effect of the discharge upon the prospective lien was the same as though the debt had been paid before the wages were earned."

Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233, reaches a contrary conclusion. Clearly it disregards the plain policy of the statute. It is not supported by the weight of authority. The theory of that decision is that, as the assignee has a right under his contract to take the wages when they do come into existence, the right so to take them, though the wages are not then in existence, amounts to an equitable lien, at the time of the adjudication, which the bankruptcy statute preserves against the absolutions of the discharge. But what was then in existence upon which a lien could fasten? Certainly nothing but the right to work under the contract in the future. That right cannot be the subject of any lien whatever, either at law or in equity. Caption of the fruit of that work after bankruptcy cannot be sustained on the theory that the assignee had a prior lien on the right to work, which can be extended to the fruits of that labor. The wages not being in existence at the time of the adjudication, and the right to earn them not then being subject to a lien, there was no property or thing in existence, at that time, upon which a lien could attach, or be preserved. The most the assignee had, at the time of the adjudication, was an executory contract to turn the wages over to him when they did come into existence in the future. *East Lewisburg v. Marsh*, 91 Pa. 96; *Christian & Craft Grocery Co. v. Michael & Lyons*, 121 Ala. 87, 25 South 571, 77 Am. St. Rep. 30. This equity cannot be made to ripen into a lien upon the wages until they come into existence after the adjudication, and then only by enforcing against the bankrupt the obligations of a contract for whose enforcement the law denies all remedy, and from which the discharge releases the bankrupt of all liability. The upholding and enforcement of the claim of the creditor, under such circumstances, is not the preservation of a valid lien, which the bankruptcy statute saves, but the creation outright of a lien in violation of the provisions of that statute.

Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673, upon which *Mallin v. Wenham* is really rested, does not sustain it. In the former case the owner of a manufacturing plant mortgaged it, together with such tools and stock as might be acquired in the next four years, during which the debt was to be paid. Upon default the mortgagee took possession of the mortgaged property and the tools and stock in trade acquired in the business since the making of the mortgage, and the contest as to the title to the acquisitions of the mortgaged property was between the purchaser from the mortgagee and the assignee for creditors. The bankruptcy statute of 1841 provided, among other things, that nothing therein shall be construed "to annul, destroy, or impair any lien or mortgage or other securities on property, real or personal, which may be valid liens by the laws of the states, respectively, and which are not inconsistent with the second and fifth sections of the act." The present bankruptcy statute preserves valid

liens upon property in actual existence at the time of the adjudication, but does not save the right to create liens in the future on something to come into existence in the future, by enforcing executory contracts made concerning it, when the subject-matter has not come into existence at the time of the adjudication, where a discharge destroys all remedy for the enforcement of the bankrupt's liability under such contract. Justice Story was speaking of an accretion or increase in the form of "personal property," to quote the expression of the statute of 1841, as to the subject-matter upon which it saved liens, which had come into existence and passed into the possession of the creditor before adjudication, and not of a subject-matter, like wages to be earned, the mere fruit of the bankrupt's personal exertions, when they are earned and it is sought to seize them after adjudication. He was dealing with no such right, and was not giving the law as to the proper construction of a bankruptcy statute like the present as to such right. Moreover, under *Mallin v. Wenham*, the bankrupt must quit his former employer during the period covered by his assignment, else the obligation of his contract as to wages is enforced against him. The discharge destroys the remedy for the enforcement of the obligation of the contract, and it cannot be revived except upon a new promise. Continuing to work for the former employer does not constitute a new promise to pay the debt, and does not revive the remedy or avoid the release of the discharge. In many callings and occupations, which will readily suggest themselves, there is frequently only one employer in a village, town, or locality. Forcing the bankrupt to pay, or move away to get work in his usual vocation, interferes with the bankrupt's liberty, and deprives him of some of the most valuable rights the discharge vests in him. Very plainly that decision thrusts into the statute an exception which the statute does not make as to the liabilities from which a discharge shall not release the bankrupt.

The English courts have repeatedly held under their statutes, which are fully as broad as ours, regarding the preservation of liens and as to what passes to creditors, that the earnings of the bankrupt after the making of the vesting order, and before the order of discharge, cannot be recovered by the assignee, but pass to the bankrupt. The reason is tersely stated by Lord Denman, when he says, "*The bankrupt must live.*" In *Williams v. Chambers*, 69 E. C. L. 337, Lord Denman said:

"It is claimed upon the pleading, as a debt directly due the assignee for personal labor of the insolvent. If the plaintiff were entitled to recover in respect of such a claim, we must go the length of deciding that the assignee, in the words of Lord Mansfield, in *Chippendale v. Tomlinson*, 1 Co. Bank. L. 432, let the insolvent out to hire and contract himself for his personal services."

Many years ago the Supreme Court of Alabama, in *Mosby v. Steele & Metcalf*, 7 Ala. 301, declared:

"It is entirely reasonable, in the interval which must elapse between the decree and the final hearing for the bankrupt's discharge, that he shall be permitted to hold property subsequently acquired, as otherwise he would not be able to support himself and family."

Accordingly, holding that under the bankruptcy act of 1841 the federal courts had no power to interfere with the proceedings of the state courts, it enjoined the sheriff, who had made a levy, from selling under execution goods of the insolvent, acquired subsequently to the filing of the petition, and ruled, if a discharge were granted, that the injunction be made perpetual.

Lastly, the Supreme Court of the United States has declared that the "liberation" of the bankrupt "from incumbrance on future exertion" is one of the main objects of the statute. *Hanover Nat. Bank v. Moyses*, 186 U. S. 192, 22 Sup. Ct. 857, 46 L. Ed. 1113. We do not doubt, therefore, that the right and title to the wages earned by Rose after the filing of the petition passed to the bankrupt, released from any claim or right growing out of the assignment.

3. There is no aspect of the case in which the company can complain of the order to withdraw the notice of the assignment of wages, and no foundation in law for its insistence that the court could not compel it to do so in a summary proceeding. The contract of loan, under which the assignment was taken, being in violation of public policy, the assignment could not give any possession of the wages, either actual or constructive, or any title whatever. In the nature of things the respondent could not have any actual possession of the unearned wages, for they had not come into being. Prior to the adjudication the company took no steps which could reduce the wages to its constructive possession, even if it be conceded that its contract authorized it to take possession when the wages did come into existence. It did not notify the employer, and the latter made no promise. It had done nothing but take the assignment, which was a legal nullity. Whatever of actual possession there was of the wages, as between the lender and the employer and the bankrupt, when the latter filed his petition, was certainly not in the lender. The employer laid no claim to the wages, and was a mere stakeholder. This was the state of affairs existing at the time of the adjudication. The filing of the petition, to say nothing of the adjudication, operated as an attachment and injunction, as of the date of the filing of the petition, and put the wages already earned in the custody of the court, and fixed the status and rights as to the unearned wages. *International Bank v. Sherman*, 101 U. S. 407, 25 L. Ed. 866. Even if the assignment had been valid, no step taken by the lender subsequent to the adjudication could have been effective to vest him with possession. All the steps the lender subsequently took were invasive of a possession which was already in the court; and in that posture of the case the court could summarily compel the lender to restore that status quo as to these wages, by withdrawing notice of the assignment, even if the assignment had been valid, and to prosecute its claim, if it insisted on it, in the court of bankruptcy. The Home Discount Company not only interfered with the wages, after they were in the custody of the court, but the only contract or instrument under which it claimed title or right to interfere was, as matter of law upon the undisputed facts, an absolute nullity. It was, therefore, a mere naked intermeddler. The authorities are unbroken, under such circumstances, that the court may interfere sum-

marily to compel the intermeddler to desist and restore the status quo. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *In re Tune* (D. C.) 115 Fed. 906. Apart from the wages being already in the possession of the court, in consequence of the adjudication, the law, under the circumstances, gave the bankrupt the right to enjoy, pending discharge, certain privileges, immunities, and benefits, in the free exercise of which the statute imposes the duty upon the court to protect him. Among them is the right to enjoy the benefit of a discharge, if the bankrupt complies with the provisions of the statute, and, in order that the practical good of such discharge shall not be taken from him, that he shall not be coerced, pending discharge, by any device of creditors, into the payment of a debt from which the discharge would free him, or which would operate upon his rights to any particular property, if the effect of such discharge would pass such property either to himself or to the estate, as against a creditor who claimed it for himself. The jurisdiction of the court to protect the bankrupt in the enjoyment of such rights, whether ancillary or original, is abundant and its exercise is justified to conserve to the fullest extent the court's original jurisdiction, which had already attached in the particular case. Before the assignment was filed, the bankrupt, his estate, and privileges which he was entitled to enjoy in consequence of the adjudication, had been drawn into the cognizance of the court of bankruptcy. It was under duty, and had undoubted authority, to prevent any intermeddling with the administration of the estate, already begun in the court, and to prevent the taking of any steps which would defeat the application of the assets according to law or frustrate the bankrupt's right to the practical enjoyment of the privileges the statute confers upon him, in event of discharge. The filing of the assignment of the wages with the bankrupt's employer the day after the adjudication was an effort to embarrass the administration of the estate, and to force the bankrupt by the sore pressure caused by withholding the wages to pay an illegal demand, from which a discharge would free him. It was nothing more than an effort to starve him into abandonment of his right under the law, in defiance of the orders made to enforce those rights. If a court of bankruptcy has no power to prevent creditors from making such use of assignments of wages, it had as well shut its doors, and abandon all effort to vindicate the rights which the statutes commit to its protection. The law does not make such weaklings of courts of bankruptcy. They have ample power to protect the bankrupt in the enjoyment of all his rights, and to frustrate the efforts of those who seek to defeat the practical enjoyment of them. *In re Hicks* (D. C.) 133 Fed. 739; section 2, subd. 15, of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]); *Collier on Bankruptcy* (5th Ed.) p. 26.

4. The referee's order was not erroneous in any degree, because the proceeding, which resulted in the order, was begun at the instance of the bankrupt. The court administers the property. It is its duty to see that the assets are administered according to law. The trans-

action upon which respondent relied being violative of public policy, respondent had no right, title, or real claim to the wages, and in attempting to apply, and afterwards applying, them to its void claim, it was, we repeat, a mere naked intermeddler. The court could rightly interfere, of its own motion or upon complaint of the bankrupt or any other interested person. In *re Tune* (D. C.) 115 Fed. 906. It is the statutory duty of the bankrupt to inform the trustee of violations of the act. The court is not bound to delay proceedings when the matter is brought to its attention, and insist upon the circumlocution of having the bankrupt go first to the trustee, and then having the trustee come to the court. Moreover, the assignment filed with the employer covered not only wages earned at the time of the bankruptcy, but those to be earned. The earned wages, not having been claimed as exempt and the assignment of them being void, were assets of the bankrupt's estate. The wages earned after the filing of the petition, as we have seen, in event of discharge, passed to the bankrupt in his own right. The assignment purported to cover both, and keeping it on file, although it was a nullity, had the practical and inevitable effect to prevent the employer from paying the earned wages into court, as he should have done, and detained the wages earned after the adjudication from the possession of their lawful owner. The bankrupt had a direct personal interest in moving for the order.

5. There is no legal basis whatever for the theory that the court has no power to interfere here, because the loan was obtained by a false pretense by the bankrupt, whereby a debt was created which could not be affected by a discharge. The agreement under which the loan was effected and the assignment taken, being the offspring of a transaction offensive to public policy, are utterly powerless to create a debt, or to confer any rights upon the lender, which a court can recognize. The borrower and the lender are in no sense in *pari delicto*, and the borrower, therefore, may have relief against the transaction which the lender could not. *Smith v. Bromely*, 2 Douglass, 670; *Browning v. Morris*, 2 Cowper, 793; *Turner v. Merchants' Bank*, 126 Ala. 415, 28 South. 469. This would be true, even if the marshaling of the assets, according to the provisions of the statute, could be said to be administering equitable relief to the bankrupt against the contract. The local statute puts no duty upon the borrower, and does not restrain him from doing anything. It was enacted to protect the borrower against the lender. Moreover, if it be conceded, in view of the prohibitions of the statute, which the lender plainly violated, that the bankrupt could by false pretense create a debt which the court could recognize, and which could not be affected by a discharge, the fact remains that the bankrupt denied the making of the false pretense, and the referee who saw and heard the witnesses, decided the issues of fact in favor of the bankrupt. In view of the circumstances of the case, the court thinks the bankrupt's version most probably the true one, and, if it doubted, could not disregard the finding of the referee on this point, unless reasonably convinced that it was erroneous.

6. The insistence that the court has no right to make any rule for securing the costs on the petitions for review of the referee's order,

and that it is powerless to exact bond or other indemnity for the protection of the opposite party during the stay of the order, pending the review, is wholly unfounded. In the absence of statutory provisions or rules of court, a petition to review or revise an order of the referee does not in and of itself operate a supersedeas of the order, and whether or not it shall have that effect, rests in the discretion of the reviewing or reviewed authority in the particular case. It has few of the properties of an appeal. Primarily, at least, it does not contemplate a trial de novo. It removes nothing out of the District Court into any other court. The petition, though filed with the referee, is really addressed to the District Court, and asks action by that court on a record which remains in that court. It is no more than a petition for a rehearing, or a motion for a new trial, in the court of original jurisdiction, while the judgment or decree remains in the power of the court during the term, and does not stay execution, unless in pursuance of rules or by special order. Aside from the inherent power of courts to provide rules for administering of justice therein, the court has abundant statutory authority to make all reasonable regulations, not inconsistent with those prescribed by law and the rules made by the Supreme Court, which it deems needful to prevent abuses of frivolous petitions for review. One of the rules in force, when the referee's order was made, provided "that on hearings before referees in bankruptcy, and on nisi proceedings when the rule is made final, the filing of a petition for review shall not act as a supersedeas, unless the unsuccessful party shall file bond, with surety, in such amount as may be required by the referee or judge, conditioned to pay any damages growing out of said appeal, in event the same is not successfully prosecuted. Failure to comply with the order of the referee, unless petition for review and bond be filed and allowed by the referee, may be treated as a contempt of court." The only regulation in the statute regarding the revision of orders of referees is that they are "subject always to review by the judge." No. 27 of the General Orders in Bankruptcy prescribes only the form in which the matter for review shall be presented to the judge, and does not deal with any question of costs or the effect of the filing of the petition as a supersedeas. Nearly every order the District Court makes is subject to revision on appeal or writ of error. Yet it has never been heard that the party aggrieved can have a supersedeas, or avoid giving security for costs, in disregard of the rules of the court, merely because the law gives a writ of error or appeal as a matter of right. There is nothing in the regulations made by the District Court which runs counter to the statute or rules of the Supreme Court. With the volume of business in the Middle and Northern Districts presided over by a single judge, whose time is constantly engaged with the common law, criminal, and equity dockets, as well as the bankruptcy business, in five different places of holding court, from four of which the judge is always absent, it would be an intolerable abuse if a suitor, no matter how frivolous his objections, could, by the simple expedient of filing a petition for review, stay the execution of every order until finally confirmed by the District Court, and then, if the petition be determined ad-

versely to him, escape all liability for damage done by the delay to the adverse party. In cases like this, which are constantly arising, such a doctrine would starve nearly every bankrupt into submission to demands of creditors. It would convert orders of referees into mere recommendations, to which no one need pay any heed until they are confirmed by the District Court, and would vest in the irrevocable discretion of disappointed suitors a power and discretion which the law lodges only in the court.

7. This is not one of the cases in which reliance upon the advice of counsel can shield a party from the consequences of a deliberate disobedience. Here there was a purpose not to perform an act which the order exacted—an order so precise and definite that no man could read it and fail to know what it demanded. Respondent does not claim that it misconstrued the order, or that it did not intend to disobey it. On the contrary, it admits that it knew precisely what the order required and that it did not intend to obey it. It concluded to disobey on the advice of counsel, on the theory that the referee had no authority to make the order and that the court had no power to compel obedience to it before the court itself first passed on the petition for review. Having ability to comply, and having intentionally and designedly disobeyed the order, realizing fully what it enjoined, the company cannot be heard to say that it did not intend disobedience to the process of the court. The intent is shown by the act, which speaks for itself. *Agnew v. United States*, 165 U. S. 50, 17 Sup. Ct. 235, 41 L. Ed. 624. This is not a case where the disobedient party did a forbidden act, honestly, though mistakenly, believing that its conduct was not forbidden by the order, and therefore, although it knowingly did the forbidden thing, yet had not any actual intent to disobey the command. Under such circumstances there is no moral intent to defy the order, though there is disobedience to its command. The principle has no application here, where a party knowingly and intentionally refused to perform a specific act, which he knew the order commanded him to do. The law prescribes the extent of the duty of obedience to a judgment or decree. If the order be void, any person may disregard it with impunity. If it be not void, though it abound in error, it must be respected, until reversed or suspended in some appropriate proceeding. The advice of counsel cannot make an order void, if it be not void; and it cannot lessen its requirements, or relieve a party from the duty of conforming to them. The rights of the disobedient party are exactly the same, whether he acts with or without the advice of counsel. Whosoever intentionally defies an order, whether upon his own judgment, or in reliance upon the advice of counsel, takes upon himself the peril of making a right decision, and if he make a wrong decision he must bear the consequences. It will seldom happen, if sufficiently diligent search be made, that some attorney cannot be found who will advise a discontented suitor, and honestly too, that a distasteful order is wholly without warrant of law, and therefore may be safely disobeyed. To recognize the advice of counsel as a justification or an excuse for a willful defiance of a valid order of the court would go a long way towards sanctioning anarchy. The process of the court would be

robbed of the sanction which the law gives it, and depend, instead, upon the varying views of counsel in each particular case, no matter how erroneous they might be. Such a doctrine finds no countenance in our jurisprudence.

8. After the referee made his order the respondent took no step either to obey it or to supersede it. Notwithstanding the rule nisi from this court to its managing agent about three weeks after the referee's order, respondent continued to tie up the wages of the bankrupt until in the end it was enabled to coerce him to make a settlement out of court, the effect of which, in defiance of the provisions of the bankruptcy statute and the orders of the court was to make valid a void assignment and kill all enjoyment by the bankrupt of rights which the laws secure to him in the interval between his adjudication and discharge. This private settlement, which it was enabled to effect only by its persistent disobedience, was never brought to the attention of the court until it called for explanation; and then it is boldly brought forward, not only as a determination of all matters at issue between the respondent and the bankrupt, but as foreclosing all right of the court to take notice of the issues respondent raised with the court by its persistent defiance of its process. Respondent urges that this settlement was voluntary on the part of the bankrupt, and made at his instance, and that as an inducement to it he promised to dismiss the contempt proceedings, in order to obtain what respondent seems to consider a personal favor to the bankrupt. The settlement, though, perhaps, not made under such duress as would enable the bankrupt to avoid it was far from a favor to him. The respondent had tied up the wages of the bankrupt for weeks. For what purpose? Did not the bankrupt yield to the company's exactions in order to obtain a part of his wages, rather than to face the worse situation which confronted him if he held out? The settlement was a favor to the bankrupt only in the sense that a captor's acceptance of an offer of a ransom is a boon to his helpless captive, because it relieves him from greater evils. The bankrupt could not bargain away any right of the court. He could condone violations of the orders of the court only in so far as they affected his civil and pecuniary rights. The disobedience here involved much more than disregard of the personal rights of the bankrupt, because that result was accomplished and could be accomplished only by persistent and flagrant defiance of the authority of the court. The court is compelled to notice respondent's conduct, because, in the language of Blackstone, it demonstrates "that gross want of regard and respect, which when courts are once deprived of, their authority, so necessary for the good of the kingdom, is entirely lost among the people." *Bessette v. W. B. Conkey Co.*, 194 U. S. 329, 330, 24 Sup. Ct. 665, 48 L. Ed. 997. Respondent was charged with knowledge, and doubtless actually knew, since it was advising with counsel, that the nature of the step of the court should or might take to rebuke and punish the defiance of its orders could not be a matter of barter and sale with the bankrupt. When analyzed, the excuse here set up, notwithstanding the formal protestations of respect for the authority of the court and want of any intent to condemn its process, is nothing

more nor less than the assertion that the respondent had a right to do what it did, and that, having forced the bankrupt to settle the controversy in defiance of the orders of the court, it is now none of its business how that result was brought about. Such conduct "is utterly inadmissible in any community professing to be governed by law." *In re Swan*, 150 U. S. 652, 14 Sup. Ct. 225, 37 L. Ed. 1207. All respect would be lost for the orders of a tribunal which would receive the excuse here tendered, or allow it to go unrebuked and unpunished.

The abuses resulting from these loans, taken in violation of the local statute, and the methods resorted to for their enforcement, the bankruptcy law and all other law to the contrary notwithstanding, have grown so great that the number of insolvents who flee to the court of bankruptcy for refuge is larger in the Northern District of Alabama than in any other district of the United States, with two or three exceptions. It is high time that an end was put to this state of things, if a firm enforcement of the law can bring it about. The Home Discount Company is the real offender. Its disobedience was willful. It persisted in its lawless conduct to promote its own gain and to effect its own unlawful ends. The court, under the circumstances, will not consider how far it ought to deal with the mere agent, a woman who was misled by the advice of counsel, and perhaps thought she was only doing her duty to her employer, but will visit the penalty upon the real author of the disobedience. While the advice of counsel cannot be received as a justification or excuse for resistance to a valid order, the court may in its discretion consider it in mitigating the penalty for disobedience, and it does so now in imposing a fine of \$500.

BAY STATE GAS CO. OF DELAWARE v. ROGERS.

(Circuit Court, D. Massachusetts. July 18, 1906.)

No. 90.

1. CORPORATIONS—RECEIVERS—APPOINTMENT—AUTHORITY TO SUE.

A receiver was appointed for a corporation in the domiciliary district, and thereafter an ancillary appointment was made by the Circuit Court of the District of Massachusetts. The order of ancillary appointment expressly gave the receiver all powers described in the order of original appointment, which authorized him to institute actions or suits in any court for the recovery of any estate, property, or demand existing in favor of the corporation. *Held* that, though the receiver's powers were interlocutory, and he was not constituted an assignee or trustee for the purpose of winding up the corporation, he had authority to sue in the federal courts sitting in Massachusetts, in the name of the corporation, to recover profits made by defendant, by virtue of his control of the corporation as its trustee, for which defendant had not accounted.

[Ed. Note.—Actions by or against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.]

2. EQUITY—JURISDICTION—RECOVERY OF MONEY.

Where the subject-matter of a suit consisted of certain gains and profits arising out of a trust, either express or constructive, the fact that the amount claimed could be liquidated in cash, so that the purpose of the

bill in the end was merely a demand for money, did not deprive the federal courts of jurisdiction thereof in equity.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 151, 152; vol. 47, Cent. Dig. Trusts, § 565.]

3. TRUSTS—ACTIONS AGAINST TRUSTEES—PRIVATE PROFITS—ACCOUNTING—PARTIES.

Where suit was brought to recover profits made by one of three trustees, there being no claim that defendant shared the gains and profit sought to be recovered with his co-trustees, they were not necessary parties to the bill, as provided by Rev. St. § 737 [U. S. Comp. St. 1901, p. 587], and Equity Rules 22, 47, and 53.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 367, 368.]

4. SAME—LACHES.

In a suit in equity brought by a receiver of a corporation to compel an accounting from one who held certain assets in trust for the corporation, in which case it appeared that the facts were not known until after the receiver was appointed, and that there were no peculiar circumstances beyond the delay, *held*, that the suit was not barred by laches.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 362.]

5. SAME—ACTIVE TRUST.

Where a deed of trust gives in terms to a trustee the entire control and management of certain particularized assets, the trust created thereby is held to have been an active one.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 178.]

6. SAME—OBLIGATIONS OF TRUSTEE DEALING WITH HIS OWN PROPERTY SIMULTANEOUSLY WITH THAT OF A TRUST.

The complainant corporation controlled certain gaslight companies operating in the city of Boston. The defendant had acquired, and still held, controlling interests in two competing gaslight companies operating in that city and its vicinity. Under those circumstances, the complainant corporation, in order to prevent injurious competition, gave the defendant by a deed of trust practical control and management of the companies controlled, by it for a specific term named therein. While the trust still continued, the defendant caused to be executed contracts between the last-named companies and a coke company for the purchase of the gas, which was the expected product of the coke company, and was also expected to afford a sufficient supply. At the same time, the defendant caused to be made like contracts between the coke company and the two companies which he controlled in his own right, and simultaneously therewith he negotiated for and completed a sale of his interests in those two companies at a large profit to himself. The record did not show that he had expressly coupled the two transactions; neither did it show that he advised the complainant corporation in regard to the transactions, or obtained its consent thereto. *Held* that, under the circumstances, his relations as trustee and to his own property were such that he was holden in equity to account to his cestui que trust for an equitable proportion of the profits derived from the sale of his own interests in excess of a fair return on the cost thereof; and also *held* that, in the absence of any definite rule by which an equitable apportionment of the profits could be accurately made, the apportionment should be made in moieties, according to *judicium rusticum*.

In Equity.

Sherman L. Whipple, Frank B. Bracken, and Alexander Lincoln, for complainant.

Alfred Hemenway, James M. Beck, and Walter I. Badger, for defendant.

PUTNAM, Circuit Judge. We do not understand that the parties in this case raise any distinct question with reference to our jurisdiction in equity in regard thereto. Nevertheless, on account of the importance of the topics involved, we deem it better to make it clear that there is no doubt in our own minds on this point.

George Wharton Pepper was appointed the receiver of the complainant corporation by the Circuit Court for this district by an order entered on June 8, 1903. This order gave the receiver full power over "all and singular the properties, choses in action, franchises, and rights" of the corporation, and vested him with full power to demand and receive, and take into his possession, all the same. This appointment was ancillary to his appointment as receiver of the same corporation by the Circuit Court of the United States for the District of Delaware, which was the domiciliary district; and the order in this district expressly gave the receiver all the powers described in the decretal order of the Circuit Court for the District of Delaware. The latter order provided that Pepper as receiver might institute actions at law or suits in equity in any court for the recovery of any estate, property, or demand existing in favor of the corporation; so that there can be no question, so far as it was within the power of the Circuit Court for the District of Massachusetts to authorize Pepper as such receiver to prosecute this suit, he was fully empowered to do so. It is probable that the powers of the receiver were only of an interlocutory nature, and that, so far as the record shows, he was not in any way constituted an assignee or a trustee, or a quasi assignee or quasi trustee, for the purpose of winding up the corporation. What further orders there might have been in that direction, if any, the record does not disclose. It is not important that it should, because, while the bill was originally filed in the name of the receiver, it was afterwards amended, in accordance with the settled practice, so as to become a bill in the name of the corporation, brought by the receiver under the authority of the court. That, under these circumstances, a bill can be so brought and maintained seems to have been settled, so far as the federal courts are concerned, by *Davis v. Gray*, 16 Wall. 203, 217, 21 L. Ed. 447, and *Porter v. Sabin*, 149 U. S. 473, 478, 13 Sup. Ct. 1008, 37 L. Ed. 815, and by the long unquestioned practice in that direction; although, of course, under the late decisions of the Supreme Court, especially in *Great Western Company v. Harris*, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163, this suit could not have been brought or maintained in the name of the corporation by Pepper simply by virtue of the powers vested in him by the Circuit Court for the District of Delaware.

The bill in this case will be found to settle itself into a demand for money; but, under thoroughly established rules, the fact that the amount claimed can be liquidated in cash does not deprive the federal courts of jurisdiction in equity. The subject-matter, it is true, is only gains and profits, but it is the gains and profits arising out of a trust as courts of equity define trusts, express or constructive; and therefore, although it sometimes happens that there is a concurrent

remedy at law where a trust has worked itself into cash, yet in the federal courts the remedy in equity always remains. Indeed, if the propositions of the complainant in this case can be sustained, the common law would be incompetent to give it a remedy, because its eye is not keen enough, nor the reach of its arm long enough, to work out the legal complications arising out of the series of events which are alleged to have occurred. It is hardly necessary to cite authorities on this proposition, but it is well enough to refer to *Taylor v. Benham*, 5 How. 232, 274, 12 L. Ed. 130, *National Bank v. Insurance Company*, 104 U. S. 54, 67, 26 L. Ed. 693, and *Clews v. Jamieson*, 182 U. S. 461, 479, 21 Sup. Ct. 845, 45 L. Ed. 1183. The case in this respect is entirely unlike *Root v. Railway Company*, 105 U. S. 189, 26 L. Ed. 975, and others of analogous classes, where the original right exists not in equity but at law.

It will appear that two gentlemen who are out of the jurisdiction of this court, and on whom service has not been made, were constituted co-sharers with the respondent in the trust alleged in the bill. Their absence, however, does not affect our jurisdiction. The claim made against the respondent, Rogers, is for gains and profits in which the others associated with him did not share, for which they are in no way sought to be held responsible, and in which they can have no part either by liability to contribute or by compelling contribution from Rogers. On the record, they have no interest in the questions involved, and the substantial issue is wholly between the complainant and the respondent. Therefore, especially in view of section 737 of the Revised Statutes [U. S. Comp. St. 1901, p. 587], and of Equity Rules 22, 47, and 53, no objection to our taking jurisdiction arises on this score. Story's Equity Pleading, § 161.

Some minor defenses which do not touch the merits of the controversy can easily be laid aside at this stage, although before stating the substance of the complainant's case. One is that the equity—that is, the cause of action which chancery recognizes—does not lie with the complainant, the Bay State Gas Company of Delaware, but with sundry local corporations at Boston, to be referred to hereafter. We are unable to see any basis whatever for this proposition, and think we need not discuss it. It is also stated in effect that, whatever position the respondent, Rogers, occupied with reference to the subject-matter of the litigation, the co-sharers of whom we have spoken were jointly responsible with him, and that, as stated at large, he (Rogers) was under no obligation to compel these or any other associates to continue as such, and that he therefore was not liable for their failing to so continue. No possible liability of that nature is in any way involved in what is demanded by the complainant, which is, as we have already said, gains and profits received by the respondent, Rogers, in which no other person was concerned. It is also urged on us that the gains and profits which the complainant seeks to recover were received by the respondent, Rogers, on December 10, 1897, while the present litigation was commenced on July 3, 1903, not quite six years subsequently. Therefore, the respondent makes a claim of laches; but the demand is purely a money demand,

which would not be barred by the statute of limitations at law, and therefore not concurrently barred in equity, unless there may be some peculiar basis in reference thereto. We do not perceive that any such basis exists. As the complainant makes its bill, there is no ratification or waiver, because the peculiar facts on which it rests its claim were not known until after the receiver was appointed, which was in June, 1903. Neither are there any elements of estoppel, nor any intervening occurrence which would prejudice the respondent on account of the delay, so far as we can perceive. Moreover, this bill was brought by a corporation which was strictly a cestui que trust against a respondent who was strictly a trustee. In equity such relationship always creates a dependent situation, so that, as between trustees and cestuis que trustent, laches can hardly ever be said to afford a defense unless from the time when the facts are fully known and understood; a condition which, as applicable to the complainant's allegations, did not exist until after the present receiver was appointed. Therefore, we are clear that none of these minor defenses are available to the respondent.

The principles of law applicable to this proceeding are simple and familiar. The facts also resolve themselves very easily on a single proposition. On the other hand, the proofs offered in the record are very voluminous, and the facts leading up to the single crucial question involved, and following it, as told by the parties, are numerous, and protracted over a long period of time. To undertake to state the history of the case as given us with full justice to one side and the other would require a very elaborate opinion, which, so far as we can perceive, would be of no substantial advantage. Therefore, beyond stating the case as shown by the complainant's bill, we are of the opinion that it may best be disposed of by a few propositions. The bill, after it was filed, was amended, and the complainant has furnished us with a new draft, as it claims it stands after being thus amended. We are satisfied that this draft is substantially correct for all the purposes for which we are required to use it. Some abbreviations are used in the bill which we will avail ourselves of in this opinion. Omitting some portions, which are unnecessary for us to repeat, the bill is as follows:

"On or about October 31, 1896, there existed a corporation known as the Bay State Gas Company of New Jersey, hereinafter called the 'New Jersey Company,' which had been organized under the laws of the state of New Jersey, and had been in existence for some years. The capital stock of said New Jersey Company was \$1,000,000, consisting of 10,000 shares of the par value of \$100 each, and approximately every one of said shares was owned and held by the Bay State Gas Company of Delaware, hereinafter called the 'Delaware Company.'

"On said thirty-first day of October, 1896, there were existing four corporations doing business in the city of Boston, commonwealth of Massachusetts, and there engaged in the manufacture and distribution of illuminating gas, said four corporations being named, respectively, the Boston Gaslight Company, South Boston Gaslight Company, Roxbury Gaslight Company, and Bay State Gas Company of Massachusetts. Practically the entire capital stock of said four companies, hereinafter called the 'Boston Companies,' had been deposited with the Mercantile Trust Company, a bank-

ing corporation doing business in New York City, and were held by said trust company under a certain agreement to secure the payment of principal and interest on two issues of bonds of the New Jersey Company, known as 'Boston United Gas Bonds,' first and second series, said series of bonds amounting to several millions of dollars.

"Subject to the aforesaid lien, the New Jersey Company was the owner of the said stocks of the Boston Companies, and under the terms of said trust agreement the power to nominate and cause the election of directors and other officers of the said Boston Companies was reserved to and vested in the New Jersey Company. Such ownership and power were of great value, and were on said thirty-first day of October, 1896, practically the sole asset of said New Jersey Company, and absolutely the sole asset which gave value to the said stock of said New Jersey Company. By the ownership of its said stock of the New Jersey Company, the Delaware Company was able to, and did, manage and control the said Boston Companies, and had for several years managed and controlled said Boston Companies, and said Delaware Company was practically the sole owner, either by direct ownership or through the New Jersey Company, of all said stocks of the Boston Companies, subject to the aforesaid pledge of the same to the Mercantile Trust Company.

"On or about October 31, 1896, the Delaware Company appointed the defendant, Rogers, with two associates, as trustees to manage and control the said Boston Companies for its interest and benefit; and to effectuate such power and privilege and secure to said Rogers the absolute management and control of said Boston Companies, deposited with and conveyed to said Rogers and his associates all the capital stock of said New Jersey Company owned by it; and said Delaware Company thus actually transferred to said Rogers and his associates the management and control of all said Boston Companies, and the power to nominate and elect directors and other officers thereof precisely as if he, the said Rogers, and his associates were the actual owners of all the capital stock of the Boston Companies. The terms of said trust were set forth in a deed of trust dated October 31, 1896, duly delivered to and accepted by said Rogers and his associates. A copy of said deed of trust is hereto annexed marked 'Exhibit C,' and made a part hereof. The defendant, Rogers, and his associates thereby became bound to manage and control said Boston Companies in the interest and for the benefit of the Delaware Company.

"The defendant, Rogers, thereafter immediately requested the resignation of the directors and controlling officers of said Boston Companies, and caused the election and substitution therefor of persons not interested in said Boston Companies as stockholders or otherwise, but who would be, and thereafter proved to be, subservient to said Rogers, and willing and ready to execute and carry out all the wishes and commands of said Rogers in connection with said company, and thereby said Rogers, by the election of said directors subservient to him, came into absolute management and control of said Boston Companies.

"At the date of said trust agreement (Exhibit C), to wit, October 31, 1896, said Rogers was the owner of a controlling interest in two corporations known as the Brookline Gaslight Company and the Dorchester Gaslight Company, said corporations being organized under the laws of the commonwealth of Massachusetts, and being engaged in the manufacture and sale of illuminating gas in the city of Boston. Both of said corporations, being under the control and domination of said Rogers, had for some years been engaged in keen competition and rivalry with said Boston Companies, and more especially the Boston Gaslight Company, which competition and rivalry between said companies had caused great loss of profits, not only to the Boston Companies, but to said Brookline Gaslight Company as well.

"On or about September 30, 1897, an association known as the New England Gas & Coke Company was organized for the purpose of manufacturing coke by the Otto Hoffman process, so-called, and producing by-products in connection therewith, including a very large amount of fuel and illuminating gas. It was a part of the plan of the organizers of said company that its

manufacturing plant should be located in the vicinity of the city of Boston, and they considered it necessary to the success of the enterprise that a market should be found in said city for the sale of the gas to be manufactured by said company as a by-product. About the time of the organization of the said Coke Company, or shortly thereafter, the managers, or certain persons representing the said company, with the object of carrying into effect their said plan, approached the defendant, Rogers, and opened negotiations with him for the purpose of securing contracts with all the companies owned or controlled by said Rogers in and about the city of Boston for the sale to them by said Coke Company of gas to be thereafter manufactured by it, in such quantities and for such long periods of time as would warrant the construction by said Coke Company of an expensive plant and works. The plaintiff is informed, believes, and therefore alleges, that the defendant Rogers declined to cause the execution by said companies owned or controlled by him of such contracts for the purchase of gas from said Coke Company, except upon condition that said Coke Company should purchase from him all his interests in the Boston gas field; that thereupon the said Coke Company, in order to secure the desired contracts for the sale of its gas, was obliged to and did enter into an oral agreement and undertaking with said Rogers some time in November, 1897, substantially in terms as follows:

“(a) That said Rogers should cause not only the Dorchester and Brookline Companies, owned and controlled by him, but also the four Boston Companies, to enter into contracts to buy gas from said Coke Company for the period of fifty years, through the medium of the Massachusetts Pipe Line Company, a subsidiary company owned and controlled by the Coke Company.

“(b) That said Rogers should convey and transfer to said Coke Company, or its order, the following securities:

“18,500 shares of the capital stock of the Brookline Gaslight Company; 5,170 shares of the capital stock of the Dorchester Gaslight Company; certificates of indebtedness of said Brookline Gaslight Company, amounting to \$1,615,000 par value, and Boston United Gas Bonds, First Series, to the amount of \$1,000,000, being substantially the same property which he had offered to sell, and upon which he had given an option, as aforesaid, for the sum of \$6,062,061.08.

“(c) That said Coke Company should pay to the defendant, Rogers, or cause to be paid to him, the sum of \$8,053,103 cash, \$1,000,000 par value of the bonds of the said Coke Company, and \$400,000 par value of the stock of said company. And

“(d) That upon the payment of the said sum of money and the delivery of said securities to said Rogers, ostensibly as the consideration for said property owned by him, he would, through the exercise of his power as trustee for the Delaware Company, turn over the practical control and management of said Boston Companies to the said Coke Company by causing to be elected as directors of said Boston Companies persons nominated by and in sympathy with said Coke Company.”

“Pursuant to said agreement and understanding, the said Rogers, some time in December, 1897, did in fact cause to be executed by said Boston Companies, as well as by the said Brookline and Dorchester Companies, and delivered or caused to be delivered, contracts providing for the purchase for a term of fifty years from the said Coke Company of the gas to be manufactured by it; also assigned and delivered to said Coke Company, or its representatives on its behalf, all of the said securities owned by him, as aforesaid; and passed the control of said Boston Companies to the said Coke Company by resigning himself, and causing the other directors thereof to resign, and by selecting as his and their successors persons nominated by and identified with said Coke Company.

“In further pursuance of said understanding and agreement, the said Rogers was, on December 10, 1897, by the said Coke Company or its representative, paid the full consideration therein provided for, namely, the sum of \$8,063,102.44, which included interest, in cash, the first mortgage bonds

of the Coke Company of the par value of \$1,000,000, and stock of said Coke Company of the par value of \$400,000. The said bonds and stock were of great value, and were subsequently sold by the defendant Rogers for sums aggregating over \$950,000.

"The fair market value of the said securities at the time they were sold, as aforesaid, to the Coke Company did not exceed the sum of \$6,000,000, and the defendant Rogers could not at that time have secured from the Coke Company a larger sum therefor if he had not, through the use of his power of control as trustee for the Delaware Company, caused the said Boston Companies to enter into said fifty-year contracts with the said Coke Company, and undertaken to turn over the control of said Boston Companies to the said Coke Company in manner as aforesaid. The plaintiff therefore avers that all of the said consideration over and above the fair market value of the said securities was in reality paid to the said Rogers by reason of his said position as trustee for the Delaware Company, and in consequence of his improper use of said position for the benefit of the said Coke Company in manner as aforesaid.

"The plaintiff further is informed and believes, and therefore avers, that said cash consideration paid to defendant, Rogers, by the said Coke Company, in manner as aforesaid, was loaned the said Coke Company for this purpose by a syndicate represented by the Central Trust Company of New York, and of which the defendant, Rogers, was a member; that the said syndicate loaned to the said Coke Company the sum of \$12,000,000, which included the sum paid as aforesaid to the defendant, Rogers, and received from the said Coke Company, in addition to the interest on said loan, as a consideration or bonus for making the same, stock of the said Coke Company of the par value of \$2,400,000; that out of said stock the defendant, Rogers, received as a part of his share of the profits of said syndicate shares of the par value of \$1,200,000, which he subsequently sold for prices amounting in the aggregate to \$360,000; and that the defendant, Rogers, by reason of his participation in said syndicate, subsequently (namely, on September 25, 1899) received from the said Coke Company, through the said Central Trust Company, the sum of \$254,087.46. The plaintiff is advised and believes, and therefore avers, that the said sums, amounting to \$614,087.46, should be considered as additional profits derived from the foregoing transactions by the said defendant, Rogers, through the improper use of his position as trustee for the Delaware Company.

"Wherefore the plaintiff prays:

"That a decree be entered against the defendant ordering him to pay to the plaintiff the sum or sums received by him as trustee of the Delaware Company, or by reason of his position as such trustee, from the New England Gas & Coke Company, or by its procurement, with interest thereon, and for such other relief as the case may require or admit of."

Exhibit C, the instrument of trust referred to in the bill in equity, is as follows:

"Trust Deed Made by New Jersey Company.

"This deed of trust, made this 31st day of October, 1896, by and between the Bay State Gas Company of Delaware, a corporation duly organized and existing under and by virtue of the laws of the state of Delaware, party of the first part, and Henry H. Rogers, John G. Moore, and Frederick W. Whitredge, citizens of the state of New York, jointly as trustees, parties of the second part,

"Witnesseth: That whereas the Bay State Gas Company of Delaware is the owner of approximately \$1,000,000 par value of the capital stock of the Bay State Gas Company of New Jersey, and whereas the Bay State Gas Company of New Jersey has, by virtue of a certain deed of trust, dated January 1, 1889, made by and between J. Edward Addicks and William E. L. Dillaway, parties of the first part, the Mercantile Trust Company of the city of New York, party of the second part, and the Bay State Gas Company of Delaware, parties of the third part, certain powers in respect to

the designation of persons to be elected directors of certain gas companies in the city of Boston, Mass., and set forth in the last-mentioned deed of trust; and

"Whereas, numerous suits in equity and other actions have from time to time been brought against said Bay State Gas Company of Delaware, and the Bay State Gas Company of New Jersey, and are threatening to be brought against the gas companies in the city of Boston, the equity in the stocks of which are owned by the said Bay State Gas Company of New Jersey and Delaware; and

"Whereas, receivers were, on or about the 16th day of October, 1896, appointed in said suits by said Bay State Gas Company of Delaware in the state of Massachusetts, New York, New Jersey, and Delaware, and various injunctions and other restraining orders have been from time to time obtained in said suits; and

"Whereas, the result of the proceedings last mentioned has been to cause a large depreciation in the price of the securities known as the Boston Gas bonds; and

"Whereas, the effect of such proceedings is to hamper the operation of the companies, and will probably bring about a default in the payment of interest upon the first and second series of said Boston United Gas bonds, which will result in a foreclosure of the deeds of trust or the mortgage securing the same, and ultimately result in the destruction of the equities in the stocks of the Boston Gas Companies owned by the Bay State Gas Company of Delaware; and

"Whereas, an arrangement has been made by which all of the said suits are to be discontinued, and the orders of injunction and for the appointment of receivers made therein are to be vacated upon consent; and

"Whereas, it is the term and condition of such arrangement that the control of the management of the Boston Gas Companies above referred to shall hereafter be vested in the parties of the second part—

"Now, therefore, this agreement witnesseth:

"First. That for the purpose of perfecting such arrangement, securing such control, and saving the interest of the Bay State Gas Company of Delaware in the equities of the said stocks of the Boston Companies from destruction, the said Bay State Gas Company hereby assigns, transfers, and sets over unto said parties of the second part 10,000 shares of the capital stock of the Bay State Gas Company of New Jersey in trust until such time as the Boston United Gas bonds of the first series shall have been retired by the operations of the sinking fund or otherwise paid off.

"Second. The parties of the second part agree to hold the shares of stock of the said Bay State Gas Company of New Jersey in trust for the Bay State Gas Company of Delaware, and to return the same to it when the Boston United Gas bonds above referred to shall have been paid.

"It is understood and agreed that in the event of the resignation, death, or incapacity of either of the trustees, his or their successor may be appointed by the survivors.

"The Bay State Gas Company, Delaware,

"By its President, J. Edward Addicks.

"Attest: W. H. Miller, Sec."

We omit from further consideration the special claim in the closing paragraphs of the bill as to certain sums amounting to \$614,087.46, as we are unable to perceive that anything in the record sustains the proposition that this was in any way connected with the use of the respondent's position as trustee of the Delaware Company; but, so far as we can discover, the matter related entirely to the operation of an independent syndicate, which was formed for the benefit of all concerned, and as to which the respondent was entitled to occupy the same position and relation as the other gentlemen involved

in it, without any liability to account to the complainant or to any one else by reason thereof.

The proofs in the record sustain all the propositions of the bill except those to which we will especially refer. The respondent maintains that the trust created by the instrument of October 31, 1896, was merely a naked trust, otherwise a mere voting trust, and that by the very nature of the trust it was necessarily shared by the respondent's co-trustees in all particulars; and that further, by its nature, it was impossible for the respondent to convert it into an active trust either with or without the aid of his co-trustees, by which either he alone or he and his co-trustees could put themselves in practical control of the Boston corporations, as alleged in the bill. But, by the clear terms of the instrument, the trust was an active and a responsible one, because by its letter "the control of the management of the Boston Gas Companies" was "vested in the parties of the second part"; that is, Mr. Rogers and his associates. The record puts it beyond doubt that during the period covered by the bill the control and the management of the Boston Gas Companies were practically assumed and exercised by the respondent, Rogers, undoubtedly by the consent of his co-trustees, with only nominal interference on the part of either of them. It is not, however, important whether all three trustees united in this practical control, because the liability of the respondent, Rogers, to account for gains and profits received by him alone for his sole benefit would, as we have shown, be precisely the same whether the control was exercised jointly with the co-trustees, and whether the opportunity to obtain gains and profits was shared with them or not, so far as there was sufficient opportunity for him to secure them, as alleged in the bill. That there was in fact an active trust of the kind alleged by the complainant, and that the relations of Rogers to that trust were of such character as to afford an opportunity of securing the gains and profits alleged by the bill, provided the New England Gas & Coke Company, or the gentlemen interested in it, were willing to assent to an arrangement out of which the gains and profits could be derived, are all too clear on the proofs in the record to require further discussion or development by us.

It is necessary, in order to understand the relations of the parties thereto, that it should be stated that the instrument of October 31, 1896, was the result of an antagonism between the Boston Gas Companies and the respondent, as a consequence of which he obtained the control of the Brookline Gas Company, which corporation, by reason of its authorized capacity to parallel, to a certain extent, if not throughout, the gas supply lines of the Boston Companies, was possessed of certain advantages. The respondent, in his explanation of the amount which he received for the securities of that corporation, speaks of its strategic position, and he says that the purposes of the Coke Company with reference to supplying gas, not only to Boston, but to other cities and towns, would have been materially enhanced by securing the control of "the dominating company in Boston and Brookline." The words in quotation marks are as used by the respondent,

but he adds that the Coke Company purchased his securities "upon terms that were satisfactory to him and to them." The possible command which the Brookline Company had over the entire field of gas supply in the locality, including the city of Boston, was made practically evident from the fact that it was through the securing of its control that the respondent, Rogers, compelled the termination of the antagonisms by the deed of trust of October 31, 1896, making him and his associates masters for the long period stated therein of the whole situation, subject, nevertheless, so far as the Boston Gas Companies were concerned, on the part of himself and his associates, to all the far-reaching obligations of an active trusteeship which equity placed on him and them. Apparently, therefore, without having first resigned the trust, Rogers, as one of the trustees, was prohibited from making use, to the disadvantage of the Boston Gas Companies, of the strategic position of the Brookline Company, and from passing the control of that corporation into the hands of others without providing the proper protection against the possibility of the resumption of the hostile attitude. As this bill is drawn, however, we have no occasion to follow this suggestion further.

As we will state further on, there can be no question that, notwithstanding the trust under the agreement of October 31, 1896, the respondent, Rogers, so far as concerns anything claimed in this bill and appearing on this record, might have sold his interests in the Brookline Company without being accountable for any part of so much of what he might have received therefor as would represent his investment and an ordinary, reasonable return on the same. We do not mean by this merely such a return as would be expected to come from what are known as strictly investment securities, but such a return as might reasonably be expected from an investment like the respondent's in the Brookline Company, if successful, having in view compensation for the possibilities of loss which such investments involve.

While we reserve the right to review our findings on the coming in of the report of the master, we are of the present opinion that the amounts received by the respondent, Rogers, for his Brookline securities was in excess of any value which we have described; and that that amount was enhanced by reason of the fact that, in the position of things, the breaking up of the trust, as it was in fact broken up by the respondent's disposing of his securities and what immediately followed that disposition, together with the power which the control of the Brookline securities carried with them with regard to the entire gas field in question, brought the respondent a considerably larger return than he otherwise would have received. We will not at this point undertake to consider the matter further, as we can make our position clearer later, except to say at the outset that the facts disclosed by the record cannot in any event entitle the complainant to recover as gains and profits such entire excess, but only its equitable proportion thereof.

At this point it becomes necessary to state that the record shows no basis whatever for the allegation in the bill that the respondent,

Rogers, sought to secure the management and control of the Boston Companies in order that thereby he might, in connection with the sale of his interests in the Brookline and Dorchester securities, secure a large compensation and profit for himself. On the other hand, the arrangement out of which grew the instrument of October 31, 1896, is clearly shown to have been made in good faith and for the interests of all concerned, in view of the condition into which the respondent, Rogers, had been able, without any violation of any obligation, to force the so-called gas field in that locality. The power which he was able to exercise was evidenced by the fact that the control of the entire field was, by his holding of the Brookline and Dorchester securities, in connection with the instrument of October 31, 1896, placed with apparent confidence in the hands of himself and his associates. Therefore, it is that we say that practically in any event, so far as this bill is concerned, the respondent is entitled to receive and retain the first cost of the securities which he owned, plus an ordinary, reasonable return thereon, as we have described it. When the respondent had, by making that investment, placed himself in the position such as the record shows he was able to occupy by the consent of the complainant itself, and such as to enable him to receive for his property a sum, as alleged by the complainant, largely in excess of the original cost and an ordinary, reasonable return thereon, it certainly cannot be said that there would be any equity in throwing on him a loss; and to deprive him of his original investment and an ordinary, reasonable return thereon would inflict a loss, in the proper mercantile sense of the term.

The bill for the most part is rested squarely on the proposition that the respondent, Rogers, in his negotiations with the Coke Company expressly made all dealings, so far as concerned the Boston Gas Companies, conditional on the purchase by the Coke Company of the respondent's interests in the Brookline securities; in other words, it expressly alleges and makes it the gravamen of the case that the respondent, Rogers, refused to allow the Coke Company to deal with the Boston Gas Companies except under the condition of purchasing his Brookline securities at a price fixed by him. Of course, such a position on the part of the respondent would be a clear breach of a still existing trust, and might entail on him an accounting of all gains and profits as claimed by the complainant. There was, indeed, a series of facts happening contemporaneously which fully justified the complainant in putting on foot the investigations which culminated in bringing this bill in the more specific form in which it is presented to us. Those investigations showed a series of events which might well suggest the theory on which the bill mainly rests. The negotiations with the Coke Company for the contracts with the Boston Gas Companies and the negotiations between the respondent, Rogers, and the Coke Company for the sale of his holdings in the Brookline Company were proceeding to a certain extent apparently contemporaneously, and there was apparent ground for the suggestion that the respondent, Rogers, by his controlling position as a trustee, held up the completion of the contracts with the Boston Gas Companies until the

contract of sale of his Brookline securities had been practically, if not actually, consummated in all particulars. There was also the further fact that, immediately after the consummation of all the negotiations, the personnel of the management of the various Boston Gas Companies, as well as of the Brookline Company, was changed substantially, if not entirely. There was also the further more urgent fact that it is quite difficult to understand why the Coke Company, which was all along struggling to come into existence, meeting, as the record shows, with great difficulty in its incipency, should load itself up with a mass of securities like those of the Brookline Company, involving several millions of dollars, at a price on which the income from the securities purchased could not meet the current rates of interest; although it is, indeed, true that it is difficult to reproduce the governing considerations existing nearly 10 years ago in the minds of the gentlemen involved in an enterprise like that of the Coke Company, and it may also be true that inducements to the purchase of the Brookline Company securities may be explained by the fact that the ramifications were so peculiar that the purchase gave the Coke Company the use of \$1,000,000 of securities at a time when it especially needed it, besides gaining the strategic position of the Brookline Company, as said by the respondent. Nevertheless, however all these things may be, and however suggestive in favor of the complainant the peculiar facts to which we have referred, and however much they would help the complainant if other proofs in the record tended to sustain it, the fact is there are no such other proofs; and the case as made by the bill in the particular way which we have explained must fail, because the complainant does not sustain the burden resting on it. In the eyes of the law what is not proven does not exist. Macmillan, a witness called by the complainant, was such a factor in the negotiations with the respondent for the sale of his Brookline securities, and also was such a factor in the organization and control of the Coke Company, that it is impossible to conceive that there could have been such an express understanding as alleged in the bill without his being practically and fully cognizant of it; and yet Macmillan positively, fully, and clearly denies its existence. The record shows him to be a man of large experience and unquestioned character, understanding and comprehending fully what he was testifying about. He was called by the complainant and is appealed to by both parties. He is unimpeached, and, so far as the record is concerned, an unimpeachable witness. Searching the record by and large we are unable to find anything, singly or together, which can contravene his testimony; and we are therefore compelled to find that, on the bill before us as it more largely rests, the complainant fails.

So far we have found no difficulty in our conclusions except on the question whether the bill necessarily takes on merely the character which we have described. The transaction has other phases than those which rest on the express arrangement thus alleged to have been entered into by the respondent trustee. He voluntarily assumed the trust, and linked with it his own interests, and therefore he was bound to protect the cestui que trust, although he was authorized

to protect himself so far as he could do so without a breach of his trust obligations. The rules in reference to trust obligations have never been carried too far by the chancellors, and it is not too much to repeat the language of Perry on Trusts (5th Ed.; 1899) § 427, as follows:

"All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe, nor would it be possible for courts to apply any other as between trustee and cestui que trust."

The arm of the chancellor is so long, and his sight so keen, that it is never possible to frame specific circumstances for him in advance, and specific rules to meet the varying fluctuations of human affairs. Therefore, it is often more easy to appreciate what equity would accomplish after the facts have been made known, than to define it by general rules, or in any way to put it into words in advance. The powers of the equity courts are never absolutely controlled by apparent analogies, but perhaps the position into which parties who subject themselves to their jurisdiction are brought is exhibited more strikingly by analogy to those before us than elsewhere by the following extract from an opinion passed down by the judge now presiding in *Western Union v. American Bell*, 125 Fed. 342, 346, 347, 60 C. C. A. 220, 224, 225:

"In contemplating the construction and effect of the contract, we must first of all consider that the relations of the parties to it were of the fiduciary character to which we have referred; so that the telephone company, as the sole holder of the joint interests, left in exclusive control thereof, was bound to the underlying rule that neither directly nor indirectly, nor by any artifice whatever, should the Western Union be deprived of its share in the net profits of the licenses or leases, whatever form they might assume, unless and except as expressly so provided. In *Batchelder & Lincoln Company v. Whitmore*, 122 Fed. 355, 361, 58 C. C. A. 517, we illustrated how such fiduciary obligations may arise between others than technical trustees and cestuis que trustent, pointing out that the utmost good faith is required between creditors coming into a composition of a failing debtor. The existence of similar obligations under other circumstances, as between copartners, and also as between officers of a corporation and the corporation, is explained in *Pomeroy's Equity Jurisdiction*, §§ 157, 1088, and sequence, although it is shown that under such circumstances jurisdiction in equity does not lie to the same extent as with technical trusts. It is also true that, other than with a technical trustee, this contract left a large discretion with the telephone company, and did not bind it to any particular rule of diligence or skill. Nevertheless, this general equity requires it to account with the utmost good faith for what concerns the common interests. This equity is effectual, universal, and unyielding, and we must approach the contract in the light of it, and give the Western Union the full benefit thereof."

On the one hand, we have no occasion to deal with any questions as to what the obligations, rights, and liabilities of the parties would have been in the event the respondent, Rogers, had seasonably resigned his trust, giving such notice of his purpose in reference thereto as the law might require, and a reasonable opportunity to the complainant to meet the emergency arising therefrom. On the other hand, while the record shows an apparent general insolvency on the part of the complainant and of the Boston Gas Companies, the cause

thereof has not been brought to our attention; neither has it been brought to our attention that the contracts made with the Coke Company in behalf of the Boston Gas Companies was to their detriment. Moreover, the record raises the suggestion that the mere fact that these contracts were made was for the advantage of all concerned therein. Certainly the record does not disclose to us that Rogers, the respondent, was guilty of any breach of trust so far as the making of these contracts was concerned, or could have been held responsible as for an equitable tort in reference thereto. Moreover, as we have already said, the purpose of the bill is for an account of gains and profits, so that we have no occasion, as we have again already said, to investigate any question of damages arising out of any possible equitable torts, if there had been any; but we must deal only with the division of gains and profits arising out of the transactions to which this bill relates. So far as this bill is concerned, the expressions we have cited from Perry on Trusts have a sweeping application, and certain expressions in what we have extracted from *Western Union v. American Bell* are particularly in point. For example: "That the sole holder of the joint interests left in exclusive control thereof" is "bound to the underlying rule that, neither directly nor indirectly, nor by any artifice whatever, can the beneficiary or" the cestui que trust "be deprived of his share in the net profits of the result of the working out the joint interests"; and also the expression that this general equity requires an accounting "with the utmost good faith for what concerns the common interests," and "is effectual, universal, and unyielding." We also may justly make a close application of what we have cited from Perry on Trusts, to the effect that "all the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners"; and we may add that the well-known rule stated in the same edition of Perry on Trusts, in section 428, also applies here, that where the common properties of the trustee and cestui que trust have been dealt with together, the burden rests on the trustee to vindicate the transaction, and that the court can be relied on to scrutinize it with great severity. The underlying rule which controls our decision is based on the same fundamental principles as the rule in *United States v. American Surety Co.*, 126 Fed. 811, decided by the Circuit Court for the District of Maine on December 22, 1903, and affirmed by the Circuit Court of Appeals for this circuit in 135 Fed. 78, wherein it was held that the United States, having consented to make themselves quasi trustees by accepting a statutory bond for the benefit of themselves and sundry individuals who might become creditors, were holden to share pro rata, although ordinarily entitled to priority. The same observation applies to the class of cases of which *Bradley v. Farwell*, Holmes, 433, Fed. Cas. No. 1,779, is an excellent example, in which it was held that, as the directors of a corporation are quasi trustees for all concerned, they could not obtain any priority over other creditors by accepting for debts due them security from the corporation when known by them to be insolvent or on the verge of insolvency.

To apply the language of *Western Union v. American Bell* to the case at bar, the respondent was, for all practical purposes, as we have already decided, the holder of the joint interests, "and had been left in exclusive control thereof." The interests had been linked together for the general good of each, and purposely so linked. So to speak, he did not hold his own interests in one hand and the interests of the complainant in the other, but both in the same hand. Without surrendering his trust; without any notice which the record discloses; without relieving the complainant from its tutelage, so that it became its own master; and without furnishing it with any opportunity of sharing in any profits which he might acquire by disposing of a portion of the property thus linked together; without any effort to ascertain whether, as the result of dealing with one of the interests which had so been joined, the complainant had any equity in the profits which might be derived therefrom, and, if yes, what equity; dealing, moreover, with parties whose purpose was to acquire rights with reference to the entire field to which the joint holdings related, and therefore with reference to the entire joint holdings; and although, as he well knew, the Coke Company was negotiating in fact for all the several parts of the entirety, and almost simultaneously completed all their dealings with regard thereto—the respondent claimed and received for himself the entirety of the gains and profits so far as any gains and profits immediately resulted. Under these circumstances, equity deals with the actual condition of things, and with the relations of the parties, with little reference to their express purposes. In this way arose the masterful rules of equity with reference to exoneration, contribution, and subrogation, as to each of which there are for the most part no purposes expressed, and, at the best, there is involved what the law calls "implied contracts," which, for a large part, are no contracts at all. The reasons for this are patent, especially as applied to the case at bar, where a trustee, in dealing simultaneously, or almost simultaneously, with his own interests, deals also with those which he holds in trust. With simultaneous negotiations relating to a common result, although not expressly linked together, it is not within the power of human nature to pick out all the strands, or to ascertain what are concealed, or to delineate all the motives and considerations which induce and control the mind of one who is acting in a twofold capacity. While, as we have already said, all the refinements of such a condition are not easily understood or put into words, a somewhat bald illustration would make clear the wisdom and justice of the result which equity reaches under circumstances like those before us. For example, suppose the guardian of a minor, appointed by an orphans' court, holds in his own right certain portions of a water privilege and of the land surrounding it, and also controls as guardian of the minor other portions of the same privilege and of the land surrounding it, the two together completing the field which a promoter would desire to acquire as a whole, and the two so linked together that one would be less valuable without the other. Carrying the hypothesis further, and suppose that, on being approached by a purchaser, the guardian sug-

gests that the purchaser first acquire his own individual interests at a price named by him, yielding a large profit, and that this is done, and that afterwards the interests of the minor are sold for an ordinary price to the same purchaser, and as an ultimate part of the enterprise which is being promoted, could it be doubted that, under such circumstances, not only the equity courts and the orphans' court, in accordance with their rules, would order an investigation and an accounting, but that the ordinary mind of the intelligent man in the community would pronounce the course of dealing one which demanded a probable division of profits?

While in the case supposed the relations of the parties would be of such a character that judgment would be plainly pronounced, the rules applicable are precisely the same as in the case before us. The respondent, Rogers, was the master so far as his own interests were concerned, while the complainant's interests were in tutelage in the respondent's hands. In no particular, according to the rules of equity, is there any difference in principle between the case supposed and the case at bar. Indeed, the evidence offered by the respondent affords positiveness to this illustration. Burrage, called by him, testified that he was negotiating with reference to the subject-matter of these proceedings with the representatives of the Coke Company, having a number of interviews with Macmillan, whom we have already spoken of, and others; and, as we understand the record, he opened the negotiations in behalf of the respondent, Rogers.

We may say here that sometimes in the course of the opinion we have spoken of both the respondent's interests in the Brookline Company and in the Dorchester Company, and sometimes we have named only the Brookline securities; but, however this may be, we intend by our observations and our findings to cover the entire interests of the respondent, Rogers, disposed of by him as alleged in the bill.

Burrage testified further as follows: "They stated to me the plan they had in mind of establishing a coke company gas by-product plant near Boston, and of supplying gas to the district." By "the district" undoubtedly was intended, not only that covered by the Brookline and Dorchester Companies, but that covered by the four Boston Companies, so that, at the outset, respondent, Rogers, through his representative, Burrage, understood that the result of the negotiations was to be an entirety, if it could be accomplished, in behalf of the Coke Company; that is, that it related to the entire field, even though it was to be gathered together step by step, by separate threads, or otherwise by separate parcels. The witness testifies they stated to him that they believed the undertaking would be successful. He added:

"I stated to them that, under these circumstances, perhaps the best thing for them to do would be for them to buy the securities of the Brookline and Dorchester companies, and we thereupon took up negotiations for this purpose."

Here is a fact in all respects like the hypothetical case of the guardian and ward. With this introduction, who can tell the operation of the suggestion upon the minds of the parties to the negotiations?

Who can say, as it came from the respondent, Rogers, who held in the same hand his own interests and the others which the Coke Company expressly stated they desired to deal with, whether it was accepted merely as a suggestion or as a primary condition? No one can determine how a suggestion of this sort operated on the minds pro and con, and equity says no one need tell. It proceeds on broader grounds, and requires the respondent trustee to share with the cestui que trust the gains and profits of which, by his method of negotiation, they were barred from sharing, and barred even from a hearing with reference thereto. The pith of the whole is that, whatever may have been the motives of the respondent, Rogers, and although on the record he is not chargeable with the particular accusations on which the bill mainly relies, and even though he may have fairly supposed, according to the ordinary rules governing the relations of mankind, that he was entitled to make a sale of his securities without being liable to account therefor, yet, under the circumstances and for the reasons stated, the chancellor, sitting in equity, could not if he would shake off the conclusion that what was thus profited must be apportioned among all the common interests.

We have referred to the fact that the bill has been pressed on us mainly in another aspect, and that we doubted whether on its allegations it could be applied to the aspect which we have thus developed. We have been compelled to reject for want of proof, as we have explained, those portions of the bill that allege that the respondent, Rogers, sought the controlling position which he held for an improper purpose, or that he as it were "held up" the negotiations until his own securities were disposed of. But there remains the allegation "that all of the said consideration"—meaning the consideration which he received for his interests in the Brookline and Dorchester Companies—"over and above a fair market value of the said securities, was in reality paid to the said Rogers by reason of his said position as trustee"; and also there remains in the prayer for relief that he be decreed to account for what he received by reason of such disposition. As to the allegation, it might have been more aptly expressed with reference to the case as we have developed it; but, as we doubt not the facts are also fully developed, we should, if we deemed it necessary, allow the slight amendment which would be required to adapt it perfectly thereto. We, however, do not deem this necessary, but we think the allegation sufficient as it stands. While the prayer of the bill asks the entire profits received by the respondent, Rogers, and we are of the opinion only that he is liable to share with the complainant, it never has been regarded as a variance of any importance that the prayer for relief exceeded that to which the complainant in equity or a plaintiff in a suit at law was entitled. He may pray for the whole, and recover only a portion.

There are serious difficulties in determining upon what basis the gains and profits referred to should be shared between the complainant and the respondent; that is, what portion thereof should be retained by the respondent. The case having been pressed on us almost solely on the ground that the complainant was entitled to the entire profits,

the court has received no assistance from counsel in this particular. A master must be appointed, according to the views we have expressed, to report a scheme for a just and equitable apportionment. If none other can be found, it may be, and probably will be, necessary to resort to the field which courts who are unable to proceed strictly philosophically are often compelled to enter—that is, to the *judicium rusticum*—and apportion gains and profits half to each. On whatever sum may be allowed, interest should be added at a fair market rate.

We hold, therefore, that the respondent must account for an equitable proportion of the gains and profits received by him as alleged in the bill, subject to the view expressed in this opinion that he is in any event entitled to retain the original cost of his investments, and an ordinary, reasonable return thereon, as we have described it. We find that the respondent has received gains and profits largely in excess of what he is thus entitled to retain. We, however, direct the master to ascertain such original cost, and what would be such an ordinary, reasonable return thereon, computing the same with reference to what the respondent received for his securities, and we reserve the right to dismiss the bill in the event it should be finally ascertained that our summary computations in this respect have been erroneous. We also hold that the gains and profits should be apportioned upon equitable rules, as we have pointed out in this opinion, so far as the same can be ascertained; that if no definite rule is ascertained, they shall be apportioned half to the complainant and half to the respondent; and that the bill should be sustained, and a master appointed in accordance with the views herein expressed.

It is ordered, adjudged, and decreed that the bill be sustained for the purposes and to the extent shown in the opinion passed down this day; that Moorfield Storey, Esq., be, and he is hereby, appointed master to take the accounts and report upon such other matters as required by such opinion; and a certified copy of this decree and of the opinion shall stand as the commission to the master.

KAHN et al. v. HEROLD, Collector of Internal Revenue, etc.

(Circuit Court, D. New Jersey. July 21, 1906.)

1. INTERNAL REVENUE—INHERITANCE TAX—PAYMENT—PROTEST—VOLUNTARY PAYMENT—RECOVERY.

Where, at the time certain executors paid an internal revenue inheritance tax on a life estate under protest, they had no knowledge that the life tenant had died and that the life estate had therefore terminated, the payment was not voluntary so as to preclude a recovery thereof.

2. EVIDENCE—LIFE ESTATES—VALUE—USE OF LIFE TABLES.

Where, at the time certain internal revenue inheritance taxes were assessed on the value of a life estate, such estate had been already terminated by the death of the life tenant, it was improper to use life tables to determine the value of such life estate.

3. INTERNAL REVENUE—INHERITANCE TAX—PAYMENT—RECOVERY.

Where an internal revenue inheritance tax was assessed and paid on the supposed value of a life estate, as determined by life tables at a time

when the life estate had terminated by the death of the life tenant, but such fact was not known either to the executors or the internal revenue officers, the executors were entitled to recover the excess of the amount properly taxable under the facts as they actually existed as money paid under mistake of fact.

McCarter & English, for plaintiffs.

John B. Vreeland, Dist. Atty., and H. P. Lindabury, Asst. Dist. Atty., for defendant.

CROSS, District Judge. The plaintiffs, as executors of the last will of Abraham Wolff, deceased, sue to recover the sum of \$37,673.13, which they claim was the amount of the tax illegally collected by the defendant upon a life estate devised by said will, to Clara W. Wertheim, a daughter of said deceased. The testator died October 1, 1900, leaving a last will and testament, whereby he appointed the plaintiffs his executors, who duly qualified as such, and took upon themselves the burden of the administration of his estate November 7, 1900. The twenty-eighth section of his will, which it is admitted is the only one affecting this case is as follows:

"All the rest, residue and remainder of my estate, both real and personal, of which I may die seized and possessed and wherever situate or being, except as hereinbefore otherwise provided, including all lapsed legacies, I give, devise and bequeath to my trustees, the survivors and survivor of them and his successors, upon the following trusts, that is to say: (1) To divide, set apart and hold the same in as many equal portions or shares as I shall leave daughters me surviving and the issue of a deceased daughter, allotting, however, and turning over to the issue of a deceased daughter only the portion or share which their parent would have taken if living, that is to say per stirpes and not per capita, and as to the share of a surviving daughter, to invest and keep invested the personal estate and proceeds of real estate of such share, if sold, in such securities as by the thirty-sixth article of this my will they are authorized to invest in. (2) To collect and receive the rents, issues, interest and income of the portion or share so to be set apart for each of my said daughters and to apply the same to her use so long as she shall live free from any control of her husband. (3) Upon the death of such daughter leaving issue her surviving, to dispose of her share or portion among such issue in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof among such issue in shares per stirpes and not per capita, and if she shall leave no issue her surviving to continue to hold her share or portion for the benefit of her sister, if living, for life, in trust to collect and receive the rents, issues, interest and income thereof, and to apply the same to her use so long as she shall live, and upon or in case of her death, to divide the same to and among her issue, if any, in shares as she may appoint by will, and in default of such appointment, or so far as such appointment shall not be made, to dispose thereof among such issue, in shares per stirpes and not per capita, and in default of such issue to divide the same to and among the following persons in the proportions herein provided, that is to say: [naming them.]"

Other paragraphs follow which need not be recited. The testator left him surviving two daughters, Addie W. Kahn and Clara W. Wertheim, and under the foregoing section of his will, each was entitled to a life interest in one-half of his residuary estate. The said Clara W. Wertheim, died August 15, 1903, 2 years, 10 months and 14 days after the death of said testator, Abraham Wolff.

On May 19, 1903, the executors, pursuant to the requirements

of section 30 of war revenue act (Act June 13, 1898, c. 448, 30 Stat. 465 [U. S. Comp. St. 1901, p. 2308]) filed with the defendant a schedule and return, together with an affidavit showing the legacies and distributive shares arising from the personal property of every kind, belonging to the estate of Abraham Wolff, including therein the life interests of the two daughters, Mrs. Kahn and Mrs. Wertheim, under the foregoing section of his will. This affidavit was filed with the return for the purpose of bringing to the attention of the collector, certain items not included in the return, which the executors claimed were not taxable. These disputed items, however, had no relation to the claim in suit. On July 10th the plaintiffs were informed by a letter from the defendant that the Commissioner of Internal Revenue claimed that the returns and schedules as filed were, for certain reasons specified, erroneous and defective, and the executors were requested to forward a new return for transmission to the department. Some correspondence thereupon ensued between the executors, the Commissioner and collector, and one of the counsel of the executors, on August 13, 1903, went to Washington in their behalf and attended personally before the Commissioner and discussed with him the legal questions involved, and claimed that there was no occasion to file a new return until after the legal propositions in dispute had been settled. The Commissioner said that he would take the matter under advisement. There was some further correspondence between the Commissioner and the counsel of the executors, and on September 8, 1903, the Deputy Commissioner advised them that no further information was desired, and that action would be taken in the matter in the near future. This was in reply to a letter from them dated September 2, 1903, asking whether anything further by way of proof or brief was required, and to which was appended this statement: "We understand that no assessment has yet been made." Nothing further transpired until October 26, 1903, when the plaintiffs received a notice from the collector stating that a tax of \$107,398.16 had been assessed upon the estate, and demanding its payment. The tax so assessed included a tax on the life interests of the two daughters of the testator in the estate of their father. The portion of the estate which was given Mrs. Wertheim, in trust for her benefit for life, amounted, as computed by the Commissioner of Internal Revenue, to \$2,647,768.97, and the clear value of her life interest, as computed under the mortality tables, was \$1,870,367.08, which, taxed at the rate of \$2.25 per \$100, amounted to the sum of \$42,081.91, which sum, included with other taxes of the estate, was paid under protest November 4, 1903. The assessment as finally made by the Commissioner was based, not upon any new return made by the executors, but upon the original return and affidavit which at first were adjudged insufficient by the Commissioner. The Commissioner did, however, add to the assessment some items not included in the schedule, but which were brought to his attention by the supplemental affidavit filed therewith. The tax thus assessed was not paid until between two and three months after the death of Mrs. Wertheim. The payment when made by the executors was made under protest,

but without notice or knowledge that the life tenant was then dead. So far as the record shows, both parties were ignorant of her death when the tax was paid.

Some time after its payment, and on April 4, 1904, a petition was filed by the executors asking to have \$26,637.59 of the total amount paid by them, refunded. This petition did not embrace the taxes for which recovery is sought in this suit, but only such part as had been in dispute between the executors and the Commissioner before the assessment was made. The claim made under the foregoing petition was subsequently, and on April 11, 1905, allowed to the extent of \$13,983.36. Almost immediately thereafter, and before payment to the executors of the amount of such allowance, the department was notified by them that they intended to file a further petition, asking that another portion of the taxes paid, be refunded. The foregoing notification was given in order that the department might withhold, if it cared to, the rebate allowed under the first petition, until the second petition could be filed, and its merits determined. Such a petition was subsequently and on May 15, 1905, filed for the return of \$37,673.13 with interest; being the tax in controversy herein. There was considerable correspondence between the counsel of the executors and the department with reference to the subject-matter of this second claim, but it was later altogether disallowed. This suit was thereupon instituted within two years from the time the tax was paid, and before the statute of limitations barred its prosecution.

The first question for consideration is whether the tax was voluntarily paid. At the time it was paid the executors protested verbally and in writing against the entire tax, on the ground that it was illegal and invalid, and had been illegally and improperly assessed, and it was stated that they paid the same only under protest, and only because of the requirements of the department, and to prevent proceedings to compel collection with interest and penalties, and they further particularly protested that the said tax was illegal and invalid and was illegally and improperly assessed so far as it included the tax on the life interests created under said will, and added that the tax thereon was paid only under protest, and for the reasons mentioned in their general protest. It is claimed on behalf of the defendant that the protest above outlined was insufficient, and that the payment of the tax was voluntarily made, notwithstanding that a written demand had been made upon the executors for the payment of the tax in the following form:

List for Month of Sept., 1903, Div. 12.

United States Internal Revenue Office of the Collector of Internal Revenue,
Fifth District, State of New Jersey.

"Newark, Oct. 26, 1903.

"Messrs. Otto H. Kahn and Henri P. Wertheim, Executors, Estate of Abraham Wolff, Dec'd.:

"You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to one hundred seven thousand three hundred ninety eight and 16/100 dollars, the same being a tax upon legacies and distributive shares, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. Demand is hereby made for this

tax, which is due and payable within one year of death of testator, when death occurred on or after July 1, 1901, and in case testator died before July 1, 1901, tax must be paid before July 1, 1902, but in all cases payment of tax before distribution is imperative, and unless paid on or before the day when due and payable, it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.

"Payment may be made to me at Newark P. O. Building. \$107,398.16

"[Signed]

Herman C. H. Herold, Collector."

This notice was accompanied by a letter from the defendant dated October 28, 1903, reciting the transmission therewith of the notice and demand for payment above set forth.

As to what constitutes voluntary payment in matters of taxation, we find the rule laid down in 27 Am. & Eng. En. of Law (2d Ed.) tit. Taxation, p. 760, as follows:

"Where a party pays an illegal demand with full knowledge of all the facts which render it illegal, without an immediate and urgent necessity therefor, to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back."

The foregoing rule follows substantially the language of the Supreme Court in *Little v. Bowers*, 134 U. S. 547, 554, 10 Sup. Ct. 620, 33 L. Ed. 1016, which in turn follows the language of the same court in *Railroad Company v. Commissioners*, 98 U. S. 541, 543, 25 L. Ed. 196. In the latter case the court, after stating the rule in the language hereinabove given, adds:

"This, as we understand it, is a correct statement of the rule of the common law."

In *Lamborn v. County Commissioners*, 97 U. S. 181, 185, 24 L. Ed. 926, Mr. Justice Bradley, in delivering the opinion of the court, says:

"A voluntary payment made with the full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back." Citing case.

See, also, *Philadelphia v. Collector*, 5 Wall. 720, 732, 18 L. Ed. 614; *Chesebrough v. The United States*, 192 U. S. 253, 259, 24 Sup. Ct. 262, 48 L. Ed. 432.

From these decisions it is clearly apparent that in order to constitute a voluntary payment, payment must be made with full knowledge of all the facts and circumstances, and that where such knowledge is wanting the payment, whatever else it may be, is not voluntary. This view seems to dispose of the questions now under consideration. The payment made by the plaintiffs herein was not voluntary. They were ignorant of the fact that the life tenancy, upon which the taxes they were paying had been assessed, had been terminated by the death of the life tenant before such assessment was made. Had they known this fact it can hardly be presumed that they would have paid the tax. The knowledge which they lacked was essential to the exercise of sound judgment, as well as to a correct understanding of the legal situation. But beyond this, the defend-

ant claims that the protest made and filed at the time of the payment was inadequate and insufficient for the reason that it was an omnibus protest, and did not specify the ground now insisted upon. A sufficient answer to this insistent lies in the fact that they did not know the reason which they now urge. This of itself made the payment involuntary, and if it did not entirely obviate the necessity of any protest, rendered its form comparatively unimportant. While it is true that the protest was broad and general, it was, nevertheless, directed particularly to the tax assessed against the interests of the life tenants. I do not find any case which holds that under such circumstances, or indeed under any circumstances, a protest must be couched in the terms, and with the certainty of a common-law pleading. The case of *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048, is both instructive and authoritative upon this point. Mr. Justice Bradley (page 178 of 101 U. S. [25 L. Ed. 1048]) says:

"On this point it is to be observed that the case stands on a different ground from that of the illegal exaction of duties on imports. To recover these, the statute makes it necessary that the party interested should give notice in writing to the collector, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of his objection thereto. Act of June 30, 1864, c. 171, § 14, 13 Stat. 214; Rev. St. § 2931; *Westray v. United States*, 18 Wall. 322 [21 L. Ed. 763]; *Barney, Collector, v. Watson et al.*, 92 U. S. 449 [23 L. Ed. 730]; *Davies v. Arthur*, 96 U. S. 148 [24 L. Ed. 758]. No such written notice or protest is required of a party paying illegal taxes under the internal revenue laws. He must pay under protest in some form, it is true, or his payment will be deemed voluntary. *City of Philadelphia v. The Collector*, 5 Wall. 720 [18 L. Ed. 614]; *Collector v. Hubbard*, 12 Wall. 1 [20 L. Ed. 272]. But whilst a written protest would in all cases be most convenient, there is no statutory requirements that the protest shall be in writing. In the present case, the court merely finds that the payment of the tax and penalty was made under protest, which may have been either written or verbal. We think that this finding is sufficient to show that the payment was not voluntary. It is apparent from the findings, it is true, that the objection of the parties was particularly made against the legality of the tax, and not against the penalty as distinct therefrom. But, of course, the objection included the penalty as well as the tax; and as the latter was clearly illegal, we think that the plaintiff should have the judgment for the amount thereof, unless barred by the statute of limitations."

This case was followed in *Stewart v. Barnes*, 153 U. S. 456, 459, 14 Sup. Ct. 849, 850, 38 L. Ed. 781, where the court says:

"No evidence was introduced to show the nature of the protest made, but it was unnecessary to prove more than that the payment was made under 'protest' which was admitted by the plea."

Under the circumstances attending this payment I conclude that it was involuntary, and was accompanied by a sufficient protest.

We come now to the consideration of the main question which is stated by the counsel of the plaintiffs in their brief as follows: Mrs. Wertheim having died before the assessment was made, the duration of her life interest was already fixed, and the assessment made on the basis of her expectancy of life is invalid. The war revenue act (Act June 13, 1898, c. 448, 30 Stat. 465 [U. S. Comp. St. 1901, p. 2308]) § 30, imposes upon an executor or trustee, the duty, within 30 days after any legacy or distributive share has come to

his charge or trust, of giving notice thereof to the collector or deputy collector of the district wherein the deceased last resided. It then provides that he shall pay to the collector or deputy collector of such district, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector, a schedule or statement of the amount of such legacy or distributive share, together with the amount of duty which had accrued or should accrue thereon. It also provides that such schedule or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest; that the same should be verified by oath, and immediately delivered, and the tax paid thereon to the collector. It is further provided in the same section as follows:

"And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector, the duplicate of the schedule, list or statement of such legacies property or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interests, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon."

The balance of the section is confined to the remedy to be pursued in case of nonpayment of the tax or duty assessed. This section, as a whole, clearly makes it the duty of the executors in the first instance to file a schedule containing the names of each and every person entitled to any beneficiary interest in an estate, together with the clear value of such interest, and the amount of the duty or tax which has accrued or shall accrue thereon. If however, the executor or trustee neglects or refuses to do any of the acts he is required to do, or does them falsely, imperfectly, or incorrectly, the collector or deputy collector is thereupon required to make out such lists and valuations, and assess the duty thereon. A statement and schedule as required by the act was made in this case, and filed with the collector, and it was accompanied by an affidavit which set forth certain property and interests which it was claimed by the executors, were not subject to taxation. The schedule so furnished was not accepted by the Internal Revenue Commissioner, although there was no question raised, apparently, that it was not made in absolute good faith; indeed, the fact that matters which the executors disputed were included in a separate affidavit, thus making a full disclosure in the premises, is ample evidence of good faith. Furthermore, that there was merit in the contention of the executors, and that the same was not urged in a dilatory or captious spirit, is shown by the fact that subsequently their claim was in part allow-

ed, and a corresponding portion of the taxes paid by them refunded. The schedule and return as made and filed by the executors was subsequently and during the summer of 1903 made the subject of frequent discussion between the executors or their counsel, and the department at Washington, and this situation continued until some time in the fall of that year, when the assessment was finally made. It seems to me that the time when the assessment should have been made under the act, or when the tax became a lien, is relatively unimportant in this connection, and that the important consideration is rather the time when it was in fact made. It should be noted here that when the dispute first arose as to the correctness of the return made by the executors, the executors were directed to file a new return. The executors claimed there was no occasion to file a new return until the legal proposition in dispute had been settled. The Commissioner seems to have acquiesced in this to the extent at least of saying that the matter would be taken under advisement. As a matter of fact no new return was ever again required or filed, but the assessment as made by the Commissioner was made upon the schedule and affidavit originally filed by the executors. It plainly appears, also, that no assessment was made until some time after September 8, 1903. On September 2d the plaintiffs' counsel wrote to the Commissioner asking whether anything further by way of proof or brief was required, to which letter they added the statement that it was their understanding that no assessment had yet been made. To this letter of inquiry reply was made on the 8th day of the same month to the effect that no further information was desired, and that action would be taken on the matter in the near future. It is impossible to construe this correspondence as meaning otherwise than that at that time the department was possessed of all the information it desired, or that was necessary to make the assessment; that it had not yet been made, but that it would be made, or the making of it undertaken in the near future, and this construction, moreover, is borne out by the fact that nothing further transpired between the parties until the notice of the assessment of the tax was received, and a demand for its payment made October 28th following.

Recurring now to the fact that the life tenant, whose interest was thus assessed, had died on the 15th day of August preceding, and that both parties were ignorant of that fact when the assessment was made and paid, the question is presented whether such assessment was properly made by the use of life tables. Life tables at the best are uncertain and conjectural evidence. They are used because in many cases they afford the best if not the only means of ascertaining the probable duration of a life or lives. Counsel for the plaintiffs contend that their use is absolutely unwarranted in any case under this act, and cite in support of their position, among other cases, a dictum of the Circuit Court of Appeals of this district, in the case of Herold, Collector, v. John F. Shanley et al., executors (C. C. A.) 146 Fed. 20, but in the view I take of this case, it is unnecessary to decide that question, since they

were here used under circumstances which would have barred their use, even if the act had expressly permitted it. The event which through their use it was calculated would happen some 30 years or more in the future had already transpired. The life estate assessed was ended. Its duration was ascertained. The fact under investigation was determined. Under the circumstances, their use was neither necessary nor proper, and wrought error where absolute certainty otherwise existed. Nor do I perceive why ignorance of the fact that the life was ended excused or justified the assessment after the fact of the death was disclosed. This is not at all the case of an assessment of a life estate regularly made upon the basis of the tables and paid, and after such assessment and payment death ensued sooner than the time estimated by use of the tables. The defendant contends that the interest of the deceased in the estate was subject to the tax from the time of the death of the testator, and that whenever imposed the tax related back to that time. Nevertheless, the clear value of each interest had to be ascertained, and as the interest to be assessed in this case was a life interest, and its value depended upon the duration of a life such duration had to be determined, and it was just here that the mistake was made. It would hardly be pretended in reason, that if the life tenant had died the day after her father, that a tax, the amount of which had been thereafter determined by the use of mortality tables, would be legal even though it be admitted that such tax rightly imposed would relate back to the death of the parent. The duration of life in the case supposed, would have been determined and the value of the life interest ascertained by its known duration. Each interest liable to taxation must be valued independently. *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. As already said, life tables are not the best evidence or conclusive evidence, their use is only justified when no better evidence is obtainable. Cases somewhat similar to the one at bar, but arising previously thereto, were brought to the attention of the court by counsel, from which it appeared that the Commissioner of Internal Revenue had in such cases, granted like relief to that sought in this case. But when the facts in this case were brought to his attention for review, his reply was that the cases above referred to were either erroneous or had been overruled, presumably by himself.

The laws of the state of New York (chapter 360, p. 607, Laws 1860) provide that no person having a husband, wife, child or parent, shall by his or her will devise or bequeath to any benevolent, charitable, literary, etc., institution, more than one-half part of his or her estate. In order to determine whether more than one-half part of the estate had been devised contrary to the provisions of that act, it has frequently been necessary to ascertain the value of a life estate where it had not terminated, and the use of life tables in such cases has been permitted, but not, however, in cases where, by reason of death, the duration of the life estate has been actually fixed. In *re Stiles Estate* (Sur.) 3 N. Y. Supp. 137, the

court, in dealing with the value of the widow's dower right for the purpose mentioned, used this language:

"This should ordinarily be ascertained on the principle of life annuities. This method is resorted to where the time is not actually known, but in this case it appears that the widow lived 6.833 years; so we may adopt that as the number of years' purchase of her annual dower interest."

In *re Teed* (Sup.) 12 N. Y. Supp. 642, a life beneficiary under the will had died before the final distribution of the estate, and the court said (page 644):

"It was stated there [*Hollis v. Seminary*, 95 N. Y. 166] in the elaborate opinion of Judge Earle, that the calculation upon which the judgment rested, contained an element of uncertainty as to the duration of the lives of the persons having a life estate. * * * That was a case dealing in uncertainties, in the case before us there is no uncertainty, because the proceeding is for the final distribution of an estate after the death of an annuitant, the length of whose life is accurately known."

And it was further held, in substance, that the case of *Hollis v. Seminary*, in which the use of life tables was justified, applied only to cases where the life beneficiary was living.

In *re Grant's Estate* (Sup.) 28 N. Y. Supp. 203, the court said (page 204):

"To ascertain what the personal property was worth at the time of the death of the testator, the value of the life estate in it which succeeded his death must be measured. If it had not terminated when the division was sought, it would have been determined by a certain known method of measurement. This was well illustrated by Judge Earle, in *Hollis v. Seminary*, 95 N. Y. 166. But as the life estate has ended, there was no occasion to do more than to make it appear what in fact was its value."

These cases only declare what common sense dictates, that where a life estate has been terminated by death, there is not only no necessity for, but no propriety in, the use of life tables. The case of *Vanderbilt v. Eidman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession and enjoyment thereof. In the case at bar, the actual possession and enjoyment of the life tenant in her estate had ceased before the tax was imposed, and since it was only for the period of such actual possession and enjoyment that it was liable to taxation under the act, the amount it was taxed in excess thereof was clearly illegal.

The case presented is one of mutual mistake brought about by the ignorance of a controlling fact, and it seems to me that law and justice demand that the plaintiffs should be afforded relief. Suppose a life estate were apparently created by a will and the same was duly valued and taxed, and the tax paid by the executors, but later it was discovered that in fact no life estate ever existed for the reason that the supposed life tenant had predeceased the testator; surely, in such a case the executor would not be remediless; nor do I see how, in principle, it differs from the case at bar. Ignorance of fact is a well-recognized ground of relief in all such cases. When the life tenant died, the matter of the assessment was,

under the law, properly in the hands of the Commissioner; he was discharging a duty which the law imposed upon him, and the attendant delay was his, and not the plaintiffs. They paid the tax within a week after they were notified of the assessment. If the matter rested between individuals, the plaintiffs would undeniably have a claim to relief. The well-known principle applicable in such cases is clearly laid down in *United States v. Barlow*, 132 U. S. 271, 10 Sup. Ct. 77, 33 L. Ed. 346, where Mr. Justice Field, in delivering the opinion of the court says, page 281 of 132 U. S., page 80 of 10 Sup. Ct. (33 L. Ed. 346):

"It is familiar law that an action may be maintained to recover back money paid as the price of articles sold, or of work done, when the articles are not delivered or the work not done. The reason is that the consideration for the payment has failed. It is not perceived that the principle of law sought to be applied in this case is in any essential particular different. If the contract for extra allowance was void by reason of fraud or clear mistake, the action becomes simply one for the return of moneys paid for services of stock and carriers never rendered, but which when payment was made were believed to have been rendered. As in the case of goods not delivered, or work ordered not done, the consideration to the party paying has failed. As said by Baron Parke in *Kelly v. Solari*, 9 M. & W. 54, 58: 'Where money is paid to another under the influence of a mistake—that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue—an action will lie to recover it back, and it is against conscience to retain it.' See, also, *Townsend v. Crowdy*, 8 C. B. (N. S.) 477; *Strickland v. Turner*, 7 Exch. 208."

It has already been shown that payment made to a public official when made in ignorance of controlling facts, is not voluntary, hence, I see no reason why the principle declared in the above case should not be applicable to this. Payment was made involuntarily and under protest. The tax could have been legally assessed upon Mrs. Wertheim's interest only for the period she lived; for that period, however, it was liable to assessment, and it should be assessed upon the amount which she or her estate actually received. The evidence shows that Mrs. Wertheim, or her estate since her death, received upon her legacy the sum of \$491,432.17; she also received under the will, a legacy of furniture valued at \$5,000. To the sum of these items should be added \$42,081.91, which was the amount of tax paid by the executors, and deducted from Mrs. Wertheim's legacy, thus making the total value of the legacy to Mrs. Wertheim \$538,514.08. The rate fixed by the act upon that amount is \$1.87½ per \$100, and the total amount of tax for which her interest in the estate was liable, therefore, is \$10,097.14. This result is obtained upon the theory that the tax in issue was deducted by the executors from Mrs. Wertheim's interest in the residuary estate as required by law, and is, therefore, now to be considered as a part of the same in establishing its clear value. Deducting from \$42,081.91 the amount paid by the executors, the sum of \$10,097.14 the amount of the tax for the payment of which her interest was taxable, leaves \$31,984.77, for which sum, with interest from November 4, 1903, a verdict is given for the plaintiffs. The foregoing figures are, however, subject to adjustment and correction by counsel.

THE CONVEYOR.

(District Court, D. Indiana. September 26, 1906.)

No. 475.

1. MARITIME LIENS—CLAIMS FOR WAGES OR SUPPLIES—PRIORITY OVER MORTGAGES.

Liens on a vessel for seamen's wages or supplies, given by the maritime law, or by state laws, have priority over mortgages.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 62.

Maritime Liens, *The George Dumois*, 15 C. C. A. 679; *The Nebraska*, 17 C. C. A. 102; *The Electron*, 21 C. C. A. 21.]

2. ADMIRALTY—JURISDICTION TO ADMINISTER FUND.

Although a court of admiralty has not jurisdiction to foreclose mortgages on vessels, when it has a fund to dispose of, it may entertain claims based on mortgages, and its jurisdiction to administer a fund applicable, in whole or in part, to the payment of maritime liens, being exclusive, is not affected by the fact that mortgagees may also have claims against the same fund or by the pendency of foreclosure suits brought by them in a state court.

3. SAME—INSURANCE MONEY—AGREEMENT BETWEEN LIEN CLAIMANTS.

A vessel insured under a policy payable to the owners was sunk; the insurance was adjusted, and the money paid to a custodian under an agreement between the owners, various lien claimants, and certain mortgagees that it should be applied (1) to pay for the raising of the boat; (2) to the payment of all maritime, labor, and supply liens against it; (3) to the repair of said boat; and (4) the remainder to be paid to the mortgagees. The boat was raised, but was not repaired, and was sold in admiralty proceedings by the lien claimants. *Held*, that the contract under which the insurance money was held was maritime, and the fund subject to administration by the admiralty court, unaffected by the fact that the contract was not fully executed, and that under its terms the seamen and supply claimants were entitled to payment from the fund, leaving the mortgagees to resort to the proceeds of the vessel for any deficiency on their claims.

4. SEAMEN—LIEN FOR WAGES—INSURANCE MONEY.

Seamen having liens for wages on a vessel which was sunk are entitled to enforce the same against insurance money paid on account of the loss to the owners or their assignees, subject only to claims for salvage services in raising and preserving the vessel, where the proceeds of the vessel when sold are insufficient to pay the same.

In Admiralty. Heard on exceptions of Seraph Semonin, Farmers' National Bank of Uniontown, Ky., and Levi Englebright and Elizabeth Jenkins, to the supplemental and amended libels, and the several supplemental and amended intervening libels.

Iglehart & Taylor, for libellant.

Posey & Chappell and Andrew J. Clark, for claimants.

ANDERSON, District Judge. The question raised by the exceptions of the respondents Semonin, Farmers' Bank of Uniontown, Ky., and Englebright & Jenkins is whether, under the facts alleged in the supplemental and amended libel of Wallace, and the amended and supplemental intervening claims of various seamen and materialmen for wages and supplies, the \$2,000 proceeds of an insurance policy on

the steamboat now in the custody of the respondent Clark, should be applied by this court to the payment of the balance due on the claims for labor and supplies, after exhausting the fund in the registry of the court derived from the sale of the boat.

After setting up facts establishing the claim for wages, the libel alleges in substance that the steamboat Conveyor was an American vessel whose home port was Evansville, engaged in navigating the Ohio and Green rivers; that the boat was owned by the respondents Semonin and Ott; that prior to the filing of the libel the boat was sunk on the waters of the Kentucky shore of the Ohio river nearly opposite Evansville; that the boat was insured against perils of the river in a solvent insurance company for \$4,500, and the loss upon said boat, exclusive of the value of the wreck, was adjusted at the sum of \$2,000, which sum was paid by the insurance company to the owners of the boat, Semonin and Ott, who thereupon paid the same to the respondent Andrew J. Clark, pursuant to the terms of an agreement hereinafter referred to. At the time the wreck occurred, the respondents Englebright & Jenkins held a mortgage on the boat for the sum of about \$800; and the respondent Farmers' Bank of Uniontown, Kentucky, held a mortgage on said boat for the sum of \$1,500; each of said mortgages contained a printed covenant on the part of the owners of the boat that they would insure said boat in a solvent insurance company to be selected and approved by the mortgagee; the policy was made payable to the owners of the boat, and had never been assigned to either of the mortgagees, but at the time the wreck occurred the policy was in the possession of the respondent Farmers' Bank of Uniontown, Ky., who claimed to hold the same as collateral for its loan. It is then alleged that at the time the wreck occurred a controversy arose between the claimants, the mortgagees, and the owners of the boat as to how the insurance money ought to be paid, held and applied; that upon a conference between all the parties in interest it was believed that the wreck of said boat could be raised and economically repaired and its debts paid; that for the purpose of making an effort to raise said boat and repair the same, and to discharge the admiralty liens, and liens for wages, labor, and supplies done and furnished to said boat, as the same are set out in the libel and intervening libels—

"It was then and there agreed by and between the holders of both of said mortgages and said owners of said boat, and the holders of said liens against said vessel, that whatever steps were necessary to be done should be done to procure the payment of the amount of said policy, as the same was or should be finally adjusted and agreed upon, and that when the check issued and paid by the said insurance company upon said loss, * * * should be delivered, the same should be cashed and delivered to and placed in the hands of the respondent Andrew J. Clark, who should hold the same for the uses and purposes following, to wit:

"First, to pay the expenses of raising said boat, which were then estimated at \$400, which was in fact the expense subsequently incurred for the raising of said boat; second, to pay all of said maritime, labor and supply liens against said boat; third, to repair said boat; and, fourth, the balance remaining, after the payment of the items hereinbefore set out, should be delivered to the said mortgagees."

It is then alleged that pursuant to said agreement the \$2,000 insurance money was paid to the owners Semonin and Ott who delivered same to the respondent Clark; that one Robert Hornbrook was employed by the respondent Clark to raise the boat for the agreed price of \$400; that the boat was raised by said Hornbrook and brought into the port of Evansville, and thereafter the libel and the intervening claims were filed. It is also alleged that at the time of the filing of the libel by Wallace, suit was pending in the superior court of Vanderburgh county by Englebright & Jenkins for the foreclosure of their mortgage and the respondents Semonin and Ott and Andrew J. Clark were made defendants; that the Farmers' Bank of Uniontown, Ky., intervened in said suit, each of said mortgages claiming that it is entitled to the fund in the hands of said Clark; that said suit is still pending. On November 15, 1905, the libelant filed his petition for the sale of said boat, the terms of which were consented to by the owners of the boat, Semonin and Ott, and by the respondents Clark and Farmers' Bank of Uniontown, Ky., and thereupon an interlocutory order of sale was made by the court, and J. W. Wartmann was appointed special master to make said sale. Among other terms and conditions of said order of sale was the following:

"That said steamboat Conveyor, her tackle, apparel, and furniture, and machinery, be sold * * * for cash for not less than \$500, exclusive of any liens on said boat for the raising of her to be ascertained by the master. * * * Said property shall be sold discharged from all liens which shall be transferred to the fund arising from such sale and this order shall be without prejudice to the right of libelant, or any intervening libelant, to assert in this proceeding any claim to the insurance money alleged in the libel to be in the custody of the defendant, Andrew J. Clark."

In compliance with said order of sale, and after due notice, the boat was sold by the special master to Robert Hornbrook for the sum of \$900 cash; and, on December 19, 1905, the master filed his report of sale, which was duly approved by the court. The report of sale contains among other things, the following:

"That said property sold for \$900 which amount was a compliance with the order of sale aforesaid, which required said property to bring not less than \$500, exclusive of costs of raising said boat to be ascertained by the master. That I ascertained and fixed the cost of such raising in the sum of \$400 which was made under an agreement between A. J. Clark and Robert Hornbrook, and thereupon the said sum of \$900 was paid to me in cash, and I issued a certificate of purchase to the said Robert Hornbrook, as purchaser, for said sum, subject to the approval of this court, and in said certificate of purchase stated that the said cost of raising said vessel, \$400 should be protected out of the proceeds of said sale, but without prejudice to the right of the libelant in said cause to claim that said cost of raising said boat should be paid out of the insurance money in the hands of A. J. Clark. Any controversy in relation thereto to be determined by this court."

It is then alleged in the supplemental and amended libel that, after the sale of said boat, and after the payment of the \$900 proceeds into the registry of the court, "by inadvertance, and without any knowledge on the part of said libelant, or his counsel, the said sum of \$400 has been paid to the said Robert Hornbrook out of the proceeds of the sale of said vessel" instead of requiring him to wait until

the question whether the sum should be paid out of the insurance money was determined by this court. The supplemental and amended libel contains the prayer, among other things, that the respondent Andrew J. Clark may be required to pay the said insurance money into the registry of this court, and that the claims of all liens set out in the libels and intervening libels be declared to be prior to the claim of the said several mortgages, in and to the said insurance money, etc. The claims for wages aggregate \$536.24; for supplies and materials furnished, \$674.96; and the claim of Robert Hornbrook for raising the boat, \$400; and for caretaking etc., up to the time of the sale, \$130.50; making the grand total of all claims filed, \$1,741.70.

It is contended by the libelant that under the facts pleaded the \$2,000 insurance money, by agreement of the parties in interest, stands in lieu of the boat to the extent of being liable for the payment in full of the balance due on the claims for labor, supplies and raising the boat, after applying thereto the \$900 realized from the sale of the wreck. On the other hand it is claimed by the respondents that the agreement was not executed, since it was found impracticable to repair the boat, and that, therefore, the claim of Hornbrook in the sum of \$400 for raising the boat was rightfully paid from the proceeds of sale as a salvage claim prior in equity to the liens of the seamen and materialmen for wages and supplies; that the admiralty court has no jurisdiction to foreclose mortgages, therefore it is without jurisdiction to administer the fund of \$2,000 insurance money since the policy was under the terms of the two mortgages issued for the exclusive benefit of the mortgagees and owners; and that the suit pending in the superior court of Vanderburgh county, to which the respondent Clark is a defendant, is a complete bar to any proceedings in admiralty seeking to subject the insurance money to the payment of maritime liens.

It is well settled that liens on a vessel under maritime or state laws have priority over mortgages. *The Josephine Spangler* (D. C.) 9 Fed. 773; *The Guiding Star* (D. C.) 9 Fed. 521; *The Canada* (D. C.) 7 Fed. 730. The maritime law gives priority to claims for supplies furnished in a foreign port, and for seamen's wages. The law of Indiana, enforceable in admiralty, makes seamen's wages and supplies furnished in ports of the state prior in equity to the lien of the mortgages. 2 Burns' Rev. St. 1901, §§ 7239-7241. Though a court of admiralty has not jurisdiction to foreclose mortgages on vessels (*Bogart v. The John Jay*, 17 How. 402, 15 L. Ed. 95), yet, when it has a fund to dispose of it may entertain claims based on mortgages (*The Katie O'Neil* [D. C.] 65 Fed. 111; *Black Diamond Coal Co. v. O'Neil* [D. C.] *Id.*). If, therefore, jurisdiction in admiralty to administer the insurance money exists in this cause, it is not affected by the fact that the mortgagees may also have claims against the same fund. Nor is the jurisdiction ousted because of the commencement of the suit in the superior court of Vanderburgh county, for the jurisdiction of the admiralty court to enforce maritime liens against boats is exclusive. *Ballard v. Wiltshire*, 28 Ind. 341. The

policy of insurance was payable to the owners Semonin and Ott, who were liable in personam as well as in rem to claims for seamen's wages. The insurance company refused to pay the mortgagees, and paid the owners on surrender of the policy. The amount of the policy was \$4,500. The amount paid, \$2,000, represented an adjustment based upon the difference between a total loss and the value of the vessel when raised. The owners placed the money in the hands of Clark under an express agreement (1) that at least \$400 thereof should be expended in raising the vessel; (2) that the liens for wages and supplies should be paid; (3) that the boat should be repaired; (4) that the remainder should be paid to the mortgagees. The libelants were parties to this agreement. Jurisdiction to reach the \$2,000 proceeds of the insurance policy in the hands of the respondent Clark, placed with him pursuant to the agreement pleaded, depends upon the determination of the questions: (1) Whether the agreement under which the money was placed in the custody of Clark, and providing for the disposition thereof, was a maritime contract; and (2) whether the libelants have any interest in the fund by virtue of that contract and their liens.

1. Whether a contract is maritime or not depends, not on the place where the contract was made, but on the subject-matter of the contract. *New England Mar. Ins. Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90. A contract which stipulates with the libelants that "their charge for attending to the carrying out of docking, with crew's assistance, raising steamer, clearing and keeping dock clear of water to an extent necessary for working at the shaft while she is undergoing repairs, covering, releasing, rent, and all expenses that may be incurred in carrying out of such repairs, to be \$2,500," to be paid on the satisfactory termination of the contract, is purely maritime concerning which admiralty has jurisdiction. *The Vidal Sala* (D. C.) 12 Fed. 207. See, also, *Coast Wrecking Co. v. Phoenix Ins. Co.* (C. C.) 13 Fed. 127; *Id.* (D. C.) 7 Fed. 236; *DeLeon v. Leitch* (D. C.) 65 Fed. 1002; *The Iris*, 100 Fed. 104, 40 C. C. A. 301. The fact that such an agreement was not fully executed, but remains executory, does not affect the admiralty jurisdiction. *Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526; *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90. Upon the foregoing authorities, it is plain that the agreement pleaded, being for the raising of the vessel, the payment of maritime liens for labor and supplies, the repair of the vessel—all to be paid out of the proceeds of the insurance policy, and the remainder to be paid to the mortgagees, constituted a maritime contract.

2. Have the libelants any interest in the fund which will authorize the admiralty court upon a libel in rem to require the money to be paid into the registry for distribution to the libelants upon their claims? It is obvious that even if no step had been taken in execution of the contract the admiralty court would have jurisdiction of a libel against the owners, the mortgagees and the respondent Clark for breach of the maritime contract in question. See, *Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526. It is held in *The City of*

Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134, 493, in a collision case where limitation of liability was asserted by the owners of the offending vessel under section 4283, U. S. Rev. St. [U. S. Comp. St. 1901, p. 2943] that the proceeds of an insurance policy on a vessel constitute no part of the owner's interest in the vessel. Section 4283, however, is a statutory abridgment of the liability of shipowners, and applies only to the classes of claims therein enumerated. The language of the section is as follows:

"Section 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Act June 26, 1884, c. 121, § 18, 23 Stat. 57 [U. S. Comp. St. 1901, following section 4289, p. 2945], provides as follows:

"That the individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending. Provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

No case has been called to the attention of the court construing the language of the act of June 26, 1884. It is held in *The City of Norwich*, supra, that insurance money is not part of an owner's "interest" in the vessel. There is a well reasoned dissenting opinion by four of the justices. The doctrine, however, has never been applied to a lien for wages, concerning which Justice Story said in *Brown v. Lull*, Fed. Cas. No. 2,018:

"The wages of seamen attach as a lien to the ship and freight, and their proceeds, into whosoever hands they may come, as a claim or privilege, having a priority to be satisfied before all other claims. As it has been sometimes expressively said, they are nailed to the last plank of the ship. The ship is a pledge for the payment, while a single fragment remains of the wreck or its proceeds."

It must be remembered that the insurance was by the terms of the policy payable to the owners Semonin and Ott. The policy was not assigned. In so far as it can be deemed to be collateral to the mortgage loans, the mortgagees' interest in the amount paid on the policies to the owner of the boat would be subject to prior equities of the claims for wages and supplies if the insurance money can be held to be "proceeds of the wreck."

In *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269, a libel was filed for seamen's wages in the year 1810. The ship had been seized by the Spanish government off the coast of Chili and condemned as a prize. The owners became insolvent and assigned their claims against the Spanish government to various creditors. The value of the ship, cargo and freight was paid under the Florida treaty by Spain to the

assignees of the owners. Thereupon, as the case is stated by the court (page 708 of 5 Pet. [8 L. Ed. 269]):

"In December, 1825, the libelants filed a new libel, by way of petition, against the owners, and against their assignees, setting forth their grievances in a more aggravated form; and alleging the award and receipt of the proceeds by the assignees, and the promises of the owners to indemnify and pay them out of the proceeds, whenever recovered, to the full amount of their wages; and accounting for their not having proceeded to a decree in personam against the owners, except so far as to have a docket entry in June 1822 of a decree 'on terms to be filed' (which was afterwards rescinded), solely upon the faith of those promises; and praying process against the owners and also against the assignees, to pay them the amount out of the proceeds in their hands. Answers were duly filed by the owners and the assignees; the former asserting that they had parted with all their interest in the funds; and the latter asserting their exclusive title to the same, under the assignments, and denying any knowledge of any agreement of the owners in respect to the claim of wages, or of the other matters stated in the petition."

It was held that the fund in the hands of the assignees was liable for the full amount of the claims, with interest and costs. In the course of the opinion, it is said by Mr. Justice Story (page 710 of 5 Pet. [8 L. Ed. 269]):

"In our opinion there is no difference between the case of a restitution in specie of the ship itself, and a restitution in value; the lien reattaches to the thing and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of common law and equity. The owner and the lien holder, whose claims have been wrongfully displaced, may follow the proceeds, wherever they may distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them. * * * Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction, in rem as well as in personam; and wherever the lien for wages exists, and attaches upon the proceeds, it is the familiar practice of that court, to exert its jurisdiction over them, by way of monition to the parties holding the proceeds. This is familiarly known in the cases of prize, and bottomry, and salvage; and is equally applicable in the case of wages."

In *Brown v. Lull*, Fed. Cas. No. 2,018, a neutral ship was captured and afterwards the ship's value was paid under treaty, partly to the owners, and partly to the underwriters. On a libel for seamen's wages, the owners contended that, as they were not paid the full value of the ship under the treaty, the seamen's claims should be collected from the underwriters who received a moiety of the ship's proceeds. In disposing of this contention, Justice Story said:

"Suppose the testator [owner] had assigned his whole interest in the ship and freight, instead of a partial interest, for a valuable consideration; could it be for a moment admitted, that he could thereby change his own responsibility to the seamen, or turn them over for their compensation to mere strangers? Certainly not. It is quite a different question, whether they might not proceed upon their implied trust or lien against the proceeds, in whosoever hands they could find them. But the shipowner, by his own voluntary act of cession, cannot discharge himself from his original liability under his contract; for the value of the ship and freight, to whomsoever paid, must be deemed a payment by his consent and for his benefit."

See, also, *Vandever v. Tilghman*, Fed. Cas. No. 16,846.

It follows, upon the authority of the foregoing cases, that independently of the agreement pleaded, the seamen who have filed claims

for their wages are entitled to resort to the insurance money in the hands of the respondent Clark, for the full payment of their claims with interest and costs. A salvage service, in raising and preserving a sunken steamboat, has a priority of lien over claims for wages earned and supplies furnished before the accident. *Collins v. The Fort Wayne*, Fed. Cas. No. 3,012; *The Lady Boone* (D. C.) 21 Fed. 733. The agreed price for raising the boat was \$400. The claim of Hornbrook for care taking to time of sale is \$130.50. The claims for wages, exclusive of interest and costs, aggregate \$536.24. The boat sold for \$900. Thus it is seen that there is a deficit of nearly \$200, which, independently of any agreement of the nature pleaded, gives the court jurisdiction to cause the insurance money as a part of the proceeds of the wreck, to respond to claims for seamen's wages, salvage, and costs. In addition to the foregoing aggregate, there have been filed claims for supplies amounting to \$674.96. In view of the agreement pleaded in the libel, have these claimants the right to resort to the insurance money for the payment of their claims?

The claimants for supplies were parties to the agreement. They held liens prior in equity to the lien of the mortgage. *The Josephine Spangler* (D. C.) 9 Fed. 773; *The Guiding Star* (D. C.) 9 Fed. 521; *The Canada* (D. C.) 7 Fed. 730. The policy of insurance was, as we have seen, payable to the owners, and was not assigned to either mortgagee. In the absence of any assertion of a claim to a limitation of liability on the part of the owners, there would be no question of the right of the materialmen to pursue the fund in the hands of the owners by libel in case the wreck had been abandoned or no attempt made to raise the vessel. But at that time it appeared possible to raise and repair the vessel; and all parties consented to an adjustment with the insurance company by payment of \$2,000 upon a \$4,500 policy upon the express condition that \$400 should be expended out of the proceeds for the cost of raising the boat; that all liens for labor and supplies should be paid; and that the boat should be repaired before Clark should pay any part of the insurance money to the mortgagees. It is the opinion of the court that this agreement contained ample consideration to support it on the part of the materialmen, who in common with the seamen, were thereby induced to forego any action in personam against the owners of the boat in the event the wreck should be abandoned or no attempt made to raise her. Having raised the boat under the agreement in question, it is not perceived why the contract should not have been performed to the extent possible under its terms, so far as the lienholders are concerned. There is nothing in the agreement pleaded giving the mortgagees priority as to their claims over the materialmen, nor is there any part of the contract which requires the materialmen, the seamen, or the salvor to bear any part of the loss in the event the agreement could not be carried out in full. On the contrary, the agreement is express that the claims of the materialmen, as well as the seamen and salvor shall be paid from the insurance, leaving the body of the boat when raised responsive to any deficit in the claims of the mortgagees.

In the case of *The Queen of the Pacific* (D. C.) 18 Fed. 700, a
147 F.—38

ship and cargo being in peril were saved after considerable of the cargo was jettisoned. The salvors allowed the boat to proceed to its destination, where the master delivered the cargo to the consignees without contribution for salvage or jettison, but on deposit by each consignee of a sum of money equal to 20 per cent. of the value of the cargo delivered "to cover general average," and the execution of a bond for the payment of his proportion of the "losses and expenses" consequent upon such peril. In a suit against the ship and cargo for salvage, it was held that the libelants might elect to treat such deposit as so far a substitute for the cargo delivered and require the agent of the vessel, under admiralty rule 38, to bring the same into court to answer the exigency of such suit. The materialmen and seamen in the libel now under consideration have elected to treat the insurance money placed in the hands of the respondent Clark as a substitute for the body of the boat; and, in the opinion of the court, the agreement in question warrants such substitution on principle and upon the authority of *The Queen of the Pacific*, *supra*.

Rule 38 of the admiralty rules, is as follows:

"In cases of mariners' wages or bottomry, or salvage, or other proceedings in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause is shown, the court may order the same to be brought into court to answer the exigency of the suit; and upon failure of the party to comply with the order may award an attachment, or other compulsory process, to compel obedience thereto."

The libel prays for appropriate relief in accordance with the provision of rule 38.

It follows that the exceptions of the respondents to the several libels should be overruled, and it is so ordered.

UNITED STATES v. GIULIANI.

(District Court, D. Delaware. May 15, 1906.)

No. 1.

1. ALIENS—IMPORTATION OF WOMEN FOR PURPOSES OF PROSTITUTION—ELEMENTS OF OFFENSE.

To warrant the conviction of a defendant charged with a violation of Act March 3, 1903, c. 1012, 32 Stat. 1214 [U. S. Comp. St. Supp. 1905, p. 276], which provides that "the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden, and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony," where the charge is that of holding a woman so imported by defendant and another for the purposes of prostitution, it must be shown that defendant, either alone or in connection with such other, knowingly and willfully imported, or caused to be imported, such woman for the purposes of prostitution, and thereafter, to effect the object of such illegal importation, knowingly and will-

fully held such woman for such purposes. It is not necessary that defendant should have detained such woman by physical force, but it is sufficient to constitute a holding within the meaning of the statute if such woman was detained for the purpose of prostitution by physical means applied to her either directly or indirectly by defendant, or by threats, express or implied, directly or indirectly made to her by defendant, or by commands made to her directly or indirectly by defendant and calculated and operating to restrain her freedom of action and will. To warrant a conviction for attempting to hold the same proof is required, except that it is not necessary that the means used should have been successful.

2. CRIMINAL LAW—EVIDENCE—EFFECT OF TESTIMONY OF ACCOMPLICE.

While the degree of credit to be given to the testimony of an accomplice in a criminal case is a matter within the exclusive province of the jury, who may as matter of law convict on such testimony alone, yet to warrant a conviction such testimony should usually be corroborated in some material part, although the corroboration need not extend to all matters testified to by the accomplice, and the jury should also consider whether he has been successfully contradicted with respect to any material portion of his testimony.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1124, 1128.]

John P. Nields, U. S. Dist. Atty.
Leonard E. Wales, for defendant.

BRADFORD, District Judge (charging jury). The indictment in this case charges Lucia Giuliani alias Lucia Marasso, the defendant, with violating the provisions of section 3 of the act of Congress of March 3, 1903, c. 1012, 32 Stat. 1214 [U. S. Comp. St. Supp. 1905, p. 276], entitled "An Act to regulate the immigration of aliens into the United States." That section provides that "the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden, and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof," shall be punished as therein provided. The indictment as found by the grand jury originally contained three counts. The first count has been abandoned by the government and there are, therefore, only the second and third counts for your consideration. The second count charges, in substance, that the defendant and one Gesuele De Loreto having on or about the fourteenth day of December, 1905, illegally imported into the port of New York in the state of New York on the steamship Prinz Adalbert from the city of Naples in the Kingdom of Italy a woman of the name of Rosa Caliendo alias Rosa Caliento for the purposes of prostitution, the defendant, in pursuance of such illegal importation did on December 14, 1905, and thereafter on divers other days until January 19, 1906, in the district of Delaware, feloniously hold the said Rosa Caliendo at and in the premises Nos. 216 and 218 East Second Street, in this city, for the purposes of prostitution. The third count is in all respects similar to the second, except that, instead of charging that the defendant feloniously held

Rosa Caliendo for the purposes of prostitution, it charges that the defendant feloniously attempted to hold her for such purposes. To warrant a verdict of guilty on both or either of the counts remaining open for your consideration all the essential ingredients or elements of criminality as therein charged must be established by the evidence beyond a reasonable doubt as hereinafter defined. To justify a conviction of the defendant on the second count you must be so satisfied that the defendant either in co-operation with Gesuele De Loreto or by herself knowingly and wilfully imported or caused to be imported Rosa Caliendo from Naples to the port of New York by the steamship Prinz Adalbert for the purposes of prostitution; and that thereafter the defendant knowingly and wilfully and in pursuance of and to effect the object of such illegal importation held Rosa Caliendo on some day or days between December 14, 1905, and January 19, 1906, both inclusive, at the above-mentioned premises in this city for the purposes of prostitution. To justify a conviction of the defendant on the third count you must be satisfied that the defendant either in co-operation with Gesuele De Loreto or by herself knowingly and wilfully imported or caused to be imported Rosa Caliendo in the manner and for the purposes above set forth; and that thereafter the defendant knowingly and wilfully attempted, at some time or times within the above mentioned period at the above mentioned premises in this city, to hold Rosa Caliendo for the purposes of prostitution. If Rosa Caliendo solely in the exercise of her free and unconstrained will remained during the whole of the above mentioned period at the premises in question for the purposes of prostitution, although at the invitation of or by reason of alluring promises made by the defendant, the defendant did not hold Rosa Caliendo for the purposes of prostitution as charged in the second count, and your verdict in that case should be not guilty as to the second count. But to constitute a holding of Rosa Caliendo for the purposes of prostitution as charged in the second count, it is not necessary that the defendant should have detained her by physical force, as, for instance, by chaining her or forcibly confining her or placing her under lock and key at the premises in question, or by placing a guard over her to restrain or control her bodily freedom or power of locomotion in order to compel her to submit herself to prostitution. It is sufficient to constitute a holding in the meaning of the statute that Rosa Caliendo should have been detained by the defendant at the premises in question for the purposes of prostitution either by physical means, directly or indirectly applied to her by the defendant, or by threats, express or implied, directly or indirectly made to her by the defendant or by command or commands made to her directly or indirectly by the defendant, and calculated and operating to restrain her freedom of action and will. To constitute an attempt by the defendant at the premises in question to hold Rosa Caliendo for the purposes of prostitution, as charged in the third count, it is necessary that the defendant should have endeavored or made an effort, though ineffectual, by means designed and to a greater or less extent calculated to effect the object; to hold her for the purposes of prostitution in the sense of

the term hold as above defined, with an intent on the part of the defendant at the time of so endeavoring or making effort to hold her for the purposes of prostitution. It is not necessary to a conviction under the third count that the attempt to hold should be successful. The statute denounces an attempt to hold equally with a holding. An attempt to hold for the purposes of prostitution may be made, as in the case of a holding for such purposes, by physical force, threats or commands, or by other means designed and calculated to restrain freedom of action and will. If the defendant made an attempt to hold Rosa Caliendo for the purposes of prostitution, as charged in the third count, she should be convicted if the other elements of criminality therein charged have been established to your satisfaction.

There are certain principles of law for your guidance in your deliberations to which it is now the duty of the court to direct your attention. There is a conclusive presumption of law founded on the clearest principles of public policy that persons of sound and mature mind have knowledge of the criminal laws of the government under which they live and are responsible for their violation; and the law presumes, in the absence of evidence to the contrary, that all persons are of sound mind. The law presumes that persons charged with crime are innocent until they are proved by competent evidence to be guilty. This presumption is evidence in favor of the defendant and stands as her sufficient protection unless it has been overcome by the evidence in the case, taken as a whole, proving her guilt beyond a reasonable doubt. To justify a verdict of guilty, the evidence in the case as a whole must be such as to exclude every reasonable hypothesis but that of the guilt of the defendant as charged in both or either of the counts of the indictment remaining open for your consideration; and from this it, of course, follows that if the jury find that all the evidence in the case when taken together is as compatible with the theory of innocence as with the theory of guilt there should be an acquittal. The commission of a criminal offense can be proved by circumstantial evidence as well as by direct evidence, provided the circumstances proved, together with all reasonable inferences drawn from them, are such as to leave no reasonable doubt in the minds of the jury that the defendant is guilty. You are to take into consideration all the evidence in this case, both direct and circumstantial, documentary and oral, together with all reasonable inferences to be drawn from that evidence, in arriving at a conclusion. A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. It is not a whimsical, arbitrary or purely speculative doubt, nor a mere conjecture or guess. If after an impartial comparison and consideration of the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt, but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have a fixed conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt, and in

that case should find a verdict of guilty. Absolute certainty is not required for such a verdict. Proof beyond a reasonable doubt as above defined is sufficient.

The law permits the defendant at her own request to testify in her own behalf. The defendant here has availed herself of this right. Her testimony is before you and you must determine how far it is credible. The deep personal interest which she has in the result of this case should be considered by you in weighing her evidence and in determining how far or to what extent, if at all, it is worthy of credit. In considering the credibility of or weight which you should attach to the testimony of the defendant, you should regard, among other things, the inherent probability or improbability of her statements, and to what extent she has been corroborated or contradicted by other evidence in the case whether documentary or oral. Where a witness has a direct personal interest in the result of a case, especially of a criminal case, the temptation is strong to color, pervert or withhold the facts.

Gesuele De Loreto appears from his testimony to have co-operated with the defendant in the alleged illegal holding of Rosa Caliendo for the purposes of prostitution as well as in the importation of Rosa Caliendo from Naples to the United States. He should, therefore, be treated as an accomplice so far as his credibility as a witness is concerned. While the testimony of an accomplice should always be received with caution and weighed and scrutinized with great care by the jury, the accomplice is nevertheless a competent witness, and the degree of credit which should be given to the testimony of an accomplice is a matter exclusively within the province of the jury. While the jury as a matter of law may convict a person accused of a grave crime upon the uncorroborated testimony of an accomplice, it is, however, usual for the court to advise the jury against a conviction unless the testimony of the accomplice has been corroborated by competent evidence in some material part. The corroboration need not extend to all matters testified to by the accomplice, but it being shown that the accomplice has testified truly in some material parts it may be inferred by the jury that he has in others. In this case you are to determine upon the evidence, documentary as well as oral, whether Gesuele De Loreto has or has not been corroborated with respect to material parts of his testimony by the documentary evidence and the testimony of a number of witnesses, including Rosa Caliendo, Pasquale Frallicciardi and also several others who testified they were frequenters of the premises in question and had heard certain statements or declarations made by the defendant, which you will doubtless recall. You are also to determine whether or not Gesuele De Loreto has been successfully contradicted with respect to any material portion of his testimony. And, of course, if you believe that Pasquale Frallicciardi was also an accomplice the above remarks would apply to him. I may further add that if the testimony of Rosa Caliendo and Pasquale Frallicciardi stood wholly uncorroborated, directly or circumstantially, this court would deem it its duty to advise the

jury not to convict the defendant upon their uncorroborated testimony, in view of their admittedly false statements in their examination at the preliminary hearing before the commissioner; but unquestionably there is evidence in this case tending to corroborate the truthfulness of their testimony before you, and the weight of that corroborative evidence is for you as reasonable men, and not for the court, to determine.

In a criminal prosecution where the oral testimony is more or less conflicting and especially in a case like this where two of the witnesses for the government in their examination at the preliminary hearing before the commissioner made statements varying on material points from their testimony given before you, it is of much importance for the purpose of enabling you to determine whether greater weight should or should not be given to their evidence before the commissioner than to their testimony before you, that you should take into consideration those facts which are admitted or established by uncontradicted evidence, together with all reasonable inferences or deductions therefrom, and that in the light of such facts and inferences and of the documentary evidence before you, you should weigh the probability or improbability of the truthfulness of the oral testimony submitted to you, in order to reach a result satisfactory to your minds. By such a process you will be the better enabled, not only to determine whether the evidence of the two witnesses given before you is or is not entitled to greater credence than that given by them before the commissioner, but also to reach a just verdict. And you will give to their explanation before you of such discrepancy such weight as you shall consider it entitled to.

I shall now advert to some of the evidence, at the same time reminding you that what I shall say with respect to it is not in the least binding upon you; and that there is not the slightest intention on the part of the court to usurp your function as a jury to pass upon the facts, but only to assist you in reaching a just conclusion. It is admitted by the defendant that she has for many years and in different places kept establishments in which prostitution has been practiced. There is uncontradicted evidence to the effect that Rosa Caliendo for years before her importation into the United States was a common prostitute in Italy, and that she was imported on the steamship Prinz Adalbert from Naples to the port of New York, arriving at the latter place December 14, 1905. It further appears from the uncontradicted evidence that the defendant went from Wilmington to New York a day or two prior to the arrival of the steamship in order to receive Rosa Caliendo; that upon the arrival of the steamship the defendant conducted or accompanied Rosa Caliendo to the premises of the defendant in this city. There is further uncontradicted evidence that a passage ticket was procured and paid for in this city for the transportation of Rosa Caliendo, although there is a conflict in the evidence on whose account such importation was had. It further appears from uncontradicted evidence, including that of the defendant, that within two days after

her arrival at the premises of the defendant Rosa Caliendo indulged in common prostitution on those premises and paid to the defendant as the result of her illicit or carnal intercourse during a period of ten days a sum of money approximating \$100, and that thereafter and until the 19th day of January, 1906, she also paid to the defendant periodically as the result of her continued illicit intercourse further sums of money to a considerable amount, which you will recall; and further, that the defendant retained one-half of all the moneys so turned over to her by Rosa Caliendo as her share. Under these circumstances and on the question whether or not the defendant either by herself or in co-operation with Gesuele De Loreto imported or caused the importation of Rosa Caliendo into the United States for the purposes of prostitution, it is material to consider the probability or improbability of the contention by the defendant that Gesuele De Loreto and Pasquale Frallicciardi procured the importation of Rosa Caliendo for their own purposes, and not she, the defendant, for the purposes of prostitution. Who first conceived the idea of bringing Rosa Caliendo to the United States? On this question, and wholly aside from the oral testimony, you will doubtless recall the letter of August 17, 1905, admittedly written by the defendant to Pasquale Frallicciardi. Does or does not this letter tend to corroborate and support the testimony of witnesses on behalf of the government as to declarations alleged by them to have been made by the defendant in the fall of 1905, as to the coming of a girl from Naples to her premises for the purposes of prostitution? To whom was it of greater interest that Rosa Caliendo should be imported to this country, in view of what subsequently transpired on the defendant's premises with respect to gains from illicit intercourse? I shall not undertake further to review and analyze the documentary and oral evidence bearing on the question of the importation of Rosa Caliendo for the purposes of prostitution. It is wholly unnecessary as the evidence has been recently delivered and doubtless is fresh in your recollection. If you should conclude that the defendant, either by herself or in co-operation with Gesuele De Loreto, caused the importation of Rosa Caliendo to the United States for the purposes of prostitution, the further question arises whether or not within the definition of holding heretofore given you by the court the defendant held her for the purposes of prostitution at the premises in question. It is not necessary to a conviction that the defendant should have held Rosa Caliendo for such purposes for any given period of time. If the defendant so held her on any day or days between the fourteenth day of December and the nineteenth day of January, both inclusive, she is guilty on the second count, if the other elements of criminality as charged in that count have been established to your satisfaction. You have heard the testimony of the defendant and others in denial of force, coercion or threats practiced upon Rosa Caliendo, and you have also heard the testimony of the witnesses on behalf of the government on the subject of threats, confinement to the house and allowing Rosa Caliendo to leave the house only when in charge of or accompanied by the defendant or

some other person connected with her establishment. The fact, if fact it be, that on one or more occasions Rosa Caliendo was permitted to go alone on the streets of Wilmington, or went without permission on the streets of Wilmington, does not in and by itself negative a holding of her by the defendant for the purposes of prostitution at other times within the above-mentioned period. A holding of her by the defendant for such purposes for a single day or for the fraction of a day, would constitute a holding within the meaning of the statute. The effect of threats made by the defendant or commands given by her or those acting by her request, if such were made or given, is for your determination. While Rosa Caliendo is a grown woman and physically well developed, and while it appears from the evidence there were several doors leading from the defendant's premises to the adjoining streets, it may or may not be material that you should bear in mind that she was a foreigner, just arrived from Italy, a stranger in the United States and unable to speak the English language. Under these circumstances it is for you to determine what effect threats or commands on the part of the defendant, if such were made or given, would have upon such a woman with respect to her freedom of action and locomotion. According to the testimony on behalf of the defendant no compulsion or threats of any kind were made or practiced by her toward Rosa Caliendo, and the latter was at liberty to leave the house whenever she should so desire. It is for you to determine whether or not it is probable, had such been the case, that in a city of between eighty and ninety thousand inhabitants Rosa Caliendo would not have been seen on the streets many times and by many persons, including neighbors, during the period in question, who could and would have so testified. If you are of the opinion, under these circumstances, that there is an inherent improbability in the contention on the part of the defendant that Rosa Caliendo was not held for the purposes of prostitution, during the whole or any part of the period in question, it will be for you to determine how far the existence of such improbability tends to support direct and positive declarations of witnesses on the part of the government relating to alleged threats made to and restraint placed upon Rosa Caliendo in order to detain her at the premises in question for the purposes of prostitution. The following passage occurs in the testimony of the defendant, after a denial of the making of any threats by her:

"Q. Do you recall about the third week after Rosa came she had done something to displease you? A. Yes, she was making too much noise; she was hugging and kissing the customers there and she was a regular crazy person and I told her she had better go to her brother. Q. You told her to leave? A. Yes, I wanted to send her away. Q. Did she go? A. No, she didn't go away because she had to finish to pay Gesuele and then we were arrested."

A pertinent inquiry may be, how was she to pay Gesuele unless out of her proceeds of prostitution, which, so far as is to be gathered from the evidence, was her only source of revenue? And further, why did the defendant take such an interest in her paying Gesuele unless she, the defendant, was under some obligation to Gesuele on account of which the money to be paid by Rosa Caliendo was to be

applied? And if so, what obligation? Gesuele, you will recall, testified to the effect that he had loaned money to the defendant, first \$30, and afterwards \$13. It is in evidence that the passage ticket of Rosa Caliendo cost \$31.65, and that \$13 was loaned by Gesuele to the defendant to pay her expenses to New York. Did or did not the defendant hold Rosa Caliendo for the purposes of prostitution in order that money should be paid to Gesuele? It is in evidence before you and is not disputed that during the first ten days of her prostitution at the premises in question and thereafter and until her arrest she earned an amount of money, which at the prices paid by customers will enable you to form some conception of the extent and degree of her carnal intercourse. It is for you to determine whether Rosa Caliendo under these circumstances continued at all times in her prostitution without some constraint practiced upon her, and if there was constraint, by whom? Rosa Caliendo testified, among other things: "Sometimes I was sleeping on the couch and wouldn't feel very well and she," meaning the defendant, "would waken me up and say here, get up and do business." Is this a probable or improbable statement by Rosa Caliendo, and would it or not, under the circumstances disclosed in the case show or indicate restraint practiced by the defendant? This is for your determination. Did or did not the defendant attempt to hold Rosa Caliendo for the purposes of prostitution at her establishment in pursuance of the illegal importation as claimed by the government? It is unnecessary, in view of what has already been said, and I shall not undertake to review the evidence on this point.

I desire to repeat that you are in no respect bound by any references made by the court to the evidence in this case, nor by any inferences by the court from the evidence, express or implied, excepting in so far as they commend themselves to your own independent judgment. It is your duty to consider the evidence in the case, oral and documentary, as a whole, and not to give undue importance to minor points or portions of the evidence taken piece-meal. A criminal case involving much testimony and many facts should not be decided upon the probability or improbability of any one point singled out of the evidence, but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, in the case.

You are the sole judges of the credibility of witnesses, their demeanor, their relation to the respective parties, the weight to be given to their testimony, and the weight and effect of the evidence, whether oral or documentary, and in the exercise of your judgment you may accept as true or reject as false in whole or in part the testimony of the defendant or any other witness. While it is the exclusive function of the court to present to you the principles of law applicable to the case, it is your exclusive function to pass upon the facts and the evidence and reach a conclusion, subject to the principles of law as presented by the court. The court has been requested to give you instructions on a number of points of law in the language employed by the counsel for the defendant. The charge of

the court embraces in substance all the propositions suggested by the counsel in so far as those propositions are, in the opinion of the court, properly applicable to the case. The guilt or innocence of the defendant is to be determined by you as intelligent and conscientious men upon the evidence adduced in this case and upon that alone. No consideration of consequences, whether to the government or to the defendant, which may result from your verdict, should be permitted in any manner to influence your deliberations or control your verdict. If upon all the evidence in the case you are not satisfied beyond a reasonable doubt of the guilt of the defendant on both or either of the counts remaining in the indictment you should acquit her; but if upon all the evidence in the case you are satisfied beyond a reasonable doubt that the defendant is guilty in manner and form as she stands indicted in the second and third counts, or either of them, you should return a verdict of guilty. If you find a verdict of guilty it may be a general verdict of guilty as to both counts remaining in the indictment, or a verdict of guilty as to either one of them, as the evidence shall warrant.

STONE & DOWNER CO. v. UNITED STATES.

(Circuit Court, D. Massachusetts. July 10, 1906.)

No. 44 (1,598)

1. CUSTOMS DUTIES—MIXED WOOLS—"CHANGE IN CONDITION."

Construing Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 356, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1665], providing an increased duty on wool "changed in its character or condition for the purpose of evading the duty," *held*, that it is not necessary that there should be any mechanical or chemical change, disguising the quality or character of the wool; and that, where white and black Iceland wools, which had always been dealt in and imported separately in different bales, were imported mixed together in the same bale for the purpose of securing a lower rate of duty on the white wool, the wool had been changed in condition within the meaning of the law.

2. SAME—DOUBLE DUTY.

Where two kinds of wools are changed in condition by mixing them in the same bale, in order to make the mixture subject to the lower duty provided for the poorer kind, *held* (1) that, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 356, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1665], only the better kind is changed "for the purpose of evading the duty to which it would otherwise be subject," because the poorer kind would be subject to the same rate, whether mixed or not; (2) that, therefore, the further provision in the same paragraph that wool changed for such purpose shall pay "twice the duty to which it would otherwise be subject," would apply only to the better kind, and not the poorer; and (3) that the duty which is thus doubled is that which would have been applicable to the better kind if imported in its natural condition.

3. SAME—AVERAGE AGGREGATE VALUE.

Section 2012, Rev. St. [U. S. Comp. St. 1901, p. 1926], providing that the rate of duty on wool of different qualities imported in the same package shall be determined according to the average aggregate value of the contents of the package, applies where it does not appear that the wool was mixed for the purpose of obtaining a lower rate of duty. If such

purpose is shown, the case is brought within the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 356, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1665].

4. SAME—CHANGE TO MEET TARIFF CONDITIONS—GOOD FAITH.

Importers may adjust themselves to the tariff laws as framed by Congress, and in the absence of any deception have the right to obtain the lowest classification of their goods.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,629, T. D. 25,168.

Searle & Pillsbury (Charles P. Searle, of counsel), for importers.
Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

COLT, Circuit Judge. The merchandise in this case consisted of one bale of Iceland wool, entered at the port of Boston, May 4, 1903. The bale contained 40 pounds of white Iceland wool, and 40 pounds of gray or black Iceland wool mixed together.

The wool was classified as third-class wool, and the 40 pounds of white wool were valued at $6\frac{1}{2}$ pence, or over 12 cents, per pound, and the 40 pounds of black wool at 5 pence, or less than 12 cents, per pound, making the aggregate value of the contents of the bale $5\frac{3}{4}$ pence per pound, or less than 12 cents per pound. The collector assessed a double duty of 8 cents per pound upon the white wool, and a duty of 4 cents per pound upon the black wool. The Board of General Appraisers held that the entire contents of the bale was subject to a double duty of 8 cents per pound. The importers claim that no portion of the wool is subject to a double duty, and that the proper duty is 4 cents per pound.

The evidence shows that in trade and commerce white Iceland wool and black Iceland wool are never mixed together, but are sold in separate bales, and that they have been hitherto imported into this country in separate bales; and, further, that the importers purposely mixed this wool in order to test their right to do so under section 2912 of the Revised Statutes [U. S. Comp. St. 1901, p. 1926].

The question of the proper duty upon this wool involves the consideration of paragraphs 356, 358, 359, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 183 [U. S. Comp. St. 1901, pp. 1665, 1666], and section 2912 of the Revised Statutes:

Paragraph 356: "The duty upon wool of the sheep * * * which shall be changed in its character or condition for the purpose of evading the duty * * * shall be twice the duty to which it would be otherwise subject."

Paragraph 358: "On wools of the third class * * * the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound."

Paragraph 359: "On wools of the third class * * * the value whereof shall exceed twelve cents per pound, the duty shall be seven cents per pound."

Section 2912: "When wool of different qualities is imported in the same bale, bag, or package, it shall be appraised by the appraiser, to determine the rate of duty to which it shall be subjected, at the average aggregate value of the contents of the bale, bag, or package."

If this wool had been imported in separate bales, the white wool would have been classified under paragraph 359, since its value ex-

ceeds 12 cents per pound, thereby making the rate of duty 7 cents per pound; and the black wool would have been classified under paragraph 358, since its value is less than 12 cents per pound, thereby making the rate of duty 4 cents per pound. If, however, as contended by the importers, the proper classification of this wool is under section 2912, as "wool of different qualities imported in the same bale," then, since "the average aggregate value of the contents of the bale" is less than 12 cents per pound, the entire contents of the bale is only subject to a duty of 4 cents per pound under paragraph 358. As to the white wool, the difference in the duty between these two classifications is 3 cents per pound, or the difference between 7 cents per pound and 4 cents per pound; while as to the black wool there is no difference in the duty, since this wool, under both classifications, is subject to the lowest rate of duty, namely, 4 cents per pound.

If it were not for paragraph 356 this wool would be properly classified under section 2912 and paragraph 358, as contended by the petitioners, although it had been mixed together for the purpose of obtaining a lower rate of duty on the white wool, because importers may adjust themselves to the tariff laws as framed by Congress, and, in the absence of any deception, they have the right to obtain the lowest classification for their goods. *Magone v. Luckemeyer*, 139 U. S. 612, 11 Sup. Ct. 651, 35 L. Ed. 298; *Seeberger v. Farwell*, 139 U. S. 608, 11 Sup. Ct. 650, 35 L. Ed. 297; *Merritt v. Welsh*, 104 U. S. 694, 707, 26 L. Ed. 896; *United States v. Schoverling*, 146 U. S. 76, 13 Sup. Ct. 24, 36 L. Ed. 893; *Robertson v. Gerdan*, 132 U. S. 454, 10 Sup. Ct. 119, 33 L. Ed. 403.

The question in this case, therefore, resolves itself into the inquiry whether, in view of paragraph 356, importers can mix together in one bale two different qualities of wool, which are always bought and sold separately, or in an unmixed condition, in the markets of the world, for the purpose of obtaining a lower classification on the wool of superior quality, and hence a lower rate of duty. In other words, does paragraph 356 apply to this wool upon the state of facts here presented, and, if it does apply, what is the proper classification of this wool, and the rate of duty to which it is subject?

Paragraph 356 provides that when wool is "changed in its character or condition for the purpose of evading the duty" it shall pay twice the duty "to which it would be otherwise subject." That the "condition" of this wool has been "changed" within the meaning and intent of this provision seems free from doubt. White Iceland wool and black Iceland wool mixed together are not in the same condition, either actually or commercially, as when each is in a separate state. The fact that they may be afterwards restored to their original condition does not make them any the less in a changed condition while they are in a mixed state. Changed condition does not mean that the wool must have been colored or dyed, or subjected to some mechanical or chemical change in order to disguise its quality or character. These words are used in a general sense, and, when read in connection with what follows in this paragraph, were plainly intended to cover any alteration in the state or condition of the wool which

is made for the purpose of having it classified under a different paragraph of the tariff act, and thereby obtaining a lower rate of duty. It is clear, therefore, that the white wool comes within the terms of paragraph 356, since it was changed in its condition for the purpose of evading the duty to which it "would be otherwise subject;" that is, it was changed in its condition by mixing black wool with it for the purpose of having it classified under section 2912 and paragraph 358, whereby it would only be subject to a duty of 4 cents per pound, instead of having it classified under paragraph 359, in which case it would be subject to a duty of 7 cents per pound.

With respect to the black wool, however, it does not come within the terms of paragraph 356, because, although it was changed in its condition by mixing white wool with it, it was not so changed "for the purpose of evading the duty to which it would be otherwise subject," since it is subject to the same duty of 4 cents per pound whether it is classified in its mixed condition under section 2912 and paragraph 358, or in its separate condition under paragraph 358.

Holding that the white wool comes within the provisions of paragraph 356, and is, therefore, subject to double duty, the question remains, how shall this wool be classified, and what is the rate of duty to which it is subject? Is it to be classified under section 2912 and paragraph 358, and subjected to a duty of 4 cents per pound, and then to a double duty of 8 cents per pound under paragraph 356; or is it to be classified under paragraph 359, and subjected to a duty of 7 cents per pound, and then to a double duty of 14 cents per pound under paragraph 356? It may here be observed, as already noted, that the collector assessed a double duty of 8 cents a pound on the white wool, and that the Board of General Appraisers held that the entire contents of the bale was subject to a double duty of 8 cents a pound.

The proper classification and duty upon this white wool seem clear upon reading paragraph 356. The language is: "The duty upon wool * * * shall be twice the duty to which it would be otherwise subject." This means that the wool is to be classified as if it had not been changed in condition, and then pay double duty under this classification; in no other way can the wool be made to pay "twice the duty to which it would be otherwise subject."

In other words, the white wool, having been changed in condition for the purpose of evading the duty to which it would be otherwise subject, it is taken out from section 2912, and is to be classified as if it were imported in its original condition, namely, under paragraph 359, and then made to pay a double duty of 14 cents per pound under paragraph 356.

This result does not lead to any conflict or inconsistency between section 2912 and paragraph 356. Section 2912 applies to imports of different qualities of wool in the same bale in which it does not appear that the wool was mixed for the purpose of obtaining a lower rate of duty. For example, if white and black Iceland wool in a mixed condition were regularly bought and sold as an article of commerce in the markets of the world, then this bale would be properly classified under section 2912, since it could not then be said that it

was mixed by the importers for the purpose of obtaining a lower rate of duty. It is only where this purpose is shown, as in the present case, that the wool cannot be classified under section 2912.

This construction of paragraph 356 is in accord with the decision of the Supreme Court in *Patton v. United States*, 159 U. S. 560, 16 Sup. Ct. 89, 40 L. Ed. 233, where the merchandise was "wool tops" which had been broken into small pieces for the purpose of having them classified as "wool waste" and thus evading the higher rate of duty.

The merchandise was entered as "wool waste," under Schedule K of the Tariff Act of March 3, 1883, 22 Stat. 508, c. 121, and a duty of 10 cents per pound was assessed and paid. Subsequently, under other paragraphs of the tariff act of 1883, the collector imposed a duty of 30 cents per pound, and then doubled this duty upon the ground that the wool had been changed in its character or condition for the purpose of evading the duty. This made the aggregate duty 60 cents per pound. The United States brought suit to recover the difference between the amount paid upon the entry and the duty subsequently imposed by the collector. Upon trial before a jury, the court, among other things, charged that the importation in question could not be considered as wool waste, as it did not consist of refuse or broken particles thrown off in the process of manufacture, and was made intentionally by tearing up what are called "wool tops." The jury found a general verdict for the United States, and judgment was entered accordingly. Upon writ of error this judgment was affirmed, first by the Circuit Court, and then by the Supreme Court. In its opinion the Supreme Court said:

"Although it was submitted as a separate question to the jury, the testimony was practically undisputed, that the articles in question were merchantable tops broken up for the purpose of changing their character or condition from that of tops to that of waste, and that it was done for the purpose of evading the duty to which the wool in the form of tops would be subject on importation, or, at least, to which the importer believed it would be liable. If such change were made, and made for this purpose, it would make no difference whether the article thus produced was known commercially as waste or not. Assuming that the product would be waste, it would be waste produced by a process which Congress had refused to recognize, and the fact that the classification of the article was thereby changed would not relieve it from the double duty which Congress had imposed upon wool whose character or condition had been changed." 159 U. S. 506, 507, 16 Sup. Ct. 89, 91 (40 L. Ed. 233).

In *Patton v. United States*, as in the case at bar, the importers relied upon *Merritt v. Welsh*, 104 U. S. 694, 26 L. Ed. 896, and *Seeburger v. Farwell*, 139 U. S. 608, 11 Sup. Ct. 650, 35 L. Ed. 297. In distinguishing those cases, the Supreme Court said:

"In those cases, however, there was no such provision applicable to sugars or to woollen cloths as exists in this case, providing that where wool unmanufactured shall be changed in its character or condition for the purpose of evading duty a double duty shall be imposed. The object of this legislation seems to have been to make that unlawful with respect to raw wools which had been held to be legitimate with respect to other articles." 159 U. S. 508, 16 Sup. Ct. 92 (40 L. Ed. 233).

The decision of the Board of General Appraisers, overruling the petitioners' protest, is affirmed.

WASLEY v. CHICAGO, R. I. & P. RY. CO.

ROENFANZ v. SAME.

(Circuit Court, N. D. Iowa, C. D. September 8, 1906.)

Nos. 285, 289.

REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—CONSOLIDATED RAILROAD CORPORATION.

A railroad company, which was a corporation of both Illinois and Iowa, having been formed by the consolidation of two companies, one of each state, and owning a line of road therein extending to the boundary line, united with five Iowa companies to form a new company, into which they consolidated and merged "their capital stocks, corporate and other franchises, rights, privileges, and property, of every nature and description," as permitted by the laws of both states. It was provided that the consolidated corporation should commence as soon as the required certificates should be filed in each state, and they were so filed, and the corporation took over and held and operated the properties of the several constituent companies. *Held*, that it became a corporation of both states, and in either, for the purposes of federal jurisdiction, was a corporation of that state, and could not remove a cause brought against it in a state court therein on the ground of diversity of citizenship.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 67.

Citizenship of corporations, see notes to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 301.]

On Pleas to the Jurisdiction and Motions to Remand.

The defendant, the Chicago, Rock Island & Pacific Railway Company, is a railroad corporation and owns and operates lines of railway in the state of Iowa and adjacent states. The plaintiffs were its employes, and received injuries while so engaged upon its roads in Iowa, for which they seek to recover damages by these actions, which were commenced in the district court of Iowa in and for Winnebago and Emmet counties, respectively, against the defendant as a corporation organized and existing under the laws of Iowa, and operating its road in that state, and removed to this court by the defendant. The petitions for removal are in due form, and each alleges that defendant was when the action was commenced and still is a corporation organized under the laws of Illinois, that the plaintiff Wasley then was and still is a citizen of the state of Minnesota, and that the plaintiff Roenfanz then was and still is a citizen of the state of Iowa. The records have been filed in this court, and the plaintiff in each case files a plea to the jurisdiction of the court and motion to remand, upon the ground that defendant is a consolidated corporation (composed of several Iowa corporations and an Illinois and Iowa corporation), duly incorporated in each of the states of Iowa and Illinois, under the laws of said states, respectively.

From the evidence adduced it appears:

(1) That by an act of the General Assembly of the state of Illinois, approved February 27, 1847 (Priv. Laws 1846-47, p. 139) the Rock Island & La Salle Railroad Co., was created with a capital of \$300,000, and empowered to build and operate a railroad from the then town of Rock Island on the Mississippi river in Illinois to the Illinois river at the termination of the Illinois and Michigan canal in said state; and by an act of said General Assembly approved February 7, 1851, the name of said company was changed to the Chicago & Rock Island Railroad Company, and it was authorized to increase its capital to \$3,000,000 and to build and extend said railroad to the city of Chicago.

(2) That on December 22, 1852, the Mississippi & Missouri Railroad Company

was duly incorporated under the laws of Iowa, viz., chapter 43, Code of 1851, for the purpose of building and operating a line of railroad from the eastern line of the state of Iowa at or near Davenport in Scott county, on the most eligible route to the western line of said state at or near Council Bluffs in Pottawatomie county; the principal place of business of said corporation to be at Davenport in said Scott county. (Said city of Davenport being on the westerly side of the Mississippi river and opposite the town of Rock Island in Illinois.) The board of directors of said corporation, with the assent of two-thirds in interest of the stockholders was authorized to sell, dispose of, and transfer to any other person or company its property and franchises, and to connect its road with the road of any other company or corporation in the state of Illinois.

(3) That on May 28, 1866, the Chicago, Rock Island & Pacific Railroad Company was duly organized under the laws of Iowa, viz., chapter 52, Revision of 1860, for the purpose, as recited in its articles of incorporation of purchasing, acquiring, and owning the railroad and other property of the Mississippi & Missouri Railroad Company, and to build and operate a line of railroad from Kellogg, Iowa, the then western terminus of said Mississippi & Missouri Railroad, to the western line of the state of Iowa, at such point as would enable it to connect with the Union Pacific Railroad Company, then in course of construction from Omaha, Neb., so as to form a continuous line of railroad from the eastern line of said state at or near Davenport, to the western line of said state to connect with said Union Pacific Railroad Company. The principal place of business of the company is designated as Davenport, Iowa, and its board of directors was authorized and empowered to sell and dispose of absolutely to any person, company or corporation, all its properties, rights, and franchises, or to contract with any connecting railroad within or without the state for the use of its road, or to consolidate its stock and road with that of any other road within or without the state upon such terms or conditions as may be allowed by law.

(4) That on August 20, 1866, the said Chicago & Rock Island Railroad Company as party of the first part, and said Chicago, Rock Island & Pacific Railroad Company as party of the second part, entered into articles of agreement and consolidation whereby the stock and properties of the two corporations were consolidated into one corporation under the corporate name of the Chicago, Rock Island & Pacific Railroad Company, pursuant to the laws of Iowa and Illinois, which, as the articles recite, authorized them to so do. The certificates of stock of the old companies were surrendered, and the certificates of stock of the new company issued in lieu thereof to the stockholders of the old companies, and the properties, rights, and franchises of every kind and description of each of the old companies were transferred and conveyed to the new company, and that company assumed the debts and liabilities of the old companies. The new company was to commence and go into operation immediately on the execution of the agreement, and it was incorporated in each of the states of Iowa and Illinois, under the laws of said states, respectively.

(5) That on June 2, 1880, the said consolidated corporation, the Chicago, Rock Island & Pacific Railroad Company, entered into articles of agreement and consolidated with five Iowa railway corporations which articles are as follows:

"Articles of consolidation, entered into this second day of June, in the year one thousand eight hundred and eighty, by and between the Chicago, Rock Island & Pacific Railroad Company, a corporation organized and existing under the laws of the states of Illinois and Iowa, party of the first part; the Iowa Southern & Missouri Northern Railroad Company, party of the second part; the Newton & Monroe Railroad Company, party of the third part; the Atlantic Southern Railroad Company, party of the fourth part; the Avoca, Macedonia & Southwestern Railroad Company, party of the fifth part, and the Atlantic & Audubon Railroad Company, party of the sixth part—the said companies of the second, third, fourth, fifth and sixth parts being corporations which were organized and now exist under the laws of the state of Iowa—which articles witness that whereas, the several railroads by said parties severally owned, or held under indentures of lease, are operated by the party of the first part as parts of one railway system extending through or into the states of Illinois, Iowa, Missouri and Kansas; and whereas, the owners of the shares of the

capital stock of the party of the first part are also the owners of the capital stock and bonds of the other parties hereto; and whereas, a consolidation, union and merger of the capital stocks and corporate and other franchises, rights, privileges and property of each and all of said parties into a consolidated corporation, which will own and be possessed of all the corporate and other franchises, rights, privileges, immunities, and property of each and all of said parties, will, in the judgment of each of said parties, secure greater economy and efficiency in the management and operation of said lines, and thereby promote the interests of the public of said corporate parties and of all the stockholders in each of them; and whereas, the proposition to so consolidate, unite and merge had been submitted to the stockholders of each of said parties, at meetings duly convened and held, upon notice given in manner and form as required by law and the by-laws of the several parties, and said proposition has been approved by votes, had at said several meetings, of majorities, consisting of the holders of over three-fourths in amount of the capital stock of each of said parties: Therefore the said parties of the first, second, third, fourth, fifth, and sixth parts severally, in consideration of the premises, and the mutual execution of these articles, do convey, covenant and agree as follows:

"Article I. They do hereby consolidate, unite, and merge their capital stocks, corporate and other franchises, rights, privileges and property of every nature and description, and hereby create one consolidated corporation, which shall be known by the corporate name of the Chicago, Rock Island & Pacific Railway Company.

"Article II. The said parties of the first, second, third, fourth, fifth, and sixth parts do respectively and severally grant, bargain, sell, release, convey, assign, transfer and set over unto the Chicago, Rock Island & Pacific Railway Company, the consolidated corporation hereby created, the several and respective railroads, railroad lands, rights of way, stations, station grounds (and other properties of said respective corporations particularly describing same), and do mutually agree and declare that the same shall, from the execution of these articles and henceforth, be held and possessed by said consolidated corporation, its successors, and assigns, forever, to and for its own use, benefit and behoof forever, to all intents and purposes. * * *

"Article III. The general purpose and objects of the Chicago, Rock Island & Pacific Railway Company, the consolidated corporation hereby created shall be: (1) To own, complete, extend, improve, maintain and operate each of the several railroads heretofore owned by any of the parties hereto and hereinafter mentioned, and which are described in the respective charters and articles of association and articles of consolidation of the several parties (to which for greater particularity, reference is hereby made), and to use and enjoy all the corporate and other franchises, rights, privileges, immunities, and property of every nature and description which form a part of, or are appurtenant or relate to any of said railroads, and which have been owned by the respective parties hereto, or by any of them, or by the predecessors, assignors, or grantors of any of them [describing particularly the lines of railroad in Illinois, Iowa, and Missouri, owned by said several companies including the line from Chicago to Rock Island, and a line in Iowa and Missouri built by the Chicago & Southwestern Railway Company, a company organized in Iowa and Missouri, under the laws of said states respectively]. * * * (3) To construct or acquire by purchase or lease, railroads lateral to any of the several lines hereby consolidated, and to maintain and operate the same as parts of its railway system. * * *

"Article IV. The Chicago, Rock Island & Pacific Railway Company, the consolidated corporation hereby created shall have and possess: (1) Each and all of the corporate and other franchises, rights, powers, privileges, immunities, and property heretofore held, possessed, exercised, or enjoyed by the said parties of the first, second, third, fourth, fifth, and sixth parts hereto, or by either of them including all franchises, privileges, and immunities secured to each by its charter or charters, articles of incorporation, articles of association, articles of consolidation, and the laws of any state of the United States. * * *

"Article V. (1) The capital stock of the Chicago, Rock Island & Pacific Railway Company, the consolidated corporation hereby created, shall be limited to the sum of fifty millions dollars, until the amount thereof is increased by an

amendment of these articles of consolidation adopted in the manner provided in the thirteenth article hereof. The said capital stock shall be divided into shares, each of which shall have a par value of one hundred dollars. (2) All of the holders of the capital stock of the parties of the first, second, third, fourth, fifth and sixth parts hereto shall henceforth be stockholders in the said consolidated corporation, in like proportional amounts, and with the same rights and liabilities between them severally and the said consolidated corporation as now exist between them and the several parties hereto.

* * * * *

"Article IX. The existence of the consolidated corporation shall commence on the first day on which the certificates required by law, showing approval by the required majority of the stockholders of each of the parties hereto, of the proposition to create said consolidated corporation, are on file in the offices of the Secretary of State for the state of Illinois, the recorder of Cook county, in said state, the Secretary of State for the state of Iowa, and the recorder of Scott county in said state; and shall continue for a period of fifty years thereafter, which existence may be renewed from time to time as may be provided by the laws of the states of Illinois and Iowa.

* * * * *

"Article XI. The principal place of business and general offices of said consolidated corporation shall be in the city of Chicago, in the state of Illinois. Its principal place of business in the state of Iowa shall be in the city of Davenport, in the county of Scott, in said state. It may also establish and maintain an office in the city of New York. * * *

These articles of agreement were duly signed by the respective parties thereto and filed in the office of the Secretary of State of the state of Iowa, June 3, 1880; and in the office of the Secretary of State of the state of Illinois, on June 4, 1880. On June 4, 1902, article V of the foregoing articles of incorporation was amended at a special meeting of the board of directors of said company, so as to limit the capital stock of said company to \$75,000,000, which article of amendment was duly acknowledged by the vice president and secretary of said Chicago, Rock Island & Pacific Railway Company, and the same was duly filed for record in the office of the recorder of deeds of Scott county, Iowa, and in the office of the Secretary of State, of the state of Iowa, on June 5, 1902, and duly recorded in the records of said officers, respectively.

Oliver Gordon and Lovely & Dunn, for plaintiff Wasley.
Mack J. Groves and J. G. Myerly, for plaintiff Roenfanz.
Carroll Wright and J. L. Parish, for defendant.

REED, District Judge (after stating the facts). The articles of consolidation of the defendant company have been set out at some length in the foregoing statement for the reason that it is contended on behalf of the defendant that they show that the purpose of the consolidation of the several companies therein named was simply to take over by the Chicago, Rock Island & Pacific Railroad Company (the Iowa and Illinois corporation) the properties and rights of the five Iowa corporations named therein; to change the name of that corporation to that of the defendant company, and to reincorporate the same under the law of Illinois alone. If it should be conceded that such was the purpose of those articles it would not change their legal effect as a consolidation of the several companies into one. *Yazoo, etc., Co. v. Adams*, 180 U. S. 1-17, 21 Sup. Ct. 240, 45 L. Ed. 395. And if the only purpose was to take over the properties of the other Iowa corporations by the Chicago, Rock Island & Pacific Railroad Company, that company would be the real party in interest in these actions under a mere change of name, and its

reincorporation in Illinois alone would not divest it of its character as a corporation of Iowa, and it would still be a corporation of each of said states. It is admitted that under the articles of consolidation of August 29, 1866, the capital stocks and properties of the Chicago & Rock Island Railroad Company, the Illinois corporation, and of the Chicago, Rock Island & Pacific Railroad Company, the Iowa corporation, were consolidated into one company under the name of the Chicago, Rock Island & Pacific Railroad Company, and that such consolidation was effected under the laws of each of the states of Iowa and Illinois, and was not merely an incorporation in Iowa of the Illinois corporation. The Illinois company was not authorized to and never did extend its road into Iowa, and its only rights in that state were under the articles of consolidation with the Iowa corporation under the laws of that state. That consolidation was effected in Iowa under sections 1332-1334, Revision of 1860, which are substantially the same as sections 1275-1277, c. 5, of the Code of Iowa of 1873, under which the consolidation of June 2, 1880, was effected. These sections are:

"Sec. 1275. Any such corporation may join, intersect, and unite its railway with the railway of any other corporation at such point on the boundary line of this state as may be agreed upon by such corporations. And with the assent of three-fourths in interest of all the stockholders, may by purchase or sale, or otherwise, merge and consolidate the stock, property, franchises, and liabilities of such corporations, making the same one joint stock corporation upon such terms as may be agreed upon not in conflict with the laws of this state.

"Sec. 1276. Any such corporation which has or may construct its railway so as to meet or connect with any other railway in an adjoining state at the boundary line of this state, shall have power to make such contracts and agreements with the corporations controlling such railways in an adjoining state, for the transportation of freight and passengers, or for the use of its railway by such foreign corporation, as the board of directors may see proper.

"Sec. 1277. Any such corporation organized for the purpose of constructing a railway from a point within the state may construct or extend the same into or through any other state under such regulations as may be prescribed by the laws of such state; and the rights and privileges of such corporation over said extension in the construction and use thereof, and in controlling and applying the assets, shall be the same as if its railway was constructed wholly within this state."

A statute of Illinois, approved February 28, 1854, is substantially to the same effect. See *Nugent v. Supervisors*, 19 Wall. 242, 22 L. Ed. 83. Section 1275 provides for the consolidation of the stocks and properties of the different corporations into one corporation, and the articles of consolidation of June 2, 1880, under which the defendant company exists, plainly provide that the several parties thereto, namely, the Chicago, Rock Island & Pacific Railroad Company, a corporation of Iowa and Illinois, and the five Iowa corporations named, severally do convey, covenant, and agree, and do hereby consolidate, unite and merge their capital stocks and corporate and other franchises, rights, privileges and property of every nature and description, and hereby create one consolidated corporation which shall be known by the corporate name of the Chicago, Rock Island & Pacific Railway Company, which shall exercise the powers,

rights, and privileges therein specified. The existence of the consolidated corporation "shall commence on the first day on which the certificates required by law, showing the approval by the required majority of the stockholders of each of the parties hereto, of the proposition to create said consolidated corporation are on file in the offices of the Secretary of State for the state of Illinois, the recorder of Cook county, in said state, the Secretary of State for the state of Iowa, and the recorder of Scott county in said state, and shall continue for a period of fifty years thereafter, which existence may be renewed from time to time as may be required by the laws of the states of Illinois and Iowa." This is not merely a uniting or joinder of several corporations under one management for the purpose of operating the same as one company in which the identity of the several companies is preserved, but is unmistakably the creation of a new corporation in which the capital stocks of the old corporations as well as their properties, rights, and franchises are consolidated, and in which the stockholders of the old corporations become stockholders in the new, and associate themselves anew under the name of a new corporation to which the properties and rights of the several old corporations are conveyed and transferred, and which assumes the liabilities of the old companies.

In *Pennsylvania Co. v. Railroad Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83, a question arose as to whether or not a corporation of Illinois had become a corporation of Indiana. The court said:

"It may not be easy in all such cases to distinguish between the purpose to create a new corporation, which shall owe its existence to the law or statute under consideration, and the intent to enable a corporation already in existence under the laws of another state, to exercise its functions in the state where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies, and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the Legislature, and such allegiance as a state corporation owes to its creator."

The difficulty thus suggested cannot arise under the articles of consolidation of the defendant company, for they do not authorize the separate corporations, as such, to exercise their powers in either state. The consolidated company alone is authorized to do this, and its articles of consolidation comply in every essential respect with chapter 1, tit. 9, Code Iowa 1873, relating to the formation of corporations for pecuniary profit, including those for the construction of railroads, and other works of internal improvement, except that they do not appear to have been acknowledged by the several parties thereto. They designate Davenport in Scott county, as the principal place of business of the company in Iowa; were filed in the proper public offices in Iowa as required by that law, and the defendant has since been acting as, and exercising the powers and functions of, a railway corporation in Iowa thereunder. Upon such consolidation being effected the constituent companies passed out of existence and were immediately succeeded by the new corpora-

tion in each of the states under whose laws the consolidation was effected. *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604; *Shields v. Ohio*, 95 U. S. 319-323, 24 L. Ed. 357; *Railroad Co. v. Georgia*, 98 U. S. 359-363, 25 L. Ed. 185; *Keokuk & W. Ry. Co. v. Missouri*, 152 U. S. 301-308, 14 Sup. Ct. 592, 38 L. Ed. 450; *Yazoo, etc., Co. v. Adams*, 180 U. S. 1-17, 21 Sup. Ct. 240, 45 L. Ed. 395.

In *Keokuk & W. Ry. Co. v. Missouri*, above, a statute of Missouri substantially the same as those of Iowa and Illinois above referred to was considered. Upon the effect of a consolidation of different railroads under such statute the court said:

"It is difficult to see how the Legislature could provide more clearly for the extinguishment of the prior companies and the formation of a new one, than by providing that the two companies shall become one; that new certificates of stock shall be issued in exchange for the stock of the constituent companies; and the consolidation agreement shall be recorded with the Secretary of State as the charter of a new company. In our opinion, this was the effect of the act in question."

In *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185, a statute of Georgia authorized the consolidation of the stocks of two railroad companies upon such terms as might be agreed upon by the directors and ratified by the stockholders, and provided that when so consolidated they should be known as the Atlantic & Gulf Railroad Co., which was the name of one of the companies consolidating. In speaking of the effect of a consolidation under such statute the court said:

"Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities, or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In *McMahan v. Morrison*, 16 Ind. 172 [79 Am. Dec. 418] the effect of a consolidation was said to be 'a dissolution of the corporations previously existing, and, at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence.' * * * 'Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the Legislature, and the formation of a new company out of such portions of the old as enter into the new?'"

The conclusion, therefore, is unavoidable that the defendant company is a new corporation created by and existing under the laws of both Iowa and Illinois, and that in so far as it exercises its powers and function in either state it is to be deemed, for the purpose of federal jurisdiction, a corporation of that state. This is so held in *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Railroad Co. v. Wheeler*, 1 Black, 297, 17 L. Ed. 130; *Railroad Co. v. Meeh*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; *Winn v. Wabash Railroad Co.* (C. C.) 118 Fed. 55.

In *Muller v. Dows*, above, a bill in equity was filed in the circuit court of the United States for the District of Iowa, by two citizens of New York, and a citizen of Missouri against the Chicago, Rock Island & Pacific Railroad Company, a consolidated corporation of Iowa and

Illinois (one of the companies consolidated as the defendant company), and the Chicago & Southwestern Railway Co., a consolidated corporation of Iowa and Missouri, under the statutes of Iowa above set out, and a similar statute of Missouri. An objection to the jurisdiction of the court rested upon the ground that one of the plaintiffs was a citizen of Missouri, and that the Chicago & Southwestern Railroad Co., was a corporation of Missouri and Iowa. But it was held that in the state of Iowa, the consolidated company was a corporation of that state alone; that the laws of Missouri had no operation in Iowa.

In *Railroad Co. v. Wheeler*, 1 Black, 286-298, 17 L. Ed. 130; the plaintiff was alleged to be a corporation created by the laws of Indiana and Ohio, and the defendant to be a citizen of Indiana. In holding that the Circuit Court of the United States for the District of Indiana did not have jurisdiction of the controversy, the court said:

"The Ohio & Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States."

These and other cases are fully reviewed in *Railway Company v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, and the rule deducible from the conclusions there reached and the authorities cited is that, where a railway corporation created by the laws of one state extends its line into another state, or there acquires the railroad property of a corporation of that state, and there reincorporates or otherwise complies with its laws for the purpose of extending and using its line of railroad and property in that state, it remains for the purpose of federal jurisdiction a corporation of the state in which it was originally created. But, where two or more corporations consolidate their capital stocks and properties into one corporation in pursuance of the laws of different states which so authorize, the stockholders of the old companies becoming stockholders of the new, such consolidated company becomes a new creation and is to be deemed, for the purpose of federal jurisdiction, a corporation of each of the states under whose laws it is so consolidated. In this case (*Railway Co. v. James*), it is also held that whatever may be the effect of the legislation of one state by way of subjecting foreign corporations doing business therein to its laws, such legislation cannot avail to create a corporation of that state out of a foreign corporation in such sense as to make it a citizen of that state within the meaning of the federal Constitution. To have that effect it would be necessary to create the corporation out of natural persons whose citizenship could be imputed to the state creating the corporation. Unless, therefore, the stockholders of the constituent companies are to be deemed stockholders of the defendant company in this case, that company cannot be deemed a citizen of any state, and there could be no federal jurisdiction of it in any event. See, also, *Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552-565, 19 Sup. Ct. 817, 43 L. Ed. 1081.

The defendant relies mainly upon *Nashua Railroad Co. v. Lowell Railroad Co.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363, and *Walters v. Railroad Co.* (C. C.) 104 Fed. 377. In the former named case the plaintiff as a corporation of New Hampshire brought suit against a Massachusetts corporation in the Circuit Court of the United States for the District of Massachusetts. The jurisdiction was sustained upon the ground that the legislation of New Hampshire and Massachusetts after the incorporation of the plaintiff in New Hampshire, did not have the effect to change the character of that company as a corporation of New Hampshire. In *Walters v. Railroad Co.* (C. C.) 104 Fed. 377, the defendant company, a corporation of Illinois, purchased the property of a Nebraska corporation, and then incorporated in Nebraska as required by its law, for the purpose of completing its right to the property and to operate the same in that state. Held that it was not to be deemed a Nebraska corporation for the purpose of federal jurisdiction.

The present case upon its facts is not materially different from *Missouri Pacific Ry. Co. v. Meeh*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250, and *Winn v. Railroad Co.* (C. C.) 118 Fed. 55. In the former of these cases the decision is by the Court of Appeals of this circuit, and in the latter the decision in effect is a decision of that court.

The conclusion, therefore, is that the pleas to the jurisdiction must be sustained, and each of the causes remanded to the court from whence it was removed. It is so ordered.

AUTHORS & NEWSPAPERS ASS'N v. O'GORMAN CO.

(Circuit Court, D. Rhode Island. July 23, 1906.)

No. 2,700.

1. COPYRIGHT—BOOKS—RESTRICTED PUBLICATION—NOTICE.

Where the owner and publisher of a copyrighted book sold copies thereof containing a notice restricting the purchaser's title, and requiring that the same should not be sold prior to August 1, 1907, such notice did not, without communication to the purchaser, become a part of the contract of sale so as to bind the purchaser with its provisions.

2. PRINCIPAL AND AGENT—SECRET INSTRUCTIONS—SALES AGENT.

Where the owner of a copyrighted book placed copies thereof in the hands of an agent for sale, he thereby clothed the agent with apparent authority to give complete title to the copies sold, so that buyers were not bound by secret instructions to such agent, restricting the title he was authorized to pass, which were uncommunicated.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 377, 377½.]

3. CONTRACTS—RESTRAINT ON ALIENATION—PUBLIC POLICY.

A provision in a contract for the sale of a copyrighted book that it should not be resold prior to August 1, 1907, or offered or advertised for resale, was not contrary to public policy.

4. INJUNCTION—PRELIMINARY INJUNCTION—ISSUANCE.

Complainant issued and sold a copyrighted book only through authorized agents, who were permitted to sell only at retail at 50 cents per copy on the express condition that the books should not be resold prior

to August 1, 1907, etc. Each of the books also contained a "notice to purchaser" reciting such restrictions. Defendant, with knowledge of complainant's plan of sale and the restrictions placed thereon, instigated the purchase of 55 copies of the book, which it proceeded to sell in violation of the restrictions, at a probable loss, for 49 cents. *Held*, that complainant was entitled to a preliminary injunction restraining such sale pendente lite.

In Equity. Complainant's petition for a preliminary injunction.

Elder & Whitman, for complainant.

Barney & Lee, Walter H. Barney, and F. I. McCanna, for defendant.

BROWN, District Judge. This is a petition for a preliminary injunction to restrain the defendant from selling copies of a copyrighted book entitled "A Rock in the Baltic," not purchased directly from the complainant, and "from purchasing or otherwise obtaining for the purpose of resale copies of said book from any person, firm or corporation having a contract with" the complainant "for the exclusive sale of said book, or from in any manner interfering with" the complainant's "rights under said copyright, or with its plan of sale and distribution of said work."

The general character of the right asserted by the complainant is shown by the following notice upon the inner side of the cover of the book:

"Notice to Purchaser.

"This copyright volume is offered for sale to the public only through the authorized agents of the publishers, who are permitted to sell it only at retail and at fifty cents per copy, and with the express condition and reservation that it shall not, prior to August 1, 1907, be resold, or offered or advertised for resale. The purchaser from them agrees to this condition and reservation by the acceptance of this copy. In case of any breach thereof, the title to this book immediately reverts to the publishers. Any defacement, alteration or removal of this notice will be prosecuted by the publishers to the full extent of the law.
The Authors Newspapers Association."

The complainant contends that, by reason of this notice on the cover of each of its copyrighted volumes, and by reason of the limited authority of its agents through whom the same were disposed of to the public, it has parted with only a portion of the monopoly which is given by the copyright statutes; and, further, that no purchaser of a copy of these books acquired any right to resell it before August 1, 1907. The main points made by the complainant are: (a) That the purchaser of one of these volumes acquired only a limited title, a title which he himself could not reconvey before the date mentioned in the notice; (b) that the defendant had full notice of the reservation by the complainant, and of the agents' restricted right to sell; (c) that the defendant is encouraging, soliciting, and procuring a breach of contract with the complainant.

Upon the hearing of this petition, my first impression was that the act that the book in question is copyrighted was immaterial.

The bill alleges that the complainant has "entered into contracts with a person, firm or corporation in each of many cities of the

United States, whereby it appointed said person, firm or corporation its exclusive agent for the sale of said book in said city and has bound its said agents to sell said books at the uniform price of 50 cents per copy, and not knowingly to sell or advertise or offer for sale to any other dealer or for resale prior to August 1, 1907, and to sell each copy upon the express condition that it should not be sold or offered for resale by the purchaser before said date."

The bill sets forth diversity of citizenship between the complainant and the defendant, and:

"That the value of its said plan of selling said books and its contracts with said exclusive agents, and the injury and damage inflicted on your orator by the acts of the respondent, exceed in value the sum of five thousand dollars, exclusive of interest and costs."

The complainant therefore does not base the claim of federal jurisdiction solely upon its ownership of the copyright. The case, in substance, amounts to this: That the complainant desires to maintain a retail price of 50 cents upon its books; to do this, it appoints exclusive agents in different cities, who agree to maintain this price; that the title to books received by said agents is subject to the express condition and reservation, and to sell each copy under said condition and reservation. If the complainant's case rested entirely upon its copyright, or if the case were presented simply as a bill for the infringement of a copyright, the complainant's rights would be so doubtful, as a matter of law, that a preliminary injunction would not be justified.

In *Bobbs-Merrill Co. v. Straus* (C. C.) 139 Fed. 155, 181, it was said:

"It is a close question whether a copyright may be infringed by selling in violation of express and explicit restrictions placed on the dealer, expressly made an agent or licensee only, as to the mode of sale or the price at which same is to be sold."

Upon appeal, in a careful and learned opinion by Judge Townsend dated June 16, 1906 (147 Fed. 15), the Circuit Court of Appeals for the Second Circuit said:

"The complainant herein is attempting by a mere notice to import into the statutory copyright a right of limited publication or of restriction upon use, which was abandoned by virtue of the surrender of the common-law copyright.

"Counsel for complainant argues as follows:

"To justify their sale by the proprietor's publication of the books, defendants must show an unqualified and absolute publication. But there was no unqualified publication, offer or distribution of *The Castaway*. It was offered and published subject to the restrictions and limitations expressed in the notice."

"We cannot assent to the latter assertion. We think, in view of the foregoing considerations, that there was an unqualified and absolute publication and a surrender of the right of restricted publication when the owner of the book complied with the statutory requirements and thus acquired the right to the multiplication of copies. * * *

"The fallacy of complainant's argument lies in disregarding the peculiar common-law right of literary property, namely, the right to restricted publication, and the conditions precedent to the enjoyment of the statutory right, namely, the surrender of such common-law right by a general publication. If the statutory owner desires after publication to control the lawfully pub-

lished copies, such control can only be secured by means of positive contract or conditions, so accepted by the party to be charged or so brought to his knowledge that it would be inequitable to permit him to violate them. But while this right might be protected at law or enforced by a court of equity, it is not a statutory right, but a common-law right attached generally to the ownership of all species of property. *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848. * * *

"A court of equity therefore would not be justified in enforcing the provisions of the copyright law, merely to prevent a sale of a copyrighted article, because the vendor has informed the purchasing public that it will treat such sale as an infringement."

In view of this decision, I am of the opinion that, upon this petition for a preliminary injunction, this case must be treated independently of the copyright law, and merely as a case involving ordinary principles of contract. The complainant, being the owner of books, offers these books, through its agents, for sale to the general public, requiring its agents to agree that they will make only conditional sales. If an agent sells a book to a purchaser unconditionally, he violates his agreement. The notice contained in the book does not, without communication to the purchaser, become a part of the contract between the agent and purchaser. It is a mere notice, and such a notice does not become incorporated in the contract unless its terms are distinctly declared and deliberately accepted by the purchaser. *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039. It is very clear that the purchaser from an agent, without knowledge of the condition, does not agree to it merely by the acceptance of a copy. If an agent offers the book over the counter for 50 cents, and a purchaser pays 50 cents for it, the latter thereby acquires a complete title free from any condition and restriction; and affirmative proof of communication, additional to that afforded by the mere fact that a notice is in the book, is essential in order to show that the purchaser agreed not to resell the book, or acquired merely a restricted title.

To meet this point, it is urged that, if the purchaser expects to buy the absolute title while the vendor has no intention of parting with the absolute title and relies upon the notice to inform the purchaser of the limitation, there is no meeting of minds, and therefore there is no sale; and that therefore, if the notice be subsequently called to the attention of the purchaser, and he then learns that his mind and that of the vendor have never met, it is his duty either to assent to the provisions and retain the book, or to return the book to the vendor. This is both impractical and unsound. Secret instructions to the agent are not binding upon the purchaser. By putting the books into the hands of an agent for sale, the owner clothes the agent with apparent authority to give a complete title.

A merchant who puts books upon the counter with the price marked thereon, and puts a salesman behind the counter, clothes that salesman with apparent authority to sell for the price named, and upon paying such price the purchaser acquires full and absolute title. In appointing the various firms or corporations agents for the sale of the books, the complainant clothes them with an apparent authority as agents, and, if it intends to clothe them with less than ordinary authority, it is under the express obligation of bringing the restriction of authority

to the purchaser's attention in such positive manner as to overcome the strong presumption of authority arising from the usual course of business. The purchaser, having acquired a complete title, has full right to convey a complete title. The mere fact that a second purchaser from the original purchaser had knowledge that the original vendor did not intend to have his agent pass a full title would be of no consequence. The second purchaser, knowing that a full title had been passed, would violate no rights of the original vendor in acquiring that full title for himself.

It is contended by the defendant that, even if the purchaser's attention is called to the notice in the book, and he is informed that the agent has but a limited authority, the purchaser nevertheless acquires a full and unrestricted title, and full right of transfer of such title. It is said that this restraint on alienation is contrary to public policy. I am unable to see any inequity or violation of public policy in the agreement by the purchaser of a chattel that he will not resell it within a reasonable period. The purchaser gets all that was offered him, and all that he paid for, and the vendor maintains the market price by an agreement that the purchaser will not compete with him by selling the book within a limited period. To consider this as an unlawful agreement in restraint of trade would be straining the matter. The case resolves itself, then, into the question of whether it is sufficiently proved that the defendant has violated any rights of the complainant.

I am of the opinion that, while it is possible that the defendant may have acquired a good and transferable title to some of the books which it has disposed of, it is highly improbable that this is the case with so many as 55 copies. It is sufficiently proved that the defendant, having knowledge of the complainant's plan of sale and of the restrictions placed upon its agents, has instigated the purchase of at least 55 copies in New York. Whether the defendant's agents, or persons induced by them to become purchasers, were expressly informed of the notice becomes immaterial; for, if the defendant had actual knowledge of the limited authority of complainant's agents, such knowledge must be attributed to defendant's agents, and to persons instigated by such agents to make the purchases.

I am of the opinion that the defendant, being apprised of the agent's limited authority, could not, by procuring or inducing the agent to break his agreement with complainant, secure a better title than the agent was actually authorized to convey. While the ordinary purchaser of a book over the counter is not bound to anticipate or look for a restriction or notice of this kind, and while it seems to me rather more probable that he would not himself discover a notice of this character than that he would, yet, if before purchasing he has knowledge of the restriction, I fail at present to see why it is not binding upon him. While I should give little assistance to an attempt to incorporate in a contract of sale terms of which the purchaser was ignorant, and while the mere fact that a book contains a printed notice of this kind seems to me altogether insufficient evidence that the purchaser knew of it or assented to it, yet I am of the opinion that a contract between vendor and vendee that the vendee will not within a year resell is not unreasonable

nor against public policy as applied to books of this character, and, if actually made, is entitled to protection.

Upon the question of granting a preliminary injunction, a further fact is of some importance. The books were sold by the defendant for 49 cents. They doubtless cost 50 cents, and therefore were not sold as a matter of ordinary business, for the sake of making a profit, but were sold at a loss for the sake of competing with the complainant. The defendant will suffer no substantial harm from being restrained from selling these books at a pecuniary loss; and to deprive it of such trade advantage as may result from breaking the price on the books, and thereby advertising the defendant's store, does not, under the circumstances, seem a hardship to the defendant which should deprive the complainant of temporary relief.

As to the terms of the injunction: It is possible that the defendant may have acquired a transferable title to some of these books, but, as it appears that the defendant, with knowledge, has instigated the purchase of or purchased a large number of books to which it can have only the limited title of one who purchased with notice, I think the case must be treated in a practical way, and that the complainant is entitled to an injunction in general terms, but subject to the right of the defendant to apply to the court for a modification as to such books as it may be able to show were procured from persons who were not directly or indirectly instigated by the defendant to purchase them, and who purchased them without knowledge of a restriction of the right to resell. In *Social Register Ass'n v. Murphy* (C. C.) 128 Fed. 116, the injunction was made general, with liberty to the defendant to apply for a modification; and I think a similar course is proper in this case. The decree should cover both sales and interference with the complainant's contracts with its authorized agents.

The complainant is entitled to a preliminary injunction, and a draft decree may be presented accordingly.

In re PINCUS et al.

(District Court, S. D. New York. September 4, 1906.)

1. BANKRUCTY—PETITION FOR DISCHARGE—PLACE OF FILING.

Under District Court rule 11 in bankruptcy in the Southern District of New York, which makes the office of the referee the office of the court, the filing of a petition for discharge with the referee is sufficient.

2. SAME—DISCHARGE—OBTAINING CREDIT BY FALSE STATEMENT.

A written financial statement made by a business firm to a commercial agency, reciting that it is made as a basis for credit with the associate members of such agency, and which is communicated to members, who extend credit on the faith of it, is equivalent to one made directly to them, and, if materially false, will debar the debtor firm from the right to a discharge in bankruptcy under Bankr. Act 1898, § 14b (3), as amended in 1903 (32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]).

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 760.]

3. SAME—PARTNERS—ADJUDICATION AGAINST PARTNERSHIP ONLY.

Individual partners cannot be discharged from partnership debts under an adjudication against the partnership only.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 778.]

In Bankruptcy. On objections to petition for discharge.

R. A. Mansfield Hobbs, for objecting creditors.

Harry R. Kohn, for bankrupts.

HOUGH, District Judge. These bankrupts filed with the referee in charge, and about five months after adjudication, the petition under review. No action by the court was taken thereon, until more than a year after adjudication, and the objecting creditors now contend that the filing with the referee was insufficient to confer jurisdiction, and the petition should be dismissed as not having been preferred within the statutory year. It is true that the referee "as referee" has no power to consider the petition. Collier on Bank. (5th Ed.) p. 171. But within this district, and by force of district rule 11 in bankruptcy, the office of the referee is the office of the court. The objection is overruled.

On and prior to July 1, 1903, the bankrupts were trading under the firm name of "Castle Manufacturing Company." The petition in involuntary proceedings which brought them into this court runs against the bankrupts as partners only. The prayer of the petition is that the "firm of Castle Manufacturing Company" be adjudged bankrupt, and the adjudication declares that the petitioners "doing business under the firm name of Castle Manufacturing Company are declared bankrupts accordingly." This is therefore a proceeding against a partnership under the authority of section 5 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 547, 548 [U. S. Comp. St. 1901, p. 3424]). On or about July 1, 1903, a statement of the financial condition of this firm was prepared, which the special commissioner reports as true when prepared. I concur in his finding of fact.

On and before July 1, 1903, a large part of the assets of the firm consisted of a loan made to it by Bernstein, one of the partners. Inasmuch as the partner's right to repayment was subordinate to the claims of creditors of the partnership, this advance (consisting of \$10,000) was rightly treated in the statement above referred to (as well as in preceding statements) as an asset. On the 3d of August, 1903, Bernstein's loan to the firm became, by an instrument of transfer in which all of the petitioners joined, the loan of an outsider (i. e., of Bernstein's uncle), and the asset of \$10,000 immediately became a liability for the same amount, ranking with the demands of persons who sold goods to the partnership, and a claim for the same has been proved herein by the assignee.

The Credit Clearing House is a mercantile agency, having for its object, inter alia, the collection of information regarding mercantile establishments for the guidance of its subscribers, who are known as "associate members." On or about July 11, 1903, the bankrupt firm furnished to the Credit Clearing House the correct statement of their assets and liabilities as made up on or about July 1st. This statement is extremely definite, is in effect a brief trial balance, and was compiled with the assistance of an expert accountant.

At the foot of this very definite statement is appended the following:

"The above is a full and correct statement of our financial condition and is made to form a basis for credit with the associate members of the Credit Clearing House.

"[Signed]

Castle Manufacturing Company,
"By Albert Bernstein, Member of Firm."

On November 12, 1903, the firm furnished to one of the objecting creditors a statement identical in figures with the one given in July to the Credit Clearing House, and, indeed, from July, 1903, down to the time of failure, this statement appears to have been available to any creditor or merchant who chose to inquire for it. At the foot of this last-mentioned copy of the statement is appended the following:

"The above is a full and correct statement of our financial condition on the first day of July 1903, and is made to form a basis for credit with Sherman, Reid & Company.

"[Signed]

Castle Manufacturing Co., by Albert Bernstein.

"Date, New York, Nov. 12, 1903."

This last statement was furnished to a Mr. Chaffee, of the firm named. His firm was an associate member of the Credit Clearing House. He had had prior to July 1, 1903, a series of reports from the bankrupt firm, and in those earlier reports definite statements had been made regarding Bernstein's loan "at the risk of the business," which formed so large a part of the bankrupts' assets, and he knew that the firm reported to the "Clearing House." In December, 1903, therefore, he called upon the manager of the Credit Clearing House, a Mr. Wheeler, and inquired whether a statement regarding this loan appeared upon the last report made by the bankrupts. Wheeler said it did not. Chaffee asked him to go and find out about the matter. Thereupon, in the latter part of December, Wheeler called upon Bernstein with the report of July 11th, and asked regarding the loan. Bernstein took from Chaffee the original signed statement of July 11th and wrote upon it (and above his firm signature at the foot thereof) the following words:

"The additional loan of \$10,000 is included in above amount and has been renewed."

Wheeler communicated the result of this visit to Chaffee; and Sherman, Reid & Co. thereupon sold goods to the bankrupts, the price of which constitutes a provable debt that has never been paid; and the evidence here is that such sales were made upon the faith both of the mercantile agency report and of the statement dated November 12, 1903.

Upon these facts it is asserted that discharge should not be granted because of the material falsity, within the meaning of section 14b (3) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), of (1) the statement made to the Credit Clearing House in December, 1903, by addendum to the report of July 11, 1903, and (2) the statement made to Sherman, Reid & Co. on November 12, 1903.

On August 3, 1903, the statement of July 1st became ancient history, and any further use of it as a basis for credit, dishonest. If on November 12th deceptive oral representations had been made by the petitioners in response to natural inquiries regarding the Bernstein loan, questions would be raised that need not be here discussed. Nothing happened on November 12th which could justify Sherman, Reid & Co. in regarding the instrument as anything but what it literally purported to be—a statement true on July 1st. If the creditors chose to make no contemporaneous inquiry, while candidly admitting that the divergence of dates was noticed, it must be inferred that they regarded the partnership condition in July as a basis for credit in November. Another creditor (Simpson's Sons & Co.) received in January, 1904, from the bankrupts another copy of the statement of July 1st. They likewise seem to have been content to get a report purporting on its face to be six months' old, to make no inquiry, and accept it as a basis for January sales. All objections based on transactions other than the statement of December, 1903, to Wheeler of the Credit Clearing House are overruled.

That Bernstein's statement of December, made in response to Wheeler's inquiry, was materially false, is scarcely denied. The assertion that the loan was "included" in the statement, having been "renewed," was equivalent to declaring that the loan was in the same condition as on July 1st, a statement grossly false. But it is urged, and has been found by the commissioner, that an objection to discharge cannot be based on this falsehood because it was told to a commercial agency, for which *In re Allendorf*, 12 Am. Bankr. Rep. 320, 129 Fed. 981, and *In re Dresser*, 13 Am. Bankr. Rep. 616, 144 Fed. 318, are cited. The latter decision has been affirmed in the Circuit Court of Appeals (May 22, 1906) 146 Fed. 383.

In my opinion neither of the decisions referred to, and still less the judgment of the Court of Appeals, affords any ground for the contention now made. The amendment of 1903 certainly intended to make of a commercial agency neither a fetish nor a sanctuary for liars, nor to grant immunity from the consequences of false statements, provided they were contained only in reports to commercial agencies. Each instance must be decided on its own facts. This bankrupt firm made in effect a false statement to every associate member of the Credit Clearing House to whom the falsehood delivered to Wheeler was communicated. The firm made the "Clearing House" its duly authorized agent to circulate that falsehood, and when Wheeler correctly communicated it to Chaffee he brought this case directly within the ruling of the Circuit Court of Appeals. *In re Dresser*, *supra*. I think this follows from the agreement that the statement originally made July 11th was to be used as a "basis for credit" with all members of the agency. What would be the result were these words omitted need not now be decided.

The application of the above findings to the present petitioners requires further consideration.

The petition for discharge was filed by all the three partners in the Castle Manufacturing Company, and prays for discharge not only

from the liabilities of the firm, but from individual debts. Bernstein apparently abandoned the proceeding, and Pincus and Salzberger obtained leave to prosecute it; the order granting such leave, however, declaring no finding as to the effect of Bernstein's conduct. The latter has left the jurisdiction, and has never been examined under the objections filed against the firm. In a proceeding of this kind under section 5, the partnership is declared "a legal entity, irrespective of the status or the separate rights of the individual copartners." In *re Stein & Co.*, 127 Fed. 549, 62 C. C. A. 272. Individual discharges cannot be granted under an adjudication against the partnership only. In *re Hale*, 6 Am. Bankr. Rep. 35, 107 Fed. 432. Although an adjudication of the partners as individuals may be entered in an involuntary proceeding against the partnership entity only, and individual discharges thereafter obtained. In *re Meyer*, 98 Fed. 979, 39 C. C. A. 368.

No steps having been taken in this matter by or against the partners as individuals, the only thing adjudicated was the partnership entity, and the only thing dischargeable is the same entity; i. e., the "Castle Manufacturing Company." All or any number of the partners may petition for the partnership discharge. This proceeding in its present form is in legal effect the petition of two partners for the release of their firm from its debts. That firm having, as above shown, violated section 14b (3) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427] as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), is not entitled to discharge. In *Re Dresser*, *supra*, a discharge was granted to the junior partner in *Dresser & Co.*, while refused to the senior. The bankrupts in that case had been duly adjudicated, both individually and as partners. The proceeding was therefore within the construction of the act given by *In re Meyer*, *supra*.

These petitioners have evidently hoped to show themselves innocent of complicity with the absent Bernstein in making the false statement above discussed, and thereupon to obtain release from partnership debts while leaving Bernstein responsible. To grant this relief without bringing their individual property and individual creditors into this proceeding is not only without statutory authority, but clearly wrong. The right to proceed in bankruptcy against a partnership as a "legal entity" is new, and before the act of 1898 unheard of. The proceeding may be extended even through individual action of a partner, so that the rights and liabilities of separate partners may be considered, even in opposition to those of his copartners. But, until the partnership entity is thus resolved, the court can and should deal with the partners only in the way they have been proceeded against—in the aggregate.

No finding is made either as to the court's present power to amend this adjudication, or the right of Pincus and Salzberger, or either of them, to obtain a discharge (should such amendment be granted) under the facts proven herein. This record is insufficient to present either question.

Discharge denied.

BORT v. McCUTCHEN et al.

(Circuit Court, N. D. Iowa, W. D. September 19, 1906.)

No. 421.

1. BONDS—RIGHT OF ACTION FOR BREACH—BOND GIVEN TO OFFICER OF CORPORATION.

A banker, designated as depository for funds of an incorporated life insurance society, executed a bond running to plaintiff as chief financial officer of the society and to the society itself, jointly and severally, conditioned to preserve the funds and pay them out only on orders drawn in accordance with the by-laws of the society. These gave plaintiff no right to withdraw money on his own order, except for the purpose of transfer to another depository. The banker died, and plaintiff, as such officer of the society, presented an order to the administrators to pay the fund on deposit to another depository, which was refused, and plaintiff's term of office expired; the deposit not having been repaid. *Held*, that plaintiff as an individual was not a party to the bond, and could not maintain an action at law thereon after he ceased to be an officer of the society, whatever his liability to the society for the funds might be, since the liability of the sureties on the bond was measured by their contract and was by its terms to the society or its officer.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Bonds, §§ 148, 149.]

2. SAME—CONSTRUCTION OF BOND.

Such a bond cannot reasonably be construed to have been made for the benefit of plaintiff individually, although he may have been responsible for the funds to the society; such fact not appearing therefrom, so as to entitle him to sue thereon under Code Iowa 1897, § 3467, which authorizes such action on a bond intended for the security of the public generally, or of particular individuals in the name of any person intended to be thus secured who has sustained an injury by reason of its breach.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Bonds, §§ 148, 149, 58.]

At Law. On demurrer to the petition.

Action by A. N. Bort, as an individual, against the estate of E. H. McCutchen, deceased, and the sureties of said McCutchen upon a bond in writing made by them to the plaintiff as head banker of the Modern Woodmen of America, a corporation, and to said Modern Woodmen of America. The defendants, other than the Modern Woodmen of America, jointly demur to the petition upon the grounds in substance: (1) That plaintiff as an individual is not a party to such bond and has no right of action thereon; (2) that he has sustained no damage by the alleged breach thereof; and (3) that the conditions precedent to a right of action upon the bond have never been complied with.

Wright & Call, for plaintiff.

William E. Johnston and Hubbard & Burgess, for defendants.

REED, District Judge. The principle questions for determination are: Is the plaintiff as an individual a party to this bond, or does it fairly appear therefrom, or the circumstances under which it was made, that it was intended for his individual benefit?

The bond, in substance, is:

"That E. H. McCutchen & Company, bankers, as principal, and S. B. Gilmore and [others naming them] as sureties, are held and firmly bound unto A. N. Bort, as head banker of the Modern Woodmen of America, a corporation and to the said Modern Woodmen of America, jointly and severally in the penal sum of

two hundred thousand dollars (\$200,000) lawful money of the United States, to be paid unto the said A. N. Bort as said head banker of the Modern Woodmen of America, and to said Modern Woodmen of America, or either him or it upon the following conditions:

"Whereas, the said A. N. Bort, head banker of the Modern Woodmen of America, has duly designated in accordance with the by-laws of said Modern Woodmen of America, the said E. H. McCutchen & Company, bankers aforesaid as one of the depositories, and such designation having been approved by the board of directors of said Modern Woodmen of America, pursuant to said by-laws; and,

"Whereas, A. N. Bort, head banker of said Modern Woodmen of America, will in accordance with said by-laws, from time to time, deposit with the said E. H. McCutchen & Company, bankers, as such depository, certain sums of money belonging to the said Modern Woodmen of America; and,

"Whereas, the by-laws of said Modern Woodmen of America provide that interest shall be paid for the sole benefit of said Modern Woodmen of America upon money so deposited in said depository: * * *

"Now, therefore, the conditions of this obligation are such that if the said E. H. McCutchen & Company, bankers aforesaid, shall (1) issue to the said A. N. Bort, head banker, in duplicate certified 'deposit slips' immediately upon receipt of any and all money deposited by him, and (2) shall keep a separate account of the general fund and the benefit fund, and quarterly receipt for and add to said general fund interest on all deposits at the rate of two per cent. per annum, * * * and (3) shall, on presentation, honor and pay all orders drawn and indorsed in pursuance of the by-laws of said corporation, free of exchange or expense to the extent of all deposits made with it, and shall charge the head banker, or said corporation, and receive credit for payment made in no other way than aforesaid, except (4) that payment of said fund shall be made to a new or other depository on the direction of said head banker on his demand made for the purpose of placing said funds in a new or other depository; then this bond shall be void," etc.

The applicable by-laws of the Modern Woodmen of America, which may be regarded as referred to in the bond, are:

"Sec. 130. The head banker shall be the custodian of all the funds and moneys of this society, and shall receive the same from the head clerk, and shall give him a receipt therefor as soon as each payment or remittance is received.

"Sec. 131. The head banker shall designate three or more responsible banks, acceptable to and approved by the board of directors, as depositories, in which all the moneys and funds of this society shall be kept on deposit, upon such terms in regard to the interest to be paid thereon as the board of directors may approve."

"Sec. 134. Immediately upon receipt of any moneys or funds belonging to this society the head banker shall deposit the same in one or more of the several depositories designated by him as hereinbefore provided, and he shall forthwith forward to the head clerk a certified deposit slip, and thereafter such moneys shall not be withdrawn therefrom save in the manner provided in the following section.

"Sec. 135. No funds deposited by the head banker, pursuant to the provisions of section 134 hereof, shall be withdrawn otherwise than upon an order or warrant authorized by the board of directors, signed by the head counsel and head clerk, and countersigned by at least three members of the board of directors, and further countersigned by the head banker, who shall designate upon such order or warrant the depository from which such funds are to be withdrawn, and on which the order or warrant shall be drawn; provided, that nothing herein contained shall be so construed as to prevent the head banker from transferring funds of this society from any one of the designated depositories to any of the other designated depositories, for good cause, such transfer, however, to be made only through the check of said head banker, drawn in favor of the depository whose deposit it is intended shall be increased by such transfer of funds."

"Sec. 133. All accretions, by way of interest or otherwise, arising from such deposits of moneys and funds of this society, shall be placed to the credit of its general fund, quarterly."

Section 132 provides that depositories shall give bonds in such amounts as may be determined by the board of directors, payable to the head banker and the Modern Woodmen of America, or either of them. And section 138 provides for the giving of a bond by the head banker and his liability to the association. Neither of these is referred to in the bond in suit, and cannot be regarded as a part thereof, and the bonds actually given by the depositories and their sureties must measure their liability in actions thereon.

The petition alleges that in July, 1903, the plaintiff was head banker of the Modern Woodmen of America; that one E. H. McCutchen was then doing a banking business in Ida county, this state, under the name of E. H. McCutchen & Co., and had been designated as one of the depositories, and pursuant to the by-laws of said Modern Woodmen of America made the bond above referred to, which was signed by the other defendants as his sureties; that plaintiff, as such head banker, and pursuant to said by-laws, deposited with said McCutchen's bank, as said depository, the sum of \$100,000 in money belonging to said Modern Woodmen of America; that in January, 1904, the said E. H. McCutchen died intestate, and the defendants Fred C. McCutchen and V. Rouche have been duly appointed administrators of his estate, and now are acting as such; that on January 29, 1904, after the death of said E. H. McCutchen, the plaintiff, as said head banker, pursuant to the by-laws of said association, drew orders on said E. H. McCutchen & Co., bankers aforesaid, to pay to the First National Bank of Mason City, Iowa, an approved depository, the sum of \$100,000 so deposited with said McCutchen & Co. and the sum of \$158.92 interest upon said deposit, and presented said orders to said Fred C. McCutchen and V. Rouche, administrators of the estate of said E. H. McCutchen who were in charge of the business of said E. H. McCutchen & Co., and demanded payment of said orders, which was refused, and said orders have not been paid; that on March 22, 1904, the plaintiff made a further written demand upon each of said sureties for the payment to plaintiff of said \$100,000 deposited with said E. H. McCutchen & Co., with the interest thereon as aforesaid, which payment was refused by them; that in the month of July, 1905, the plaintiff's term of office as head banker of the Modern Woodmen of America expired, and he was not re-elected; that he thereupon turned over to his successor in office all of the funds which had come to his hands as head banker, except the amount due from said E. H. McCutchen & Co., which has not been accounted for; and that said Modern Woodmen of America claims of plaintiff the amount of said deposit and interest upon his obligations to said company. The petition was filed January 3, 1906, and therein the plaintiff as an individual demands judgment against the administrators of said E. H. McCutchen and the sureties upon said bond for the amount of said deposit and interest.

The action is at law and by A. N. Bort individually, and his right to maintain the same in that capacity must be determined by the terms of the bond of McCutchen and his sureties, and such of the by-laws of the Modern Woodmen of America as may be fairly regarded as part thereof. In express terms the obligors in said bond are held unto A. N. Bort, as head banker of the Modern Woodmen of America, and to said Modern Woodmen of America jointly and severally, in the penal sum of \$200,000, to be paid unto them, or either of them, upon condition that said E. H. McCutchen & Co. shall, among others (3) on presentation honor and pay all orders drawn and indorsed in pursuance of the by-laws of said corporation and receive credit for payments made in no other way; except (4) that payment of said funds shall be made to a new or other depository on the direction of said head banker on his demand made for the purpose of placing said funds in a new or other depository.

The administrators of the estate of E. H. McCutchen are doubtless liable to the same extent that he would be, either upon the bond, or independent thereof, for the money deposited with him; but the liability of the sureties upon the bond is measured by its strict terms, though that must be given a rational interpretation the same as any other agreement. *United States Fidelity Co. v. Board of Directors* (C. C. A.) 145 Fed. 144-148. What, then, is the undertaking of the obligors of this bond? What is there in it, or the by-laws of the Modern Woodmen of America, that may justly be regarded as a part thereof to indicate that it is for the individual benefit of A. N. Bort, and why is he as head banker named as one of the obligees? When the bond was made he was in fact the head banker of the Modern Woodmen of America, and quite naturally was named as such, though the legal effect of the bond would be the same if it had run to the head banker of the association, without naming him. Under the by-laws of the company the head banker is the mere custodian of the funds of that company (the legal title thereto does not vest in him), and he is required to deposit the same in its designated depositories. As such officer he may transfer the same from one depository to another, and in that capacity may rightfully demand from any depository all of the funds of the company it has on deposit for such purpose and enforce such demand by any legal proceeding necessary therefor in his capacity as such officer; but he alone, as such head banker even, has no authority to withdraw them for any other purpose. The incumbent of the office of head banker, when bonds of the depositories are made, is named in the bonds as such officer; but, when his term of office expires, he no longer has any right to direct where the funds of the company shall be kept, nor to transfer the same from one depository to another. That is to be done by his successor.

The alleged breach of this bond consists in the failure of McCutchen or his administrators to honor a demand of A. N. Bort as head banker to transfer the deposit made with it to another depository, or to pay the same to him as such officer. Undoubtedly Mr. Bort, as head banker, might by a proper action in his name as such officer

have enforced his demand for the transfer of the fund during his term of office, and, if the action was not during such term finally determined, his successor in office might have been substituted in his stead, and such successor would then have controlled the further proceeding in the action; but Mr. Bort, as an individual, had and has no right to demand or withdraw funds from any depository for any purpose whatever, and any of the depositories might rightfully refuse his individual demand for all or any part of the fund on deposit with them, and such refusal would not be a breach of the bond.

It is true that by section 138 of the by-laws, and by his bond made to the company pursuant thereto, Mr. Bort undertakes to answer to the company for the default of any depository in paying over any of the moneys of the association deposited with it. This is a personal obligation assumed by him individually, and he might have exacted from any depository, in which he deposited funds of the association, an obligation that would protect him against such liability. But there is nothing in the bond in suit, nor in any by-law of the association that may fairly be regarded as a part thereof, that imposes any such obligation upon these defendants, and the fact that plaintiff assumed such obligation upon his part cannot be held to add to, or extend, the obligations assumed by the makers of this bond. Mr. Bort, as an individual, is not therefore by the terms of this bond a party thereto, and it is well settled that one cannot maintain an action at law upon a contract to which he is not a party. *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75; *Keller v. Ashford*, 133 U. S. 610-620, 10 Sup. Ct. 494, 33 L. Ed. 667; *Willard v. Wood*, 135 U. S. 309-313, 314, 10 Sup. Ct. 831, 34 L. Ed. 210.

Many authorities are cited by plaintiff to the effect that, where a contract is made by one with another for the benefit of a third, the latter may maintain an action upon such contract, though he is not named therein, if from its terms it fairly appears that he is the one intended to be benefited thereby; and section 3467, Code Iowa 1897, is relied upon as authorizing an action at law under the Iowa practice by such third party. *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210. Section 3467 is as follows: "When a bond or other instrument given to the state or county or other municipal or school corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, action may be brought thereon in the name of any person intended to be thus secured, who has sustained an injury in consequence of a breach thereof, except when otherwise provided." The correctness of the legal proposition thus stated by plaintiff may be conceded, but the difficulty is in applying it to the facts of this case, for this contract upon any fair or reasonable construction does not run to, and is not made for the benefit of, the plaintiff as an individual, and he is not therefore, under the rule contended for, entitled to sue thereon. It will be observed, however, that section 3467 of the Code only authorizes such an action by "one who has sustained an injury in consequence of a breach" of such bond or instrument.

The plaintiff is not, therefore, by the terms of this bond, individual-

ly entitled to demand or receive any part of the deposit made with the McCutchen bank, and, as his term of office as such head banker had expired before this action was commenced, he is not entitled to demand or receive the same as such officer, and the demurrer should be sustained upon the first, second, third, fourth, fifth, and sixth grounds thereof. This renders it unnecessary to consider the other grounds of the demurrer. This conclusion is the more readily reached for the reason that, if the plaintiff is permitted to recover, it must be for the benefit of the Modern Woodmen of America, the owner of the fund deposited with the McCutchen bank. That company is an obligee named in the bond, and has an undoubted right to sue thereon and to recover the amount of its deposit from the defendants, if they are liable therefor under this bond.

The demurrer is sustained upon the grounds above stated.

JAHN v. CHAMPAGNE LUMBER CO. et al.

(Circuit Court, W. D. Wisconsin. September 1, 1906.)

No. 124.

1. EQUITY—CREDITORS' SUIT—DEMURRER TO BILL—MULTIFARIOUSNESS.

Where a bill by a judgment creditor of a dissolved corporation, in behalf of himself and all other creditors similarly situated who may join, against the stockholders of the corporation, who are alleged to have divided its property between them for the purpose of defrauding its creditors, seeks to hold them as trustees with respect to such property, it is not multifarious because it also prays that, in case the amount so realized shall be inadequate, an accounting may be had of the amounts due from defendants on their stock subscriptions, the purpose of the bill in both aspects being to reach assets of the corporation in the hands of defendants.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 357.]

2. ASSIGNMENTS—SUIT BY ASSIGNEE OF JUDGMENT—CONSIDERATION FOR ASSIGNMENT.

A creditors' bill filed by the assignee of a judgment for \$2,500 is not demurrable for want of equity because the assignment which is under seal and set out in the bill expresses a consideration of \$15 and "other sufficient and valuable consideration" on the theory that the consideration was so inadequate as to show that the purchase was a mere speculative venture which a court of equity will not aid, it not appearing from the bill what the actual consideration was.

In Equity. On demurrer to bill.

This is an action in equity in the nature of a creditors' bill in behalf of the complainant and any other creditor similarly situated who may come in and join in the proceeding. In substance it is charged that one Nyback, assignor of complainant, after a protracted litigation recovered certain judgments against the Champagne Lumber Company, a Wisconsin corporation, in the Circuit Court of the United States for the Western District of Wisconsin, for personal injury, amounting, with costs, to something over \$2,500. Pending such litigation it is alleged that the Champagne Lumber Company was wound up, and all its property and assets were fraudulently distributed among the stockholders who were the individual defendants herein. So that when the fi. fa. was issued on such judgments, the same was returned nulla bona; that the defendants Stewart and Alexander were the stockholders of said corporation

at the time of its disintegration, and fraudulently divided among themselves all such property and assets, which were alleged to be of greater value than the amount of such judgment; and that such proceedings were taken by the officers and stockholders of said corporation for the purpose of defeating any recovery upon such judgments at law; that after verdict and before judgment in such proceedings at law, the cause of action therein was assigned and transferred to the complainant by an instrument in writing and under seal "for sufficient and valuable consideration." Annexed to the bill is a copy of such assignment, wherein the consideration for the transfer is stated as follows: "That in consideration of the sum of fifteen dollars this day paid by the party of the second part to said party of the first part, the receipt whereof is hereby acknowledged and confessed, and for other sufficient and valuable consideration heretofore received by said party of the first part from the said party of the second part," etc. It was further averred that the individual defendants originally subscribed for a large amount of the capital stock of said corporation, and that they had only paid in 50 per cent. of the amount of such subscription, and that 50 per cent. thereof was still due and owing from the said defendants to said corporation at the time it was wound up. The relief sought by the bill was a discovery and accounting of all the assets and property of said corporation which had been thus distributed and divided among the stockholders, also an accounting as to the amount due to the complainant and to any other creditors similarly situated who might join in the action; that, if such assets and property so misapplied by the stockholders should prove insufficient to pay the judgments of the complainant and to satisfy the claims of such other creditors as may come in and join in the action, then there be an accounting as to the amount due by the individual defendants, as stockholders, to the Champagne Lumber Company; and that said defendants be required to pay into court the amount so due upon said subscription to capital stock. There was also a general prayer for relief. To this bill the defendants interposed a general and several demurrer stating several grounds, but only two propositions were relied upon at the argument. First. It was objected that the bill is multifarious. Second. That it appears upon the face of the bill that the consideration for the assignment of the verdict and cause of action in such suit at law from Nyback, the original plaintiff, to the complainant, was so slight and inadequate that equity ought not to entertain this suit, or lend its aid to consummate what appears to be a mere speculative venture.

William T. Lennon (Julius J. Patek, of counsel), for complainant.

Reid, Smart & Curtis and Sanborn & Blake, for defendants.

QUARLES, District Judge (after stating the facts). The first proposition upon which the demurrer is predicated, namely, that the bill is multifarious, is wholly without merit. Bates Fed. Eq. Pro. § 195. It is the peculiar function of equity to protect creditors by treating the assets of a defunct corporation as a trust fund; to discover and assemble all the assets of the debtor corporation into a common fund, to be marshaled in the interest of all the creditors. Several cases are cited by counsel where conflicting remedies have been confounded in bills of this nature so that demurrers thereto have been sustained by the courts; but no such objection can be successfully urged in this case. The bill in behalf of complainant, and all other creditors similarly situated, seeks a discovery as to the alleged misapplication of the assets of the Champagne Lumber Company, which were fraudulently distributed among the individual stockholders for the alleged purpose of defeating any recovery upon the judgments at law. The bill seeks to hold the defendants Stewart and Alexander

as trustees for the creditors as to the property of such corporation remaining in their hands. This is a remedy so frequently administered by courts of equity that no discussion as to its propriety is necessary, admitting, as the demurrer does, the allegations of the bill. The bill then proceeds for further relief in case the amount realized from such property and assets of the corporation should prove inadequate; that then, and in that case, an accounting should be taken as to the amount due from the individual defendants to the corporation upon their stock subscription, and that such amount so found due, or so much thereof as may be necessary, should be paid into court, to constitute a portion of the fund to be administered for the benefit of the creditors. It is contended that these two propositions render the bill multifarious.

It will be observed that both of the individual defendants are equally concerned in both branches of the remedy sought, and both are jointly liable. There is, in the contemplation of equity, no essential difference between the two classes of assets sought to be reached. There is nothing inconsistent or incongruous in the joinder. The contractual obligation of the individual defendants to the corporation upon the stock subscription is a part of the assets of the corporation, and for the purpose of such a proceeding as this, stands upon the same footing as the tangible assets alleged to have been fraudulently appropriated. *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220. According to the rules of equity there is no fundamental difference between moneys that have been paid into the corporation and transformed into lumber and various other articles of personal property, and an obligation of individual stockholders to pay in other moneys for the purposes of the corporation whenever called in.

It is contended that, in view of the averments of the bill wherein it is stated that the value of the corporate assets specifically distributed among the stockholders is largely in excess of the amount of the judgments and other debts of the corporation, there is no warrant or excuse for compelling the defendants to make answer and defense as to their liability upon the stock subscription. The court pays little heed to a suggestion from the defendant that it is not necessary to call in the stock subscription. *Furnald v. Glenn* (C. C.) 56 Fed. 375. But very properly the plaintiff sues in behalf of all other creditors of the corporation similarly situated, and he must share the fund with them on even terms. He is not presumed to know how many such creditors there may be, and therefore is justified in so framing his bill as to resort to the contractual liability of the individual defendants upon the subscription agreement. This course has been frequently resorted to under similar circumstances. *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479; *Harrigan v. Gilchrist*, 121 Wis. 238, 99 N. W. 909, and cases cited; *Hatch v. Dana*, 101 U. S. 208, 25 L. Ed. 885. For these reasons the first contention of the defendants is overruled.

Second. The second ground of demurrer is seriously urged that inasmuch as the assignment of the cause of action to the complainant expresses a consideration of \$15 and "other sufficient and valuable consideration heretofore received," etc., that the court is justified in

assuming that the consideration was so trifling and inadequate that the court should decline to proceed with the action, on the ground that complainant is not entitled to the aid of the court, but should be shown out of court as one who speculates upon the infirmity of another, and therefore not entitled to the consideration of a court of equity. It must be remembered that the assignment was evidenced by a writing under seal "for sufficient and valuable consideration." It is true as argued, that \$1 may be considered a sufficient and valuable consideration; but it is equally true that there may have been, in fact, a consideration which the court would consider ample and adequate. Until the facts have been elicited, we cannot know what the complainant, in fact, paid for the cause of action. We can only guess. The destiny of this case cannot hinge on a mere guess.

I have examined all the cases cited and find none properly applicable to the precise case at bar. Admitting that such cases have correctly stated the law, it becomes us to know what the facts are before we undertake to apply the principles. Furthermore, general demurrers are not looked upon with favor when interposed to a bill charging fraud and conspiracy. *Johnston v. Merch Co.* (D. C.) 127 Fed. 845.

For these reasons the demurrer will be overruled, and defendants will be allowed to plead to the bill on or before the October rule day.

MILLS v. ROBERTSON.

(Circuit Court, S. D. New York. June 21, 1898.)

No. 9,674.

1. CUSTOMS DUTIES—COMMERCIAL DESIGNATION—"COTTON LACES."

In reference to the provision for "cotton laces" in Tariff Act March 3, 1883, c. 121, § 6, Schedule I, 22 Stat. 506, *held* that evidence was admissible as to whether it had a commercial meaning differing from its ordinary signification, and as to what articles such meaning included.

2. SAME—COTTON LACES—COMPLETED ARTICLES.

The provision for "cotton laces" in Tariff Act March 3, 1883, c. 121, § 6, Schedule I, 22 Stat. 506, would, in its ordinary significance, no contrary trade understanding being proved, include not only laces dealt in by the yard but made-up articles which are produced originally as lace only in the process of making the completed article.

At Law. Action to recover duties.

These proceedings were brought by Philo L. Mills and others, constituting the firm of Mills & Gibb, against William H. Robertson, collector of customs at the port of New York, to recover alleged excessive duties exacted by the collector. The pertinent portions of the law from which the question at issue arose are "cotton laces" and "all manufactures of cotton, not specially enumerated or provided for." Tariff Act March 3, 1883, c. 121, § 1, Schedule I, 22 Stat. 506. The goods in controversy consisted of various lace articles in a completed form, such as aprons, collars, collarettes, cuffs, handkerchiefs, fichus, and sets. They were assessed for duty under the former provision and were claimed by the importers to be properly dutiable under the latter. Evidence introduced in behalf of the importers showed that they were not made up from lace in the running yard, but were produced originally as lace only in their completed condition as imported. The importers also sought to show that the term "cotton laces," as used in the law, had a commercial meaning which

did not include such articles. Evidence to that end was admitted over the objection of the government, and at the conclusion of the evidence counsel for the United States moved the court to direct a verdict in favor of the government on the ground that "the term 'cotton laces,' as used in the tariff act of 1883, was a descriptive term, and, consequently, the trade meanings or understandings, if any connected therewith, are immaterial." The court overruled this motion, observing: "I think this case presents a question of fact for the jury."

Curie & Smith (W. Wickham Smith, of counsel), for importers.
James T. Van Rensselaer, Asst. U. S. Atty.

WALLACE, Circuit Judge (charging jury): * * * The issue which you are called upon to determine is an issue of fact and involves the single question whether the importations in controversy * * * were, at the date of the tariff act of 1883, articles which were included within the general commercial designation of laces—"cotton laces." Now, it seems that, by the tariff act of 1883, Congress imposed a duty of 40 per cent. ad valorem upon cotton laces, embroideries, insertings, trimmings, lace window curtains, and some other things; and by the same act imposed a duty of 35 per cent. ad valorem upon certain cords, gimps, galloons, and certain other things, and all manufactures of cotton not specifically enumerated and provided for in this act. It follows that unless the articles in controversy were cotton laces within the meaning of the 40 per cent. provision, they were manufactures not enumerated, and therefore should have been subjected to a duty of 35 per cent. ad valorem instead of 40 per cent. the amount of duty which was exacted.

Now, you have heard the testimony of a large number of witnesses, and the question to be solved by the assistance of that testimony is simply this: Were the articles in controversy commercially known in 1883, at the date of this tariff act—generally commercially known—as "cotton laces"? If such articles were so known, and fall within that general designation, then the defendant is entitled to a verdict. If they do not, then the plaintiff is entitled to a verdict.

Now, before I take up the question in any detail it is my duty to instruct you that the law presumes that the defendant here, the collector of the port, has properly performed his official duty, and that he has subjected the importations to the duties to which they were liable by law; and consequently it is incumbent upon the plaintiffs to establish to your satisfaction by a fair preponderance of testimony that their contention is right, and that the collector was wrong. And if, upon the whole case, you find that the testimony is evenly balanced, and you are unable, after an intelligent examination of this testimony, to discover where the balance lies, why, then it will be your duty to find a verdict for the defendant.

Now, gentlemen, are these articles such as were embraced in the term "cotton laces" according to the common understanding of merchants in this country in 1883? That is all the question there is in this case. That they were cotton laces in one sense does not seem to be open to any dispute. They are laces. They are cotton. They are articles made of cotton lace. So in one sense, they are cotton

laces; and in the ordinary significance of the term, I cannot entertain any doubt, aside from any question of commercial designation, that these articles would have been included within the definition of cotton laces. But it is said that the term "cotton laces" in commercial signification has a different meaning; and if it has, and if according to that meaning these articles were not embraced within the term, then the plaintiff is entitled to a verdict. Testimony has been offered to the effect that according to commercial understanding at the time when this tariff act was passed, cotton laces were understood to include only laces that came by the yard, were bought and sold by the yard, and that made-up articles, like the samples in controversy, were not, according to that commercial understanding, included within the meaning of that term. Well, witnesses have testified to that; witnesses whose intelligence and integrity we have no right to question. But you are not bound to accept their statements. They may really have satisfied themselves that this was so, and yet I think that if there had been no witnesses introduced for the defendant at all, you would have been at liberty to apply your own judgment, analyzing their testimony in the light of cross-examination and determine for yourselves whether their conclusions were correct or not. Now, it appears almost overwhelmingly that there is not anything, and was not anything in trade which was bought and sold as cotton lace by that specific name. If a customer wanted to purchase or to order a particular kind of cotton lace, he ordered it by its designation. If he wanted collarettes, or flounces, or any of these other things, lace in its various forms illustrated by the samples, he would order them by that specific name. If he wanted edging, inserting, cotton lace that ran by the yard, he would order it by that name. Now, how much does all this evidence of commercial designation amount to? Can you, upon this testimony, looking at it as sensible men, come to the conclusion that it meant anything different, according to the understanding of that term among merchants, from what it did according to the understanding of men who were not merchants? Now, this question is a question of fact, and is entirely for you. It is not for me, and whatever opinion I may have upon it, that opinion is not to control you. You are to exercise your own judgment and decide the case according to your own consciences. If you come to the conclusion that according to the general understanding in trade in 1883, at the date of the passage of this act, such articles as these in controversy were excluded in trade understanding from the article known as "cotton laces," then the plaintiff is entitled to your verdict. Otherwise, the defendant is entitled to your verdict.

UNITED STATES v. THOMPSON.

(District Court, D. North Dakota. September 7, 1906.)

GAME—INTERSTATE TRANSPORTATION—CONSTRUCTION OF STATUTE.

Act May 25, 1900, c. 553, § 3, 31 Stat. 188 [U. S. Comp. St. 1901 p. 3181] provides that it shall be unlawful for any person to deliver to any common carrier or for any common carrier to transport from one state or territory to another state or territory the dead bodies or parts thereof of any wild animals or birds killed in violation of the laws of the state, territory, or district in which the same were killed, "provided that nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured and the export of which is not prohibited by law in the state, territory, or district in which the same are killed." Section 4 requires all packages "containing such dead animals, birds, or parts thereof, when shipped by interstate commerce, as provided in section 1 of this act" (31 Stat. 187 [U. S. Comp. St. 1901, p. 290]) to be plainly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages, and makes the violation of such requirement a penal offense. *Held*, that the reference in such section to section 1 of the act was a clerical error, such section having no relation to the subject-matter, and section 3 being manifestly intended; that as so construed section 4 is limited in its application to the two classes of shipments enumerated in section 3: First, animals or birds killed in violation of the game laws; and, second, animals or birds killed during the open season and "the export of which is not prohibited by law"; and that an indictment would not lie under said section 4 for a failure to mark a package containing game killed during the open season but the export of which was prohibited by the law of the state where the same was killed.

On Demurrer to Indictment.

AMIDON, District Judge. A general demurrer has been interposed to the following information upon the ground that the same does not state facts sufficient to constitute a public offense:

"At the May, 1906, term of the United States District Court for the District of North Dakota in the year of our Lord one thousand nine hundred and six, leave of the court being first had and obtained, comes B. D. Townsend, Assistant Attorney for the United States for said district, and informs the court that one Charles Thompson on the 27th day of September, A. D. 1905, at the city of Devil's Lake in the county of Ramsey in said district, did then and there willfully, knowingly, and unlawfully ship and cause to be shipped and transport and cause to be transported by interstate commerce, to wit, from said city of Devil's Lake in said district and state of North Dakota to the city of St. Paul in the state of Minnesota, upon and by means of a certain line of railway known as the "Great Northern Railway Line," which said line of railway then and there extended continuously from said city of Devil's Lake to said city of St. Paul in and through said states of North Dakota and Minnesota and elsewhere, and which said line of railway then and there was being operated by the Great Northern Railway Company, which said railway company then and there was a common carrier engaged in the interstate shipment and transportation of freight and merchandise between said points last named and elsewhere upon and by means of said line of railway, a certain package commonly called a 'trunk,' which said package then and there did contain the dead bodies of certain game birds, to wit, the dead bodies of 64 ducks commonly called 'Mallard' and 'Teal' ducks, a more particular description of which ducks is to this informant unknown, which said ducks had theretofore and during the month

of September, 1905, been killed and taken in said district and state of North Dakota, and which said package was then and there by the said Charles Thompson shipped and transported and by him, the said Charles Thompson, caused to be shipped and transported by the means aforesaid out of the state of North Dakota from the city of Devil's Lake aforesaid into the state of Minnesota to the city of St. Paul aforesaid, by interstate commerce aforesaid, and which said trunk and package at all of said times and places was not plainly or clearly marked so that the name or the address of the shipper thereof or the nature of the contents thereof could be readily or otherwise or at all ascertained on or by inspection of the outside of said package, or otherwise or at all, and upon which said trunk and package at all of said times and places there was no mark, writing, letter or character of any kind whatsoever or combination or combinations of any thereof designating the name of the shipper thereof or the address of the shipper thereof, or the nature of the contents thereof, and upon which said trunk and package at all of said times and places there was no mark, writing, letter, or character of any kind whatsoever or combination or combinations of any thereof from which, on or by inspection of the outside of said package or otherwise, the name of the shipper thereof or the address of the shipper thereof or the nature of the contents thereof could be ascertained, and upon which said trunk and package at all of said times and places there was no mark, writing, letter or character of any kind whatsoever; and which said trunk and package at all of said times and places was securely closed and did completely conceal from view the whole of the contents thereof, to wit, the dead bodies of said ducks, and each and all thereof, contrary to the form of the act of Congress approved May 25, 1900, in such case made and provided and against the peace and dignity of the United States of America."

This information is based upon section 4 of the act of May 25, 1900, c. 553, 31 Stat. 188 [U. S. Comp. St. 1901, p. 3181] which provides:

"That all packages containing such dead animals, birds or parts thereof, when shipped by interstate commerce, as provided in section 1 of this act, shall be plainly and clearly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages."

The reference to section 1 in this section is a clerical error. Section 1 (31 Stat. 187 [U. S. Comp. St. 1901, p. 290]) is in no way related to the subject embraced in section 4. A reading of the entire statute shows clearly that Congress intended to refer to section 3. That section reads as follows:

"That it shall be unlawful for any person to deliver to any common carrier or for any common carrier to transport from one state or territory to another state or territory * * * the dead bodies or parts thereof of any wild animals or birds where such animals or birds have been killed in violation of the laws of the state, territory or district in which the same were killed: Provided, that nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the state, territory, or district in which the same are killed."

Confining section 4 to the classes enumerated in section 3, as we are required to do by its language, what does it embrace? First, the enacting part of section 3 covers the dead bodies or parts thereof of wild animals or birds killed in violation of the laws of the state in which the same are killed. An examination of the information excludes the birds in question from this class because they were killed during the open season and when by the laws of North Dakota they might properly be killed.

The second class embraced in section 3 is covered by the proviso. It relates to dead birds or animals killed during the open season, but contains the important limitation that it does not embrace such birds or animals when their export is prohibited by law in the state in which the same are killed. This limitation exempts the birds covered by the indictment from section 4 of the act in question because their export from the state of North Dakota where they were killed is by the laws of that state expressly prohibited.

It follows, therefore, as an irresistible conclusion that the ducks mentioned in the indictment do not fall within either of the classes embraced in section 3 of the act of Congress, and as section 4 of that act covers only the classes embraced in section 3, the ducks mentioned in the indictment must likewise be excluded from the provisions of section 4.

I have reached this conclusion with a good deal of reluctance. The statute in question is one of highly beneficent purpose. An examination of the debates in Congress and the report of the committee on interstate commerce of the House of Representatives which had the bill in charge shows clearly that Congress intended by the statute to require all packages when shipped by interstate commerce, which contain the dead bodies of game birds or animals, to be marked as mentioned in section 4. Two objects were thus sought to be accomplished: First, it was intended that the package should show clearly on its face the nature of its contents and where the birds or animals were killed and the place to which they were to be shipped. This was for the purpose of notifying the carrier or purchaser of these facts so that they would be apprised, on an examination of the package and a comparison of the laws of the proper state, that the package was or was not a lawful subject of interstate commerce. The second object had in view was to aid the local authorities in enforcing game regulations. The unfortunate reference, however, in section 4 to section 3 of the act imposes the limitation which I have pointed out and which was not within the actual intent of Congress, as can be learned by the debates on the bill.

In construing a criminal law we are not permitted to go beyond its language. The statute can be given a large measure of force and effect by attaching to it the limitation which its words require. A citizen is not called upon to look beyond the words of a criminal statute to learn his legal duty, and the court can only give effect to the language of the act and such implications as clearly arise from the language. A legislative intention which cannot be found by such an interpretation cannot be given effect by the courts in administering criminal law. It necessarily follows from these views that the demurrer must be sustained, and it is so ordered.

UNITED STATES v. SPEAR.

(District Court, D. North Dakota. September 7, 1906.)

AMIDON, District Judge. Upon the grounds and for the reasons fully set forth in the opinion this day filed in the case of United States v. Charles Thompson, 147 Fed. 637, it is ordered that the demurrer to the information in the above-entitled cause be, and the same is hereby sustained.

LEHN & FINK v. UNITED STATES.

(Circuit Court, S. D. New York. May 29, 1906.)

No. 3,910.

CUSTOMS DUTIES—CLASSIFICATION—HEXAMETHYLENTETRAMIN.

Held that hexamethylenetetramin is a medicinal preparation in the preparation of which alcohol is not used, within the meaning of paragraph 68, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631].

On Application for Review of a Decision of the Board of United States General Appraisers.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question consisted of certain Hexamethylenetetramin, upon which duty was assessed at 55 cents per pound under paragraph 67 of the tariff act of July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631]. The importers protested claiming that said merchandise was only dutiable at the rate of 25 per cent. ad valorem under paragraph 68 of said Act as a "medicinal preparation not containing alcohol or in the preparation of which alcohol is not used."

The only evidence before the Board of General Appraisers was an affidavit, in the German language, from the foreign manufacturer. A translation of this affidavit was produced before the referee, in the Circuit Court, also the testimony of a witness. From the translation, it appears that the article does not contain alcohol, and that alcohol was not used in its preparation. I think the board must have misinterpreted or mistranslated this affidavit, upon which it based its findings of fact. The testimony of the witness also tended to confirm the facts set forth in the affidavit as translated in court.

The decision of the Board of General Appraisers is reversed.

JENKINS & REYNOLDS CO. v. ALPENA PORTLAND CEMENT CO.

(Circuit Court of Appeals, Sixth Circuit. July 10, 1906.)

No. 1,519.

1. TRIAL—DIRECTION OF VERDICT.

A motion for the direction of a verdict for defendant should be sustained unless there is evidence favoring such of the ultimate or constitutive facts of plaintiff's case as have been put in issue to a substantial degree, and in determining this question all inferences reasonably to be drawn therefrom most favorable to plaintiff must be taken.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 332, 342, 402.]

2. SAME.

A motion for a directed verdict in favor of defendant should be overruled if there is substantial evidence favoring such ultimate facts of the plaintiff's case as have been put in issue to a substantial degree, though also there is evidence opposing and conflicting therewith, no matter how strong such opposing evidence may be.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 342.]

3. CONTRACTS—EXECUTION—REDUCTION TO WRITING.

Though parties to a verbal agreement contemplate that it is to be reduced to writing and signed, yet if the understanding is that this is to be done simply as a memorial of the agreement, the contract is binding, notwithstanding it is never put to writing.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 159.]

4. SALES—CONTRACTS—EXECUTION—QUESTION FOR JURY.

In an action for breach of an alleged contract for the sale of cement, evidence *held* to require submission of the question whether the contract was in fact made to the jury.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 145.]

5. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

Defendant employed M. as his chief salesman, and during the years 1901, 1902, and 1903, M. made diverse sales of cement on defendant's behalf, ranging from 2,000 to 7,500 barrels. In February and March of 1902 plaintiff wrote defendant for prices on from 5,000 to 10,000 barrels of cement delivered at Chicago, and 5,500 barrels delivered at other places. In each instance defendant answered through M., offering to sell the quantity wanted at specified prices, after which defendant, through M., made a contract to sell plaintiff 35,000 barrels of cement at a specified price. *Held*, that, in the absence of evidence that there was any limitation on M.'s authority to sell, as to the amount sold, and that plaintiff was chargeable with notice thereof, such facts were sufficient to show that M. had authority to make the contract.

6. SALES—CONTRACT—WHAT LAW GOVERNS.

Where an alleged contract for the sale of cement was made in Illinois, it was governed by the law of that state.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 2.]

7. FRAUDS, STATUTE OF—CONTRACT FOR THE SALE OF GOODS.

A contract for the sale of 35,000 barrels of cement at a specified price per barrel, to be delivered during six months in quantities of 6,000 barrels per month, or in such quantities as should be ordered by plaintiff from month to month, was not within the Illinois statute of frauds.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Edwin C. Crawford, for plaintiff in error.

Joseph H. Cobb, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. The plaintiff in error, Jenkins & Reynolds Company, an Illinois corporation and a dealer in brick and cement, doing business at Chicago, Ill., was plaintiff below, and the defendant in error, Alpena Portland Cement Company, a Michigan corporation, and a manufacturer and seller of Portland cement, doing business at Alpena, Mich., was defendant below. The action was brought to recover damages for breach of contract. The declaration contained four counts, the last two of which were common counts. The first count alleged specially that on April 9, 1902, in Chicago, plaintiff and defendant entered into a contract whereby plaintiff agreed to buy from defendant, and defendant agreed to sell plaintiff, 35,000 barrels of Portland cement at the price of \$1.30 per barrel in cloth sacks, or \$1.35 per barrel in paper sacks, to be delivered at Chicago, freight prepaid, during the period of six months from said date, in quantities of 6,000 barrels per month, or in such quantities as should be ordered by plaintiff from month to month, and to be paid for on the 20th day of each month for the amount delivered during the preceding month; that defendant had failed and refused to deliver any portion of said cement, except 661 barrels thereof delivered in April and May, 1902; and that plaintiff had been damaged in the sum of \$20,600, for which judgment was sought. The second count alleged specially substantially the same facts as alleged in the first count, though in somewhat different phraseology, and, in addition, that defendant agreed further that it would give plaintiff the exclusive agency of the state of Illinois, northern Indiana, and southern Wisconsin during said period of time for the sale of its cement, and that on April 15, 1902, plaintiff wrote defendant a letter referring to the contract so made, and ordering five carloads of cement on account thereof, in response to which order said 661 barrels of cement were delivered. The defendant pleaded the general issue, and by way of recoupment an indebtedness in the sum of \$2,000 on account of cement sold and delivered. On the trial the lower court, upon defendant's motion, at the close of plaintiff's evidence peremptorily instructed the jury to find for the defendant on plaintiff's declaration, and in the sum of \$1,048.13 for said 661 barrels of cement on its plea of recoupment. The jury so found, and judgment was rendered accordingly, from which this writ of error has been taken.

The principal error assigned, and the only one argued, is the action of the lower court in directing a verdict for the defendant. To properly dispose of this error it is necessary to have well in mind the rules that should govern a trial court in disposing of a motion to direct a verdict for defendant when made by him at the close of such evidence as has then been introduced. These rules have been stated, and in a certain particular vindicated, by this court on a number of

occasions, mainly in the following cases, to wit: *Mt. Adams, etc., Ry. Co. v. Lowery*, 74 Fed. 643, 20 C. C. A. 596; *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Minahan v. Grand Trunk Western Ry. Co. (C. C. A.)* 133 Fed. 37; *Coulter v. B. F. Thompson & Co. (C. C. A.)* 142 Fed. 706. They may be said to be three in number.

The first one is this: The motion should be sustained unless among such evidence as has been introduced there is evidence favoring such of the ultimate or constitutive facts of plaintiff's case as have been put in issue to a substantial degree. By substantial evidence is not meant that which goes beyond a mere scintilla of evidence. Evidence may go beyond a mere scintilla, and yet not be substantial. Judge Severens pointed this out in the *Minahan Case* in these words:

"Undoubtedly, it is distinctly settled that a mere scintilla—a spark—which arrests attention and then from mere lack of vitality fades away, is not sufficient to warrant the submission of an issue of fact to a jury where the scintilla is all that is developed by the party having the burden of proof. Such a showing has no substance, has not the quality of proof, and the judge may lawfully say so to the jury. And it must be admitted that the Supreme Court has gone a step further than this, and assigned to the province of the court the right to direct the jury in those cases standing between those where there is a mere scintilla and those where there is substantial evidence; standing in a borderland, so to speak, where the evidence is so vague, indefinite, or inconsequential as not to furnish a reasonable foundation on which a verdict could rest."

He indicated somewhat more particularly what is meant by substantial evidence in these words:

"Something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter, not carrying the quality of 'proof,' or having fitness to induce conviction."

What constitutes such evidence may be indicated in another way. If the evidence favoring such facts of the plaintiff's case is such that reasonable men may fairly differ as to whether it establishes them, then it is substantial. If, however, it is such that all reasonable men must conclude that it does not establish them, then it is not substantial. We gather this from these words of Mr. Justice Lamar in the case of *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485:

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

The next rule is this: In determining whether among the evidence that has been introduced there is evidence which favors such facts of the plaintiff's case to a substantial degree that view of such evidence and all inferences reasonably to be drawn therefrom most favorable to the plaintiff is to be taken.

And the last one is this: The motion should be overruled if among the evidence that has been introduced there is substantial evidence favoring such facts of the plaintiff's case, and this though among it

also there is evidence opposing such substantial evidence and conflicting therewith, no matter how strong such opposing evidence is. In passing on such motion it is not the province of the court to compare the substantial evidence favoring such facts of the plaintiff's case with that which opposes or conflicts therewith. The latter should be completely ignored, as much so as if it were out of the case, and the attention of the court should be confined to the evidence favoring such facts of the plaintiff's case, and to a determination of its positive character, i. e. whether it is substantial or not. It is the jury's province to make such comparison. It is never the court's province to do so except after verdict on a motion to set it aside and grant a new trial. In the Spiro Case Judge Taft said:

"The mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of the evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter it is always a comparison of opposing proofs."

The evidence introduced at the time the motion is made may be limited to that introduced while plaintiff is presenting his case, or it may include, also, that introduced while defendant is presenting his case. The rules stated are applicable in either case, though in the former case there is greatly less likelihood of the evidence that has been introduced including any that opposes or conflicts with that favoring such facts of the plaintiff's case, so as to present an opportunity for making a comparison. It is possible, however, that it may include such opposing or conflicting evidence. It may have been introduced irregularly by defendant, or inadvertently or otherwise by plaintiff. If it does, the rules are not different from what they would be had it been introduced by defendant while presenting his case.

The case in hand is one where the motion to direct a verdict, the granting of which is complained of, was made at the close of the evidence introduced while plaintiff was presenting its case. The question presented by the assignment of the granting of said motion as error, therefore, is whether, taking the most favorable view of the evidence so introduced and all inferences reasonably to be drawn therefrom, there was among it any substantial evidence favoring the ultimate or constitutive facts of plaintiff's case, all of which were put in issue; or, in other words, taking such view, is it to be said that reasonable men may fairly differ as to whether the evidence among it favoring such facts established them, or that all reasonable men would conclude that it did not.

There is no question but that breach of the alleged contract, assuming it to have been made, was established by said evidence, and it is not claimed on behalf of plaintiff in error that it warranted the submission to the jury of the fact as to the making of a contract such as that set forth in the second count of the declaration, involving, as it does, an agreement to give plaintiff an exclusive agency. It is only claimed that it warranted such submission of the making of a contract

such as that set forth in the first count. As to whether it did or not, then, is the sole question in the case. The contract was claimed to have been made on April 9, 1902, in plaintiff's office in Chicago, Ill., and by George C. Gray, plaintiff's treasurer, acting on its behalf, and John Monaghan, defendant's chief salesman, acting on its behalf. The position of the defendant in error (putting it as it must be in order to be of any avail) is that among the evidence introduced there was no substantial evidence favoring such a claim, because all reasonable men must conclude from a consideration of such of said evidence as favored said claim that no contract was then made, either for the reason that said Monaghan's action on that occasion went no further than to give the plaintiff an option to purchase the quantity of Portland cement alleged on the terms alleged, which option was never accepted, or for the reason that, though the terms of a contract of sale may have then been agreed on, its conclusion was postponed until they should be reduced to writing and signed, which was never done, or that said Monaghan was without authority to make the contract on defendant's behalf.

Consideration will first be directed to the evidence relating to the making of the alleged contract; and here first, in so far as it bears on the question as to whether what took place on the occasion in question amounted to more than defendant's giving plaintiff an option. This evidence consisted of the testimony of said Gray and of one John J. Sullivan and certain letters that passed between the parties hereto. Said Gray testified on direct examination in part as follows:

"Q. Now you may state as fully as you can remember the conversation between you and Mr. Monaghan on April 9th? A. Well, we immediately took up the question of supplying the quantity of cement, whether they were in position to supply us, and the price. He told us that he could furnish us the cement, and we told him that we wanted to make an agreement, and we agreed upon the price of one dollar and thirty cents per barrel. We told him that we would want a certain quantity at the price of one dollar and thirty cents if he could furnish it, and he said he could, and it was agreed that the quantity should be from twenty-five thousand barrels to thirty-five thousand barrels; the twenty-five thousand barrels to be the minimum amount to be ordered and the thirty-five thousand was to be the maximum. The Court: That is what you told him you wanted? A. We wanted more than that, your honor. The Court: You mean to say that the minimum amount to be ordered was twenty-five thousand barrels and thirty-five thousand barrels was the maximum agreed to be furnished? A. Yes, your honor. Q. During what year was it to be delivered? A. 1902, furnishing it so that it would be delivered before December 1, 1902. Q. That is the whole of it by December 1st? A. Yes, sir. Q. What, if anything, did Mr. Monaghan say in reply to that proposition you made him? A. He said he was anxious to have a representative in Chicago, and that they were in position to supply that quantity for that territory. Q. What did he say his company would do? A. He said they would set aside that quantity of cement for us, and was willing to make the arrangement with us at the price of one dollar and thirty cents per barrel. Q. Was there anything said at that time as to placing an exclusive agency with you? A. That was talked about. We wanted the exclusive agency for Chicago, for Illinois, southern Wisconsin, and—I have just forgotten, but there was southern Indiana and part of Michigan—the territory surrounding Chicago. Q. What did Mr. Monaghan say regarding an exclusive agency? A.

He said that was satisfactory, and he would give us that territory. Q. What was said, if anything, regarding his furnishing you the thirty-five thousand barrels of cement? A. He said they would accept the proposition, and would set aside the thirty-five thousand barrels of cement for us at one dollar and thirty cents."

He further testified that he made a memorandum of the agreement that was then made, which he produced, and was read in evidence. It is in these words:

"Can give you 35 thousand bbls. and option on same until May 1st at \$1.15 in Mich. at \$1.30 per bbl. in cloth and \$1.35 in paper, F. O. B. Chic. rail until mill is ready to ship by water. If possible we will make price less when we begin loading from our dock. You can have exclusive territory for Chic., Ill., Northern Indiana & So. Wis. 6 thousand per mo. 6 mos. for 35,000. Payments to be made 20th mo. following del. Bags to carried on account at 10 cents and settlements in lost or shtg at 5 cents each. Ship via Grand Trunk or Mich. Cent. Ry. Ind. 1.10 at mill, Ill. 1.10 at mill, Wis. 1.10 at mill, Mich. 1.15 at mill. J. J. Young, Agt, 130 Fort Indiana St., Rutland Transit Co. To carry Alpena cement and store it at dock. Wisconsin Central Ry. at Dks can carry about 3 to 5 thousand barrels."

He again testified as to what took place on the occasion in question as follows:

"Q. Going back to your interview with Mr. Monaghan on April 9, 1902, where you asked for a contract for the exclusive agency and the twenty-five to thirty-five thousand barrels cement for that season, I will ask you what Mr. Monaghan replied to that proposition of yours? Mr. Humphrey: I object to that question, for the reason that the witness has already stated that conversation—what he says was the conversation between them. Q. Tell us just what Mr. Monaghan stated as near as you can remember it? A. I don't know as I can any further than I have given it. G. State what acceptance, if any, he made to your proposition? A. He said to make the minimum amount twenty-five thousand barrels and the maximum amount thirty-five thousand, and in making out the memorandum he asked me if I thought we would like the thirty-five thousand barrels, and I said we would; that we would like twenty-five thousand barrels for use right in Chicago, and I then wrote it down there—twenty-five thousand and thirty-five thousand—on the memorandum at that time, and I figured that in taking the thirty-five thousand barrels it might be used in that way. Q. You may state what Mr. Monaghan said as to whether they would furnish the thirty-five thousand barrels? A. He said they would. Q. What did you say when he said they would furnish it? What did you say about taking it? A. I said we would take it, and start shipments on it immediately."

On cross-examination he testified as follows, to wit:

"X-Q. Do you then claim that a definite arrangement was made between you and Mr. Monaghan? A. Yes, sir; I do. X-Q. Was that on the day you had a contract with him? A. Yes, sir."

And again:

"X-Q. Do you claim that on the 9th of April you bought thirty-five thousand barrels cement from the Alpena Portland Cement Company? A. Yes, sir. X-Q. And at that time did you become responsible to pay them for that amount of cement? A. Yes, sir; upon delivery, as ordered."

The witness Sullivan, who on April 9, 1902, was an employé of plaintiff, and who claimed to have heard a portion of the negotiations between Gray and Monaghan, testified on direct examination in part as follows, to wit:

"Q. What in particular did Mr. Monaghan propose for the sale of cement? A. Well, he spoke in the usual way of a man trying to sell cement, that he wanted to place a quantity of cement in this market, and that he was looking for an agency. Q. You may state whether he suggested the amount that he would be willing to furnish Jenkins & Reynolds Company during the year 1902? A. He wanted to place in this market fifty thousand barrels of cement. Q. You may state what Mr. Monaghan said his company would furnish cement for in Chicago—what his terms or prices would be? A. \$1.30 per barrel in cloth sacks, the usual charge of ten cents additional for sacks. Q. What did Mr. Gray say in response to these suggestions or these propositions by Mr. Monaghan? A. He finally accepted the proposition. Q. Yes; I want you to tell me as nearly as you can remember what Mr. Gray said. A. Well, he of course tried very hard to get a lower price; just as to what his exact language, why I can't remember that now. Q. Well state what he said as nearly as you can remember? A. Well, he spoke about it being a new cement and not being known in the market, and that he could buy other cement for that price or lower. Q. Now, I will ask you whether at last Mr. Monaghan and Mr. Gray came to an agreement about this proposed sale of cement? A. They finally agreed on the price. Q. At what price did they agree upon? A. One dollar and thirty cents. Q. And on what amount did they agree, if you know? A. As near as I can recollect, the Alpena Company were to furnish Jenkins & Reynolds not less than thirty or thirty-five thousand barrels. Q. That is during the season of 1902? A. During the season of 1902. Q. You may state whether or not any writing was made at this interview by either Mr. Monaghan or Mr. Gray relating to this trade? A. Well, you know they had several interviews. Q. And were you present at several of the interviews? A. Yes. Q. At any of the interviews where you were present was there any writing made by either of them setting forth their agreement? A. Mr. Gray drew up a pencil memoranda of what he considered would cover the agreement, which he showed to me. Q. I will ask you whether he showed it to Mr. Monaghan? A. Yes. Q. What did Mr. Monaghan say about it, if anything? A. It seemed to be satisfactory to him. Q. Well, I asked what he said as near as you can remember? A. Well, he said that covered the ground. I don't remember his exact words, but that was my understanding, that Mr. Monaghan was perfectly satisfied with that arrangement; that he didn't have any objections to the wording of the agreement. Q. I will ask you to state as nearly as you can remember, what he finally said about this memoranda made by Mr. Gray? A. He said it was satisfactory."

On cross-examination he testified substantially to the same effect.

The letters referred to above are certain letters from plaintiff to defendant of dates April 15, 16, 23, and 24, 1902, a letter from defendant to plaintiff of date April 26, 1902, in answer to plaintiff's letter of the 24th, a letter from plaintiff to defendant of date April 28, 1902, and a letter from defendant to plaintiff of date May 5, 1902. They are as follows:

"Chicago, April 15, 1902.

"The Alpena Portland Cement Co., Alpena, Mich.—Gentlemen: We inclose herewith orders for five car loads of cement which we would kindly ask you to ship as soon as possible, as ordered. This is in compliance with verbal agreement with your Mr. Monaghan when in our office a few days ago, and which he was to have sent us in writing in a few days.

"Your prompt attention will oblige,

"Yours very truly,

Jenkins & Reynolds Co.,
"G. C. Gray, Treas."

"Chicago, April 16th, 1902.

"The Alpena Portland Cement Co., Alpena, Mich.—Gentlemen: Will you kindly obtain for us your lake and rail tariff and also all rail to points in

Indiana, Illinois, and southern Wisconsin, where we are at liberty to quote your cement? We should like to have this at the earliest moment possible, as we want to get out quotations now for the summer. Also please send us some of the literature pertaining to your cement which you spoke of recently.

"Yours very truly,

Jenkins & Reynolds Co.,
"G. C. Gray, Treas."

"Chicago, April 23, 1902.

"Alpena Portland Cement Co., Alpena, Mich.—Gentlemen: Your booklet on Alpena cement is just received, and we congratulate you upon the neatness and thoroughness of the work. The book is very attractive, and we would like to have a number of them to distribute among prospective customers. If consistent, please send us a quantity by express, as we think it will aid in securing trade for your cement.

"Yours very truly,

Jenkins & Reynolds Co.,
"G. C. Gray, Treas."

"Chicago, April 24th, 1902.

"Alpena Portland Cement Co., Alpena, Mich.—Gentlemen: On April 15th we sent you orders for five cars of cement, with instructions to ship as soon as possible, and since then only one car has been forwarded, nor have we received the letter from your Mr. Monaghan confirming our verbal agreement with your company for supplying us a quantity of cement. We presume he is still out of town, but, as we are in position now to dispose of a good quantity of cement, we are anxious to have it settled, and know what we are to expect in the way of shipments from you. As soon as this is done, we will send you more orders. In the meantime we wish you would hurry along the four cars on our order.

"Your prompt attention will oblige,

"Yours very truly,

Jenkins & Reynolds Co.,
"G. C. Gray, Treas."

"Alpena, Mich., April 26, 1902.

"Jenkins & Reynolds Co., Chicago, Ill.—Gentlemen: Replying to your favor of April 24th, would say that we entered your orders for five car loads, as stated, to go forward at once. Our orders are crowding us, so that we find it difficult to ship promptly to our customers, but we expect to get these cars off to-night and thus complete this order. The writer has delayed writing to you in accordance with the understanding we had when in your city for the reason above stated, that we are crowded with orders for cement, and that we would have difficulty in filling your orders for large quantities, and this would result in disappointment to yourselves and customers. We shall be able to do better in the future we expect, as a new addition to our factory will be put in operation within the next week, which will increase our capacity, and will then take up the question of agency in the territory discussed. Until then we are

"Very respectfully yours,

The Alpena Portland Cement Co.
"Per John Monaghan."

"Chicago, April 28, 1902.

"Alpena Portland Cement Co., Alpena, Mich.—Gentlemen: Your favor of the 26th inst. is at hand. We are somewhat surprised that we have not yet received more invoices from you on the five cars of cement ordered, when you know we are doing all we can to get your cement introduced in this market; but, if it has been impossible for you to do so, we cannot blame you, and would kindly ask you to rush the balance along as quickly as possible, and as soon as we know what we can depend upon we will send you more orders. We have nearly enough contracts to cover the minimum amount of 25,000 barrels set aside for us when you were here. If we can only get the cement regularly to both our old yard and our new north side yard we feel that we can represent you satisfactorily in

every way. Please let us know what we can expect in the way of prompt shipments on our future orders by return mail, and oblige

"Yours very truly,

Jenkins & Reynolds Co.,
"G. C. Gray, Treas."

"Alpena, Mich., May 5th, 1902.

"Jenkins & Reynolds Co., Chicago, Ill.—Gentlemen: Your favor of April 28th came during the writer's absence, and has just reached his hands. We have heretofore explained to you the cause of the delay in our shipments, and the situation in this regard is in no way improved, for we are swamped with orders for immediate delivery, and we are trying the best way we can to keep our customers supplied. We note what you say in regard to the 25,000 barrels of cement. We did not mean in our conversation in Chicago to be understood that 25,000 barrels of cement were to be set aside subject to your orders. That quantity was spoken of in reference to our agency, but we do not see our way clear to appointing an agent for your city, as we much fear that we would be unable to supply his needs throughout this season; therefore, we desire to say that we could not agree to let you have 25,000 barrels or any definite quantity at the present writing. We make this statement now, so that you will not be in the future disappointed should we find ourselves unable to ship your orders promptly.

"Respectfully yours,

The Alpena Portland Cement Co.,
"Per John Monaghan."

The orders inclosed with the letter of April 15th were just such orders as would have been sent had there been a previous understanding in pursuance to which they were sent, and they were filled by shipments made April 19th and 30th and May 1st. In the letter of April 15th reference is made to "the verbal agreement with your Mr. Monaghan when in our office a few days ago"; in the letter of April 16th request is made for freight rates to points in Indiana, Illinois, and southern Wisconsin, and for literature pertaining to defendant's cement, for the reason that plaintiff wanted to get out quotations then for the summer, and the points to which freight rates are desired are referred to as points "where we are at liberty to quote your cement"; in the letter of April 23d receipt of a book on Alpena cement is acknowledged, and a desire for a number of them is expressed, in order "to distribute among prospective customers"; in the letter of April 24th it is noted that a letter from Mr. Monaghan had not been received, "confirming our verbal agreement with your company for supplying us a quantity of cement"; and in the letter of April 28th the statement is made that plaintiff had "nearly enough contracts to cover the minimum amount of 25,000 barrels set aside for us when you were here."

Such, then, is the evidence that was introduced favoring plaintiff's position that what took place on April 9th was something more than the giving of an option by defendant. Possibly there was other evidence introduced of like character. By directing attention to this much thereof we would not be understood as negating the existence of such other evidence, though we hardly think there was. This much, however, is sufficient for our purpose. The witness Gray testified positively in that portion of his testimony quoted that an absolute agreement was entered into on the occasion in question for the purchase of defendant's cement. It is questionable what effect should

be given to his testimony as to the quantity purchased. Counsel for plaintiff in error contends that its true meaning is that 35,000 barrels were then purchased, the understanding first being that 25,000 barrels were purchased, and an option given on 10,000 barrels additional, which option was exercised before the transaction closed. It certainly goes to the extent that at least 25,000 barrels were then purchased, and an option given on 10,000 barrels additional. The witness Sullivan corroborated Gray as to an absolute agreement having been made, and there is room to claim that such was the effect of the letters introduced, with a certain exception perhaps to be hereafter noted. The attitude in which they present plaintiff is that of one who thought and claimed that he had an agreement with defendant that was something more than a mere option. Each of them presupposes that plaintiff has such an agreement, and in the first, fourth, and last ones express reference is made thereto. The correctness of this attitude of plaintiff was not controverted or questioned by defendant until May 5th, 20 days after plaintiff's first letter, in which reference is made to a verbal agreement with Monaghan, and a week after its last letter, in which reference is made to the fact that thereby 25,000 barrels as a minimum were set aside for plaintiff, and the orders for five car loads of cement inclosed with the first letter, which were said to be sent in compliance with verbal agreement, were filled. It may be said, however, that the defendant's letter of April 26th indicates that defendant regarded that matters were still open between it and plaintiff. The exception heretofore referred to is the references in plaintiff's letters of April 15th and 24th to putting the verbal agreement in writing, the effect of which will be considered when we come to take up the other branch of defendant's contention as to its not being under contract with plaintiff.

Before, however, concluding as to the positive character of this evidence, certain matters should be considered which may be thought to affect its substantiality. One is the reference in the memorandum to an option until May 1st, of which much is made by counsel for defendant in error. Gray's testimony was that this memorandum was a memorandum of the agreement that was had on April 9th. On direct examination he testified as follows:

"Q. At the time of this proposition or conversation, did you make any memorandum of the agreement? A. I did. Q. I show you three small sheets, and ask you whether this is the original memorandum you made at that time? A. They are. Q. When you made this memorandum, what did you do with it after you made it out? A. I handed it to Mr. Monaghan. Q. What did he say to it? A. He said it was correct."

On cross-examination he testified as follows:

"X-Q. Where was Mr. Monaghan when you showed him this memorandum? A. Right there by my desk. X-Q. Did you hand it to him to read, or did you read it over to him? A. I read it to him. X-Q. Did he have it in his hands? A. I could not say positively as to that. X-Q. Now, you intended at the time did you not, Mr. Gray, that your understanding by the talk between you was embodied in what was written right there? A. Yes, sir. X-Q. And you intended that whatever your understanding was from what Mr. Monaghan has said to you was contained in this memorandum, didn't you? A. Yes, sir; this is what we talked about. X-Q. And there

was no different or other arrangement made between you except what is stated in there, was there? A. There may have been. That was simply drawn to cover what we talked about. Technically, it is just what was said. X-Q. It is the idea that you got of what he was trying to arrive at at that time? A. Yes, sir."

The memorandum itself, however, hardly bears out the idea that it was a memorandum of an agreement then made. It does not wear the aspect of such a memorandum. It seems on its face to be a memorandum of a proposition from defendant, i. e. that is what it was intended to be when made. The fact that such was the case is not inconsistent with an agreement having been made on that occasion. It is possible for a memorandum of defendant's proposition to have been made, and then for an agreement to have been reached on the basis of such proposition. Indeed, this view of the matter possibly can be reconciled with Gray's testimony that the memorandum was a memorandum of the agreement. The understanding may have been that reference should be had to the memorandum for certain, at least, of the terms of the agreement; but, whether so or not, reference could properly be had to it for that purpose, as the memorandum was a part of the transaction which it is claimed resulted in an absolute agreement. One not overly accurate in his statements might, therefore, speak of it as a memorandum of the agreement. If, then, such is the true relation of the memorandum to the transaction, i. e. when made it was simply a memorandum of defendant's proposition, the reference therein made to an option until May 1st is relieved somewhat at least of any injurious effect it may otherwise have on plaintiff's position that an absolute agreement was reached on April 9th. If, however, strictly speaking, it was a memorandum of the terms of the agreement that was then had, it gives some color to defendant's contention that that agreement was not an absolute one, but an agreement for an option only. Defendant's counsel in cross-examining Gray treated the memorandum as, strictly speaking, a memorandum of the terms of the agreement, and questioned him as to how he reconciled the memorandum with his testimony that an absolute agreement was then made. The questions and his answers thereto were as follows:

"X-Q. What do you mean, then, in this memorandum of yours of the talk between you that you had an option on thirty-five thousand barrels and an option on same until May 1st? A. That was twenty-five thousand barrels bought and option on thirty-five thousand. X-Q. What do you mean by option? A. I mean that we could take twenty-five thousand barrels and option on thirty-five thousand. X-Q. Did you write in your option 'can you give thirty-five thousand barrels and option on same until May 1st'? What do you mean, that they gave you an option until May 1st on that? A. No, sir. X-Q. What do you mean? A. Gave us an option on the thirty-five thousand barrels. X-Q. Now you took an option on the thirty-five thousand barrels of cement? A. No, sir. X-Q. This memorandum was made by you at the time, was it? A. Yes, sir. X-Q. And you now claim that you made the memorandum according to your talk? A. Yes, sir. X-Q. Now, your memorandum reads like this: 'Can give you thirty-five thousand barrels and option on same until May 1st, giving price at \$1.30 per barrel in cloth and \$1.35 in paper,' etc. Now what you meant was an option until May 1st, didn't you? A. No, sir. X-Q. What do you claim you had an option on? A. Thirty-five thousand barrels. X-Q. An option, did you say, to buy same? A. Yes, sir. X-Q. But you claim that you did buy twenty-five thousand barrels and option on ten

thousand more barrels? A. Yes, sir. X-Q. Now, where is there anything in this memorandum which shows that you were to buy twenty-five thousand barrels and have an option on ten thousand barrels more? A. That does not show all that we talked about. X-Q. Does not this memorandum outline the correct understanding between you, and as you say it was presented to Mr. Monaghan? A. I read it over to him. X-Q. Then the correct understanding was that you had an option on thirty-five thousand barrels, as mentioned in the memorandum, was it not? A. No, sir. X-Q. Mr. Gray, did you ever see or talk with Mr. Monaghan after that until you met him in Detroit? A. No, sir; not to my recollection. X-Q. Whatever you did with reference to that option on thirty-five thousand barrels was done in writing, was it not? A. Yes, sir; I guess so. X-Q. If there was any acceptance of that option by you it was not verbal, was it? A. No, sir."

The effect of this testimony is not entirely free from doubt. Possibly it is this: That the agreement that was had on April 9th was that plaintiff bought 25,000 barrels of cement on that occasion, and was to have an option on 10,000 barrels additional, making 35,000 barrels in all, and it is this option to which reference is had in the memorandum. Possibly the effect of said witness' testimony as to the nature of that agreement heretofore quoted is the same. And the statement in the letter of April 28th that "we have nearly enough contracts to cover the minimum amount of 25,000 barrels set aside for us when you were here" coincides with this testimony, if such is its true effect. Counsel for plaintiff in error maintains, however, that the effect of Gray's testimony here as in the quotation heretofore made therefrom is that plaintiff accepted the option as to the 10,000 barrels on that occasion, and hence then closed the contract for the whole 35,000 barrels, and he fits this with the memorandum in this way. The statement in the memorandum, "Can give you 35,000 bbls. & option on same until May 1st," has reference to the agreement as it stood before the acceptance of the option as to the 10,000 barrels, and the succeeding statement, "you can have exclusive territory for Chic., Ill., Northern Ind. & So. Wis. 6 thousand per mo. 6 mos. for 35 thousand" had reference to it as it stood after that option was accepted. This position is open to the suggestion that it is farfetched, and the position that the option to which reference is had in the memorandum is the option as to the additional 10,000 barrels to make up 35,000 barrels in all does not fit closely the language of the memorandum. Apparently the option to which reference is had is an option on the whole 35,000 barrels. So it is that the only position which makes Gray's testimony entirely consistent with the memorandum is that heretofore suggested. The memorandum is a memorandum of a proposition by defendant, as it appears to be, on the basis of which the agreement was made, and not of the actual agreement itself.

Another matter to be here considered is a portion of said Gray's testimony on cross-examination, the effect of which is claimed to be that no binding agreement was reached on the occasion in question, and that all that took place was for defendant to give plaintiff an option. That portion of his testimony is as follows:

"Q. Up to the time you received that letter, May 5, 1902, had you in any way or form accepted the proposition contained in your memorandum for the twenty-five thousand barrels of cement, giving you an option on same

until May 1st? A. Up to what time? Q. Had you up to May 5th accepted your option, according to your memorandum, for the thirty-five thousand barrels of cement? A. We sent the order of April 15th. Q. This is the order for five car loads. Is that the only way you accepted it? A. This is the only way, and accepted in the letter sent with the orders. Q. You know of no other way except the ordering of these five car loads with the letter you sent with the orders? A. We sent that letter I know. I don't remember of any other way now. Q. And if you ever accepted your option it was by this letter of April 15th, and your three orders for five car loads cement? A. Yes, sir. Q. And that is the only acceptance of that option you ever made? A. I don't say positively. Q. You don't know of any other? A. I would not want to say until I go through the correspondence. Q. That is all you remember of now in this correspondence? A. We were waiting the return of Mr. Monaghan to Alpena. Q. And if there is any other acceptance of the option on the thirty-five thousand barrels cement it is contained in the correspondence since April 9th? A. In the correspondence; yes, sir. Q. Somewhere in it since April 9th? A. Yes, sir. Q. And you made no acceptance unless it is contained in the correspondence? A. No, sir."

But in view of the rest of said witness' testimony heretofore quoted, though the option here referred to is an option on 35,000 barrels, there is room to claim that the option really referred to is one on 10,000 barrels, which if accepted would bring the whole amount purchased up to 35,000 barrels.

Still another matter to be here considered is that, though the witness Gray testified on direct examination, as heretofore quoted, that the contract included an exclusive agency, he stated differently on cross-examination. He had been asked about a letter written by him on behalf of plaintiff on May 10th, in which he stated that on the occasion in question they "came to a positive understanding that we were to have the sole agency for your cement for Illinois, northern Indiana, and southern Wisconsin." He was then asked and testified as follows:

"X-Q. Did you at the time you wrote that letter on May 10th understand that your contract with Mr. Monaghan was that you had obtained the sole agency for the Alpena Portland Cement in Chicago? A. No, sir. X-Q. If you did not understand it that way, why did you say so? A. That according to our talk, we were to have it after they settled up with the Golden City Cement people. X-Q. Didn't you say that you entered into a positive understanding, and that you were to have the sole agency of their cement for Illinois, northern Indiana, and southern Wisconsin, and that you had made such arrangement with Mr. Monaghan when he was at your place there in Chicago? A. It was to be formed later. That was the order that he took for twenty-five thousand barrels, and an option on ten thousand barrels additional."

We are now in position to reach a conclusion as to the positive character of the evidence that was introduced favoring plaintiff's position than an agreement was come to on April 9th that was more than a mere option to purchase a certain quantity of cement. Leaving out of consideration the qualifying matters referred to, there would seem to be no room for question but that it was substantial, if, indeed, it was not sufficient, with nothing to the contrary to require a finding in accordance with that position. Gray testified positively that an absolute agreement was then entered into. He was corroborated by Sullivan, and, to a certain extent, at least, by what transpired after April 9th down to May 5th.

Then, as to the effect of said qualifying matters. While perhaps, a witness may so testify in part of his examination as to annul and destroy what he may have testified in another part thereof in favor of the party in whose behalf he was introduced, such was not the case here. Those qualifying matters referred to did not affect the substantial character of that part of Gray's testimony favoring plaintiff's said position. Possibly a view of them can be taken consistent therewith. At any rate, it cannot be said that all reasonable men would regard them as overthrowing said testimony. It was for the jury to consider them, and determine just what effect should be given to them. In the case of *Milwaukee Mechanics' Ins. Co. v. B. S. Rhea & Son*, 123 Fed. 9, 60 C. C. A. 103, this court held that the question as to whether an agreement between the parties thereto was an absolute sale or only an option was one for the jury, though it was much impressed with the theory that it was a mere option.

What, then, is the showing made by the evidence as to whether or not on the occasion in question the parties hereto, acting through their respective agents, postponed the conclusion of a contract till the terms then agreed upon should be embodied in a written instrument signed by both parties. It would seem to be certain from the evidence introduced that the parties contemplated that the terms then agreed on should be so embodied. In plaintiff's letter of April 15th it is said that Monaghan was to send the verbal agreement in writing to plaintiff in a few days, and in the letter of April 24th it is noted that the letter from Monaghan, "confirming our verbal agreement with your company for supplying us a quantity of cement," had not been received. The witness Gray testified on direct examination that when Monaghan left Chicago on April 9th he stated that he was going up into Wisconsin, and would be gone four or five days, and as soon as he returned to Alpena the arrangement would be put in writing. On cross-examination he testified as follows:

"X-Q. Do I understand you now that you did not close a contract completely on the 9th day of April? A. No; I didn't say it was closed; it was not signed; it was so far as we were concerned. X-Q. No contract was made at all on the 9th of April was there? A. Yes, sir. X-Q. Didn't you testify on your direct examination that Mr. Monaghan when he got back to Alpena was to write out the contract and have it signed by you both? A. The firm he represented; yes, sir. X-Q. That was to make the contract between you, was it not? A. No, sir; it was all agreed upon right there in our office, but he wanted to wait until he got back to Alpena to have it written out, so he could use the letter paper of the firm, and it was to be just what we had talked there. X-Q. He would put it in writing? A. Yes, sir."

And again:

"X-Q. Why didn't you ask of Monaghan to put it in writing, so it would be settled between you? A. We did, and he said he would as soon as he returned to Alpena. X-Q. Why did you ask him to have it put in writing, so it would be settled between you? A. Because it is customary to have such matters put in writing. X-Q. And until the matter was put in writing it was not settled, was it? A. Yes, sir; it was; we considered it so."

And again:

"X-Q. Mr. Gray, Mr. Monaghan when he was there in Chicago said to you, did he not, that he would have to refer this matter to the Alpena Portland Cement Company of Alpena—this talk of yours—did he not? A. He

said we would talk it over with them. X-Q. And after talking it over with them he would write up a memorandum of agreement, and send it to you for signature? A. Yes, sir; going to send it on. X-Q. Then, after taking it up with them, would draw it up and send it on to you? A. It was to be fixed after he got back to Alpena. X-Q. And whatever was talked between you two, and that talk was that the contract would be made and signed and sent to you for your signature? A. No, sir. X-Q. What was to be done? A. You see the contract was all made, and was to be drawn up by him after he went back to Alpena."

And again:

"X-Q. Did you not hear him say at that time that he would have to submit it to his company for confirmation? A. I knew that it would get back to them. X-Q. You know that he told you that he would have to submit it to his company for confirmation, don't you? A. I presume he said he would have to refer it to them. X-Q. That he would have to refer it to them for confirmation? A. No, sir. X-Q. Didn't he tell you that? A. No, sir; not that I remember. X-Q. What did you say about referring it? A. He said after he got back that it would be confirmed in writing. X-Q. Then he would answer you in writing if they confirmed it? A. That is, the acceptance of it."

And on redirect examination he testified as follows:

"R. D. Q. I will ask you whether Mr. Monaghan on April 9th, when you and he entered into certain arrangements as you have described, whether he said anything to you to the effect that he would have to report back to the company to get its approval of these arrangements? A. He said this would be put in writing when he got back to Alpena. R. D. Q. I will ask you whether he said to you that the arrangement between him and you would have to be submitted to his company for approval? A. No, sir; he said it would be put in writing when he got back home. R. D. Q. The question is, did he say that or anything to that effect? A. No, sir; he did not say it."

The witness Sullivan on direct examination testified as follows:

"Q. I will ask you, Mr. Sullivan, whether anything was said by Mr. Monaghan about reducing this pencil memoranda to writing? A. Well, yes; it was to be put in writing. This, as I understand it, was just simply a rough draft of the contract."

And upon cross-examination as follows:

"X-Q. Now, I understand you to testify on direct examination that when this was drawn up by Mr. Gray that the understanding between Mr. Gray and Mr. Monaghan was that the contract was to be put in writing? A. That was my understanding. X-Q. And, of course, if it was to be put in writing, it was to be signed by the parties, wasn't it? A. I presume so."

And in a letter written by plaintiff to defendant on May 10th, after the parties were at issue, introduced in evidence, occurs this statement:

"This understanding would have been put in writing when Mr. Monaghan was here, but he did not do so, stating that he preferred to put it on your own letterhead after he returned to Alpena."

This was the entire evidence on this matter. Now, it is well settled that though the parties to a verbal agreement contemplate that it is to be reduced to writing and signed, yet if the understanding is that this is to be done simply as a memorial of the agreement it is binding, notwithstanding it is never put to writing. In the case of *Pratt v. Railroad Co.*, 21 N. Y. 308, Judge Selden said:

"A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of the contract were in all respects definitely understood and agreed upon; and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties—this is an obligatory contract, which neither party is at liberty to refuse to perform."

And Judge Cofer in the case of *Bell v. Offut*, 10 Bush, 632, said:

"If two persons enter into a verbal agreement about a matter as to which an enforceable parol contract can be made, it would be no defense when one of them is sued for a breach of the contract that he understood it would not be obligatory unless reduced to writing; nor does a contemporaneous agreement to reduce a contract to writing make its validity depend upon its being actually reduced to writing and signed. The agreement to put in writing amounts to no more than an agreement by the parties to provide a particular kind of evidence of the terms of their contract, and no more prevents its enforcement upon other legal evidence than an agreement that they would go to a named individual and state to him the terms of their contract would render the testimony of any other competent witness inadmissible to prove what the contract was."

If, however, the understanding is that there is to be no contract until the agreement is reduced to writing and signed, of course there is none until that event happens. The cases in which the question has arisen as to whether the reduction of the agreement to writing and its signing is simply as a memorial thereof or as a conclusion of a contract are quite numerous. In some it has been held to be as a memorial thereof, and in others as a conclusion of the contract. We do not find it necessary to generalize them. Quite a collection of the American decisions are cited in the notes to Williston's *Wald's Pollock on Contracts*, pp. 46, 47. In the case of *Mississippi, etc., S. S. Co. v. Swift*, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545, Judge Emery surveys the authorities, and thus concludes:

"From these expressions of courts and jurists it is quite clear, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signature, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words. If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed."

As to what circumstances will help in determining how the matter was viewed in any particular case, he said:

"In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details;

whether the amount is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

And as to whether it is a matter always of easy solution he said:

"Still, with the aid of all rules and suggestions, the solution of the question is often difficult, doubtful, and sometimes unsatisfactory. An illustration of this is in the case of *Rossiter v. Miller*, above quoted from. In that case Lord Chief Justice Coleridge and Lord Justices James and Baggallay, three of England's most distinguished judges, were clear that there was no contract for want of formal draft. Lord Chancellor Cairns and Lords Hatherley, Blackburn, and Gordon, equally able and eminent jurists, were confident in the contrary opinion."

Pollock on Contracts (Williston's Wald's Ed.) p. 48, puts the matter this way:

"The tendency of recent authorities is to discourage all attempts to lay down any fixed rule or canon as governing these cases. The question may, however, be made clearer by putting it in this way—whether there is in the particular case a final consent of the parties, such that no new terms or variations can be introduced in the formal document to be prepared."

Here, according to Gray's testimony, every possible detail of the contract was agreed upon. Nothing was left open to be thereafter determined, and a memorandum was made by him, and inspected and accepted as correct by Monaghan, if not of the terms of the agreement, of the defendant's proposition upon which the agreement was based. The evidence tends to show that the reduction of the agreement to writing was contemplated as a memorial thereof, and not as the conclusion of a contract. Point is made of the fact that in the letter of April 24th reference is made to the nonreceipt of a letter from Monaghan confirming the verbal agreement, and anxiety is expressed to have matters settled, so that it might know what to expect in the way of shipments. This is not inconsistent with the understanding having been that the reduction of the agreement to writing was for the purpose of having a memorial thereof. If such was the case, until it was reduced to writing matters would be unsettled, and cause for anxiety would exist. At any rate, it certainly cannot be said that all reasonable men would conclude that the meaning of the parties was that the agreement was not binding in law until it was put into writing. Just what the meaning and intention of the parties in regard to the agreement being put into writing was, was a question for the jury under proper instructions. The case of *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403, has been relied on as requiring a contrary position. But it does not. There a contract in writing had been prepared and signed by Whipple and then delivered to Ambler, who promised to sign it, but did not. Mr. Justice Miller said:

"It is very clear that both parties intended to have a written instrument signed by each as the evidence of any contract they might make on that subject, and neither considered any contract concluded until it was fully executed. Under these circumstances, Ambler had a right to decline to sign the paper, and until he signed he was not bound by it. It was not

drawn by him, nor at his dictation. It was first signed by Whipple, and drawn up by him or in his presence, and made to suit his purposes. It is idle to say that because Ambler took a copy of it from Martin to examine he became a party to it, though he never signed it."

In view of the foregoing considerations, we feel constrained to hold that there was substantial evidence favoring plaintiff's position that on the occasion in question a contract was concluded between plaintiff and defendant, assuming Monaghan to have had authority to make it on the latter's behalf. In reaching this conclusion, we have left to one side matters appearing in the evidence which are relied on by defendant as opposing or conflicting with this substantial evidence. They are such matters as these: A letter from plaintiff to defendant, dated April 11th, asking quotation of price on 1,000 barrels of cement delivered at Wooster, Ohio, and about 7,000 barrels delivered at Connersville, Ind. This is thought to be inconsistent with plaintiff's having purchased 35,000 or even 25,000 barrels of cement on the 9th. Again, after defendant by his letter of May 5th notified plaintiff that it would not ship cement under its claim of a contract, plaintiff at various times gave orders for shipment of cement amounting in all to 35,000 barrels. Those orders were dated, respectively, May 10th, July 8th, July 23d, August 14th, September 23d, and October 23d. And on December 31st plaintiff rendered a statement to defendant of the amount of its account for damages for breach of contract. In each of these orders it is stated that it is to apply "on our contract with you of April 15th." And in the letter accompanying the statement the contract is referred to as "dated April 15, 1902." On cross-examination the witness Gray attempted an explanation of how in these orders and in this letter the contract was stated to have been made on April 15th, when according to his testimony it was really made on the 9th. In addition to these matters, there was a letter from Monaghan to defendant, written from Chicago on April 9th, in which no allusion is made to a contract with plaintiff, and testimony of various dealings of Monaghan in Chicago at this time in regard to cement, which are thought to be inconsistent with the view that a contract had been concluded with plaintiff on the occasion referred to. Possibly there are other matters which are also relied on by defendant; but all these matters, so far as admissible in evidence, were for the jury in determining whether in fact any contract was then concluded.

Then, as to whether Monaghan had authority to make a contract with plaintiff. His position with defendant was that of chief salesman. In February and March, before the contract is claimed to have been made, on different occasions plaintiff wrote to defendant for prices upon 5,000 to 10,000 barrels of cement delivered at Chicago, 1,500 to 2,000 barrels at Milwaukee, 1,000 barrels at Grand Rapids, and 2,500 barrels at Battle Creek, and in each instance defendant answered through Monaghan, offering to sell the quantity of cement wanted at certain prices. Evidence was introduced of Monaghan's making divers sales of cement on defendant's behalf in the years 1901, 1902, and 1903, ranging from 2,000 to 7,500 barrels. There can

be no question that he had authority to sell cement for defendant, and to enter into contract with reference thereto. That was what he was employed to do. It does not seem to be contended that he did not have such authority. Point is made solely of the fact that in this instance he is claimed to have sold a very large quantity of cement. But there was no evidence that there was any limitation upon his authority to sell as to the amount sold, much less that plaintiff was aware of any such limitation. It must be held that, in the absence of such limitation and of plaintiff's being chargeable with notice thereof, that Monaghan did have authority to make the contract.

It is to be noted that no question is made with reference to the statute of frauds. The alleged contract was made in Illinois, and is governed by the law of that state. An oral contract of the character claimed herein is not in violation of the statute of frauds thereof.

The judgment of the lower court is reversed, and the cause is remanded to the lower court for proceedings consistent herewith.

RICHARDSON v. SHAW et al.

(Circuit Court of Appeals, Second Circuit. June 20, 1906.)

No. 205.

BANKRUPTCY—PREFERENCES—STOCK BROKER AND CUSTOMER.

Where a broker buys stock for a customer on a margin, the title to such stock is in the customer, and not in the broker, who holds the same merely as pledgee to secure the advances made by him in the purchase. Hence the customer is not a creditor of the broker with respect to the transaction within the meaning of Bankr. Act July 1, 1898, c. 541, § 1, subd. 9, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], and the transfer of the stock to the customer on settlement of his account cannot be considered the giving of a preference by the broker on his bankruptcy with four months thereafter.

In Error to the District Court of the United States for the Southern District of New York.

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered upon a verdict directed in favor of the defendants.

The action was brought by Henry Arnold Richardson, as trustee in bankruptcy of J. Francis Brown, to recover preferences received by the defendants in alleged violation of the provisions of the Bankruptcy Act.

Brown, the bankrupt, was a stock broker engaged in doing business at Boston, Mass.

In February, 1903, the defendants, who were copartners doing business as bankers and brokers in the city of New York, opened a speculative account with Brown for the purchase and sale of stocks on margin and deposited with him \$500 for that purpose. The account was closed June 26, 1903, and during the five months of its continuance the defendants, from time to time, paid other moneys and transferred various securities, in lieu of money, as margins. The business was conducted in the usual manner, the broker buying and selling various stocks for his customers, charging them with the cost and crediting them with the proceeds of sales, the customers maintaining a margin of ten per cent. or more.

Upon the accounts rendered by Brown to the defendants was the following:

"It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be

sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection."

In pursuance of this agreement Brown pledged on his general loans all the securities deposited with him on the defendants' account and they, through their agent, were informed of the fact. When the account was closed, on June 25th, all of these securities had been pledged by Brown who for two months prior thereto had been insolvent.

The defendants' Boston agent, who had obtained knowledge of Brown's precarious financial condition, demanded and received payment of \$5,000 on the 24th of June. On the following day he insisted on a final settlement and an account was made up showing the amount of securities to the credit of the defendants to be \$45,583.75, charges to the credit of Brown to be \$34,919.62. The balance was \$10,664.13.

This transaction is described in the complaint as follows:

"That on or about the 26th day of June, 1903, there was an accounting between the said defendants and said Brown of various dealings between them in which it was found that said defendants owed the said Brown the sum of thirty-four thousand nine hundred and nineteen dollars and sixty-two cents (\$34,919.62) upon the payment of which said Brown was obligated to deliver to them certain securities or in default thereof to pay to them the amount of their then market value, to wit, the sum as they ascertained upon said accounting of forty-five thousand five hundred and eighty-three dollars and seventy-five cents (\$45,583.75), and thereupon said defendants paid to said Brown said sum of thirty-four thousand nine hundred and nineteen dollars and sixty-two cents (\$34,919.62), and said Brown then delivered to said defendants said securities, and the effect of such transfer will be to enable the said defendants as such creditors to obtain a greater percentage of their debt than any other creditors of said Brown of the same class."

The trial court decided that the defendants were not creditors and were entitled to their securities on paying the amount loaned thereon. The court held that the fundamental feature of the relation between the parties was that Brown, the broker, had advanced or loaned money or credit and therefore was a creditor of the defendants, holding security for the amount which they owed him and that on paying this amount the defendants were entitled to the security or their equity therein.

John Brooks Leavitt, for plaintiff in error.

Abraham Benedict (Maurice Untermeyer and Arthur B. La Far, on the brief), for defendants in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges

COXE, Circuit Judge. (after stating the facts). The bankruptcy law provides that the word "creditor" shall include any one who owns a demand or claim provable in bankruptcy." Act July 1, 1898, c. 541, § 1, subd. 9, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]. If, then, the defendants did not own such a claim it is manifest that they were not creditors preferred by the transactions of June 24th and 26th. In other words, the controversy turns upon the question whether or not the defendants were creditors of the bankrupt.

In 1869 the Court of Appeals of New York decided the case of Markham v. Jaudon, 41 N. Y. 235.

Chief Judge Hunt, who wrote the prevailing opinion, states the agreement between the broker and his customer, their relations and mutual obligations, to be as follows:

"The broker undertakes and agrees—

"1. At once to buy for the customer the stocks indicated.

"2. To advance all the money required for the purchase, beyond the ten per cent. furnished by the customer.

"3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker.

"4. At all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock.

"5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker: or

"6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

"Under this contract, the customer undertakes—

"1. To pay a margin of ten per cent. on the current market value of the shares.

"2. To keep good such margin according to the fluctuations of the market.

"3. To take the shares so purchased on his order, whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker."

He then reaches the conclusion that the contract is one of pledge and repudiates the theory that the transaction creates an executory contract of sale. The customer purchased no stock of the broker; the broker sold nothing to the customer who acquired title to the stock and remained the general owner, entitled to redeem or to have the shares or their value delivered to him on paying the amount advanced by the broker with interest and commissions.

The customer could not be divested of his title to the stock except by sale upon reasonable notice or by judicial proceedings.

Two of the judges, Grover and Woodruff, dissented and presented the view for which the plaintiff here contends with the well known ability which distinguish the judgments of those eminent jurists. In their opinion such a transaction as is here shown was simply an executory agreement for speculation in the rise and fall of stocks which the broker, on condition of perfect indemnity against loss, agrees to carry through in his name, accounting to the customer for the profits and holding him responsible for the loss. The customer had no title to the stock, the contract contemplating that the stock should at all times remain in the broker. The customer's only remedy was an action for damages for breach of the contract; he had no action for conversion for the reason that he never had title to the stock. The eminence of the counsel who argued at the bar, the thorough discussion, which must have taken place in the consultation room, as evidenced by the three opinions delivered, and the fact that the principal question was for the first time presented to the court, make it apparent that the case was decided with mature deliberation and after every possible aspect of the controversy had been brought to the attention of the court.

From time to time persistent efforts have been made to induce the court to recede from or modify the doctrine of *Markham v. Jaudon*, but without avail. In its essential features it is the law to-day not only of New York but of a large number of other states. Massachusetts alone has consistently rejected or, rather, has failed to give the doctrine full accord.

As late as 1902, in the case of *Chase v. City of Boston*, 180 Mass. 458, 62 N. E. 1059, Chief Justice Holmes, now Mr. Justice Holmes, said:

"The petitioners contend that the necessary conclusion from the statement is that they held the stock as pledgees, the purchasers being the owners and pledgors, and, if this conclusion is not simply a matter of construction, that we ought to adopt the widely prevailing opinion that that is the relation of the parties in ordinary purchases upon margin, contrary to the view of the Massachusetts cases. *Wood v. Hayes*, 15 Gray (Mass.) 375; *Covell v. Loud*, 135 Mass. 41, 46 Am. Rep. 446. See *Weston v. Jordan*, 168 Mass. 401, 404, 47 N. E. 133.

"We see no sufficient reason for departing from what has been understood to be the law of Massachusetts ever since the time of Chief Justice Shaw. No doubt, whichever view be taken, there will be anomalies, and no doubt it is possible to read into either a sufficient number of implied understandings to make it consistent with itself. * * * The English doctrine seems to be the same as that of this commonwealth, so that we are not left quite alone in a desert of logic. *Bentinck v. London Joint Stock Bank* (1893) 2 Ch. 120, 140, 141."

Here, then, are the two antagonistic views; the one holding that where a broker buys stock on a margin the title is in the customer for whom he buys; the other that it is in the broker.

Theoretically there is much to be said in favor of both contentions, but we see no valid reason to reject the New York doctrine, which has now become well-nigh universal in this country, for the other.

We are inclined to think that the logic of the situation is with the prevailing doctrine. The title to stock purchased by a broker is not suspended between earth and sky; it must be somewhere. In purchasing the stock the broker acts as the agent of the customer, and, if the transaction ended at this stage, there can be little doubt that the title would be in the customer; it is his, just as any other personal property is his which he buys and pays for.

Does not the actual transaction of buying on a margin recognize the ownership of the customer? Does he lose title to the stock because it remains with the broker as security for his advances? Is it not the customer's property that is so held and would the situation, in legal effect, be different if the customer took up the stock and substituted stock or bonds actually owned by him?

As was said by the court in the Massachusetts Case, *supra* :

"Purchases on margin certainly retain some of the characteristics of ordinary single purchases by an agent, out of which they grew. The broker buys and is expected to buy stock from third persons to the amount of the order. *Rothschild v. Brookman*, 5 Bligh (N. S.) 165, 2 Dow & Clark, 188; *Taussig v. Hart*, 58 N. Y. 425. He charges his customer a commission. He credits him with dividends and charges him with assessments on stock. However the transaction is closed, the profit or loss is the customer's."

All this is inconsistent with the theory of ownership in the broker.

The New York cases are not absolutely controlling upon this court, but even if we had more doubt regarding it we should still deem it our duty to adhere to a rule which has been in force for nearly 40 years and which is understood and constantly recognized as a guide in the management of immense financial transactions. The situation is one where stability, uniformity and certainty are of supreme importance and the court should be absolutely sure of its position before vexing the financial center of the country with so serious a conflict of authority upon a question of commercial law.

We think, therefore, that the trial court was right in holding that the defendants were not creditors but debtors and when they paid what they owed they redeemed their stocks pledged with Brown.

Of course a different situation would have existed if Brown had disposed of the stock and had refused for that reason to deliver it on the defendants' demand.

It may be that such a refusal and subsequent acceptance by the defendants of other stock purchased by Brown, after his insolvency was known to them, would bring the case within the doctrine of *Weston v. Jordan*, 168 Mass. 401, 47 N. E. 133.

The trial judge carefully considered this authority and, we think, properly distinguished it from the case at bar.

The payment of the \$5,000 was not preferential and we deem it unnecessary to add anything to what was said by the trial judge on that subject.

The judgment is affirmed with costs.

NOTE.—The following is the opinion of Holt, District Judge, on directing a verdict for defendant:

HOLT, District Judge. The question here, I think, is whether Shaw & Co. were creditors. If a person who is insolvent parts with money to a person who is not a creditor, that does not constitute a preference. It may be something else, but it is not a preference unless he pays money to a creditor. There have been different views as to the nature of the relation between a customer and a broker. I think that the different theories that have been suggested are all somewhat misleading. Some courts say the relations are those of principal and agent; others, pledgor and pledgee; others, that it is an executory contract, and that the broker is a vendor and the customer a vendee. There is considerable analogy in the case of a customer and broker to all these cases, but it is not a simple case of pledge or agency on sale, and to hold that it is is an instance of the confusion which arises from such analogies. It is like the discussion that arose when the question came up about the liability of telegraph companies for sending messages. Some ingenious court asserted that they were common carriers, and then there was great discussion whether they were or were not. Their duties and their obligations were something like those of common carriers, but the comparison led to confusion.

Now, the question here is: What is the actual relation between the customer and broker? It seems to me that the fundamental fact is that the broker advances the money, or the credit, with which to buy the stock. Of course, a man could go and buy stock for cash as a man speculates in land or any property, but by reason of the facts that these large stock exchanges are established, that securities are dealt in so largely, and that the sale of them can be made so quickly, it is comparatively safe for the broker to buy stock or sell stock for the customer on a margin, so called: that is, on security much less than the value of the property. So that arrangement is made, and a small margin is put up; but the essential point is that the broker raises for the customer the means of buying the stocks, and under the arrangement he takes the stocks and holds them as security for the money which he advances, and has the right to pledge them as security for borrowing the money. Now, although inherent in that arrangement are the features to some extent of pledge and agency, the fundamental feature and relation is, I think, that the broker has advanced or loaned money or credit, and therefore is a creditor of his customer and holds the security for it and has the right to pledge the security.

Now, originally, of course, as early as the 41st New York, it was held in *Markham v. Jaudon*, 41 N. Y. 235, that a broker who parted with the security was guilty of conversion. He was a simple pledgee and could not part with the security. The Court of Appeals had to modify that pretty soon, and later they had to admit that the broker had a right to pledge the securities, and it is

established now by the later cases in New York, as in Massachusetts, that the broker is bound to have within his reach and be able to produce similar stocks on call, but he is not obliged to keep the same stock at all. The result is, as stated by Judge Putnam in the case referred to yesterday of *In re Swift* in 7 Am. Bankr. Rep. 374, 112 Fed. 315, 50 C. C. A. 264: "There was much discussion before me whether or not this rule is peculiar to Massachusetts, but it is so only in name, and not in substance. The courts in New York use somewhat qualified language to describe the relation, but the substantial conditions are the same there as in Massachusetts."

I think that is obviously so. The fundamental relation is that the broker is a creditor holding security, and the customer is not a creditor until after he has tendered the amount due to the broker and demanded his securities. When he has done that, then he becomes a creditor if the broker does not give up the securities. That is what took place in this Wheatland Case (*Weston v. Jordan*). In that case Wheatland had parted with the stock, a demand had been made upon him for it, and he had failed to meet it, and therefore when later, for some reason or other, he went out into the street and bought that kind of stock with his money, and the customer who took the stocks knew that he had bought them, that they were not the stocks that he had purchased, but that he had gone out and taken his property and bought these stocks, the court held that that transaction amounted to a preference. I think that would be the case here, if Brown had parted with the securities, had admitted it, and refused to return them when demand was first made, and then on the eve of bankruptcy had gone and taken cash and bought these stocks and turned them over. If that had occurred, a different case would be presented. As it was, Shaw & Co. never made any previous demand for their stocks, and when the demand was made it was acceded to. Mr. Fletcher did not have them right in his pocket, of course. That would not be the case in any broker's office. If you go to your broker, tender the amount due, and ask for the stocks, and he says, "I will get them for you in the offices where they are pledged," and he goes and does it the next day, that, in my opinion, is substantially acceding to the demand. You could not hold a party for conversion or liable in a suit because he did not give them to you at that minute. That is what took place in this case, and I do not see therefore that Shaw & Co. ever occupied the position of creditors in the true sense. They were debtors, and, until they had paid the amounts which were due to the brokers, they continued to be debtors, and that is what is held in these Massachusetts cases. Judge Lowell says in this very opinion: "It would seem that the customer could not at once maintain an action for that violation without a proper demand." And in this case of Wheatland: "After Wheatland had parted with the control of the shares, and after repeated demand for them by Jordan and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland." Judge Lowell, in commenting on that case, says: "I must take these words to imply that under a Massachusetts contract no right of action accrues to the customer until after demand." Judge Putnam says the same thing in the same case on appeal. As he puts it: "A banker does not ordinarily have on hand sufficient funds to meet the checks of all his depositors, if they should all draw simultaneously. A like rule applies to stock brokers. In one case, as well as in the other, so long as either remains solvent, he is presumed to be able to meet his contracts, and no action can be maintained against a banker by a depositor without first drawing a check or making some other demand. Nor in the case of a stock broker unless demand is made for the stock."

Therefore, leaving out of view this \$5,000 item, it does not seem to me that there was anything in this case on the settlement between the parties, except that the customer tendered the amount which he owed to the broker and demanded his securities, and the transfer of the securities was nothing but the delivery of collateral. The estate received all that was due to it, all that it had any property in, namely, the amount that was due from the customer to the broker.

Now, with respect to this payment of five thousand dollars, Mr. Leavitt has argued very ingeniously that Shaw & Co. had made money in their speculations and were entitled to it and were not obliged to keep it there as margin: but the truth is, in my opinion, it was not paid as a debt. There was no debt

existing at that time. The debt was from the customer to the broker, and it was a case simply where a creditor has such large collateral, or securities so much in excess of the debt, that he was willing to increase the debt. It was an advance, in my opinion, from the broker to the customer to be ultimately settled when the account was closed with the customer. If he had not advanced the \$5,000, he could have got the securities by paying \$29,000, and it may be called a partial settlement, or, more properly, an advance on the general account.

I think that in this case the plaintiff makes out no case of a preference, and I shall direct a verdict for the defendant.

TINCHER v. ARNOLD et al.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,210.

1. WILLS—ACTIONS TO CONSTRUCT—LACHES.

Mere delay will not debar an heir from maintaining a suit to determine the validity of a legacy where such legacy has remained in the hands of trustees in accordance with the terms of the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1677.]

2. PERPETUITIES—GIFT TO CHARITABLE USE—REMOATENESS.

A bequest of all the testator's residuary estate to trustees to accumulate until it reaches a certain amount, a part of the principal and the future income from the remainder to be then devoted to a certain charity, vests for the use of the charity at once, and is not void, as in violation of the rule against perpetuities, nor for remoteness.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Perpetuities, §§ 57-67.]

3. CHARITIES—VALIDITY OF EDUCATIONAL BEQUEST—CERTAINTY AS TO BENEFICIARIES.

A bequest in trust to create a fund to be used to establish and maintain a school "for the purpose of educating boys who reside in the state of Illinois between the ages of 12 and 18 years, and who are unable to educate themselves," is not void for want of a class of boys to which the charity may apply, because of the existence in the state of a system of public free schools open to all boys of such age without charge, nor because of uncertainty as to the individual beneficiaries; such uncertainty being in fact an essential element of a valid charity.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, §§ 36, 48.]

4. SAME—ADMINISTRATION—SELECTION OF BENEFICIARIES.

Where a will appointed trustees to manage the estate, and "for the purpose of carrying out the full terms" of the will, and contained a bequest to them in trust to found and maintain a school for the education of boys "who reside in the state of Illinois between the ages of 12 and 18 years, and who are unable to educate themselves," the trustees have power to select the individual beneficiaries, and, in any event, if necessary, a court of chancery of the state may appoint a trustee for that purpose.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, §§ 42, 75, 76.]

5. SAME—CONSTRUCTION AND EXECUTION OF TRUST—DOCTRINE OF CY PRES.

A testator devised and bequeathed his residuary estate in trust, directing the trustees to manage the property, and when a fund of a stated amount had been accumulated to cause a building to be erected, to cost not exceeding a certain sum "for the purpose of educating boys who reside in the state of Illinois, between the ages of 12 and 18 years, and who

are unable to educate themselves," and directing that the remainder of the fund should be kept at interest, and the net income used "for the purpose of paying teachers employed in said school." Held, that education was the dominant purpose of the charity, as disclosed by the will, and that the courts should not defeat it by a literal construction which would restrict the use of the income to the payment of teachers, and prevent the use of any part of it to equip and maintain the building and to pay other necessary expenses of conducting the school, but should construe the will and carry out the testator's general purpose in accordance with the equitable doctrine of cy pres.

6. WILLS—SUIT TO DETERMINE VALIDITY OF BEQUEST—FEES AND COSTS.

The sole heir at law of a testator, who brings an unsuccessful suit to have a bequest in trust for a charitable purpose declared void, solely in his own interest, is not entitled to have his costs and attorney's fees charged against the trust estate.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1684-1686.]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

E. A. Otis and J. Warren Pease, for appellant.

Edwin Burritt Smith and McClellan Kay, for appellees.

Before GROSSCUP and BAKER, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge. Action to construe a will, to determine the validity of a trust clause therein, to have such clause held void, determine that complainant as sole heir at law of the testator is entitled to the amount of the trust funds in the hands of the trustees, and that they be required to account for the same and turn them over to complainant. The court below held that the trust was valid, as creating a good charitable use, and dismissed the bill for want of equity. Complainant also moved the court to allow her the amount paid for attorney's fees, on the ground that her solicitors had rendered valuable and important services to the value of \$1,500, and that the terms of the will are ambiguous, indefinite, and uncertain, and application to the court was necessary to obtain a construction thereof; that at the time of the filing of the bill in this cause the trustees under the will had themselves prepared a bill to be filed in the Circuit Court of Watseka county, Ill., asking a construction of the will. This petition was denied by the court, on the ground that complainant in this case was suing in her own right, and not for the benefit of the trust estate. Complainant has appealed from the decree dismissing the bill, and from the order or decree denying her petition for attorney's fees.

Complainant is the daughter and sole heir at law of the testator, LeGrand L. Wells, deceased. On September 24, 1883, said Wells made his will, and by the fifth clause thereof attempted to create a trust, as follows: After giving his daughter, the complainant, a life estate in a farm in Iroquois county, Ill., remainder to the heirs of her body share and share alike, and a legacy of \$1,000 and certain personal property, and \$1,000 each to her children as they should arrive at the age of 21 years, the will contains a residuary devise to his trustees for the

purpose of carrying out the full terms of the will, and then proceeds as follows:

"I further direct that my trustees and their successors manage my estate until it has accumulated a fund of at least thirty thousand dollars after setting aside a sufficient sum to pay all specific legacies, debts etc. which shall form a fund known as the Wells Fund, and shall be used in the following manner, to wit: If the city of Watseka will donate a suitable lot for such purpose within thirty days after being notified by said trustees, said trustees shall cause a building to be erected on said lot for the purpose of educating boys who reside in the state of Illinois between the ages of 12 and 18 years, and who are unable to educate themselves, which shall cost not exceeding five thousand dollars, and the balance of my estate in the hands of my said trustees after the payment for said building, shall be kept at interest and the net income, except ten dollars per year set apart for the purpose of keeping my family burial lot in repairs, shall be used for the purpose of paying teachers employed in said school. And I further direct my said trustees that in case the city of Watseka refuses or neglects for thirty days after being notified by the trustees that they are ready to carry out this provision in said Will as to said school, then they shall pay the whole sum set apart for this purpose over to the finance committee or the trustees of Onarga Seminary, located at Onarga, Illinois, the net income of which shall be used to carry on said Seminary and shall be known as the Wells Fund."

The specific legacies were paid by his executors, but the estate has never been settled in the county court of Iroquois county, nor the executors discharged. The executors and trustees continued to manage and invest the residuary estate until about the year 1890, when the trust fund amounted to \$30,000. Soon after a lot of land in Watseka was conveyed by the owners thereof to the trustees as a site for the erection of the school building pursuant to the terms of the will, but there was no donation of the lot by the city which it is alleged in the bill did not have any power or authority to purchase the lot or make any donation thereof. The will was admitted to probate May 7, 1884. The original bill was filed May 14, 1903, and the amended bill July 21, 1903.

The bill further set up that about the year 1898 the trustees erected on the lot so conveyed to them a building to be occupied as a school for the purpose of educating boys of the class mentioned in the fifth clause of the will, expending therein \$5,000, and although the building was so erected and completed in 1898 no steps had been taken by the city, or any one, to put in operation a school for the purpose mentioned; that before any school can be put in operation in the building it is absolutely necessary and indispensable to furnish the necessary fixtures, furniture, apparatus, libraries, fuel and janitor's services; that the school building must be properly cared for and suitable persons employed and paid to keep the building, fixtures and appurtenances in reasonable condition and repair; that the building should be insured, and the taxes and assessments thereon paid, all of which would require the annual expenditure of a large sum of money over and above the salary of teachers employed therein, and that the city has no power or authority to discharge or perform these indispensable duties for the operation of a school of the character mentioned, and the trustees are absolutely without power to pay these expenses; with the result that no one is authorized or able to give the building any care or attention whatever, and that it has remained vacant and unoccupied ever since its construc-

tion. Its windows and doors have been boarded up and the same is becoming in a ruinous condition from lack of care and attention, no arrangements having been made or contemplated by any of the defendants, or otherwise, to maintain any school or carry into practical execution the provisions of the will; that the net income of the trust will not exceed \$1,000 to \$1,250 a year, and that sum is wholly insufficient and inadequate to pay the salaries of teachers in said school even if the other expenses mentioned were otherwise provided for, and the carrying on of such a school will require annually the expenditure of many times the amount of such net income; that pursuant to the mandate of the Constitution of Illinois there was at the time of the death of the testator a complete system of free public schools in force in Illinois, whereby all boys of the ages mentioned in the will could and can be educated without charge, and there are no boys in Illinois who are unable to educate themselves, and no class of persons to which the fifth clause of the will applies. The city has no power to levy any tax to support or maintain such a school, and the trust provision of the will is uncertain, illegal, indefinite and incapable of being carried into execution.

It is further alleged in the bill that the defendant Grand Prairie Seminary (successor to Onarga Seminary), is a school conducted for profit, is not a charity under the laws of Illinois, and the trust provision of the will is void as against said Grand Prairie Seminary, if otherwise valid, because it creates a perpetuity; and that it is impossible to ascertain and determine what school or seminary should receive the benefit of the trust in case no site for the erection of the building had been supplied by the city of Watseka.

It is further averred that the Grand Prairie Seminary, claiming to be the school referred to in the will, filed a bill in the circuit court of Iroquois county, claiming the legacy in its own behalf, and that neither the complainant nor the city of Watseka was a party to that bill or concluded by the same in any way. That suit proceeded to final hearing and decision in the Supreme Court of Illinois, wherein it was finally determined that Grand Prairie Seminary was not entitled to said fund. A final decree was made in that suit in the circuit court, June 30, 1896, declaring the trust illegal and void, and a final decision sustaining the trust was made by the Supreme Court of Illinois on February 14, 1898. 171 Ill. 444, 49 N. E. 516. Grand Prairie Seminary answered the bill in this case. The trustees, the city of Watseka and the Attorney General demurred to the bill for want of equity, and also on the ground of gross laches and estoppel by election. The court sustained the demurrers, and entered a decree dismissing the original and amended bills for want of equity, reserving the question of costs on the pending motion. An order or decree was afterwards entered, denying the motion, and appeals taken from both decrees.

As tending to explain the delay in filing the bill, complainant stated in the amended bill that about a year and a half after the death of her father she removed to Nebraska. She was advised by the executors to believe that several years would elapse before the residuary fund in their hands as trustees would amount to \$30,000, and that there was no necessity for her to assert any claim thereto, because the trust es-

tate was required to remain in their custody. She was in limited circumstances, and unable to pay the expenses of instituting the proceedings to obtain a construction of the will, and, having entire confidence in the integrity, honesty, and responsibility of the trustees, she was induced to delay proceedings. In 1895 she first ascertained that steps were being taken by the Grand Prairie Seminary to obtain a construction of the will, and during the pendency of that suit, and for a long time thereafter, she was informed and fully believed that the final decision in that case would settle and determine the rights of all the parties to the trust fund, and she did not learn otherwise until a short time before beginning this suit. She further submits that no injury has resulted to any of the parties claiming the trust fund by reason of her omission to commence suit earlier, and that the ultimate rights of the parties to the trust fund remain substantially unchanged. Upon the argument the court disposed of the question of laches through the following expression by Judge Baker, in which we all concurred: The legacy is either void or valid. This is to be determined by the will. If valid, the delay is of no consequence; if void, the laches of appellant could not make it valid. In no event could it become the individual property of the trustees. That the bequest does not offend against the rule of perpetuities, because of perpetuity in the first taker, and is not void for remoteness, is equally clear; and is settled by the cases of *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454, and *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320. See, also, *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397.

The only difficult question presented is that of definiteness and possibility of execution. The testator gave to his executors, to be held by them as trustees for the purpose of carrying out the full terms of the will, all his residuary estate. They are directed to manage the property until it has reached at least \$30,000, when it is to form a fund to be known as the "Wells Fund," to be used in the following manner: If the city of Watseka will donate a suitable lot within 30 day after notice by the trustees, said trustees shall cause a building to be erected on said lot for the purpose of educating boys who shall reside in Illinois between the ages of 12 and 18, and who are unable to educate themselves, to cost not exceeding \$5,000; the balance to be kept at interest and the net income (except \$10 a year set apart to keep the family burial lot in repair) shall be used for the purpose of paying teachers employed in the school.

Several important questions are presented. As the Illinois public school system affords a free education to boys of the ages mentioned, it is urged: First, that there were not, and are not now, any boys in Illinois unable to educate themselves; second, if such a class is decided to exist, its members are said to be indefinite, and no means of selection provided, the trustees not being empowered to select them; and, third, that the will imperatively requires all income to be used for teachers' wages, leaving nothing for other things absolutely essential, such as heating, lighting, care of the schoolhouse, repairs, taxes, and board and clothing of the boys. Wherefore the scheme is alleged to be indefinite, impracticable, illusory and void.

1. Is there a class of boys to which the charity may apply, notwithstanding the public school system? Such system existed when the will was made, and when it became operative; and the testator was fully aware of its operation, scope, and limitations. Perceiving this he well understood that there are many boys who are still unable to avail themselves of its great advantages; whether by reason of indifference of parents, poverty, and consequent necessity of earning their own living, or otherwise. It is said the class is not restricted in any way, by the capacity, color, or condition of the beneficiaries; but it is enough to say that charity delights in uncertainty. "Charity begins where certainty in the beneficiaries ends." In fact such a certainty will avoid the trust. "It is the number and uncertainty of the objects, and not the mode of relieving them, which is the essential element of a charity." *Dodge v. Williams*, 46 Wis. 97, 50 N. W. 1107. Trusts for charitable purposes "may, and indeed must be, for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal certainty." *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397. The very indefiniteness complained of is the best means of making the charity effective and beneficial, since those boys to whom the school may be of real and substantial good may be selected from the large class indicated. "The rule that, to raise a valid trust there must be sufficient words, a definite subject, and a certain object, has its exception in charitable uses, of which uncertainty and indefiniteness of object are characteristic." *In re Daly's Estate*, 208 Pa. 58, 57 Atl. 180. In *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269, a trust was created for the erection and maintenance of a polytechnical college for the purpose of giving the boys and girls of the state of California a practical training in the mechanical arts and industries, the better to fit them to engage in the different pursuits of life. It was urged that the trust was void for uncertainty in the recipients, the trustees not being authorized to designate what boys and girls, and, if all applied, the trust would be impossible of execution. It was held that, when the class has been fixed, this very vagueness and uncertainty as to individuals and numbers are not only permitted, but are absolutely essential elements, in the creation of a valid charitable trust.

But it is also objected, as all children may obtain a free education in the public schools, there are no boys in Illinois unable to educate themselves. It is well known, notwithstanding the public schools are free to all, there is still a class of boys who are unable to attend them; among whom are orphans, the poor who need public assistance, and those obliged to labor during school hours. Such an objection has never been sustained by the courts, so far as we have been able to find; on the contrary, similar charities have been sustained in a number of cases. A trust for the education of the children of the state of Kentucky, particularly the poor and most unintelligent, was sustained in *Bedford v. Bedford's Adm'r* (Ky.) 35 S. W. 926; *Handley v. Palmer*, 103 Fed. 39, 43 C. C. A. 100. Also a trust for a home and place for the maintenance and education of poor children, in *Howe v. Wilson*,

91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226. For the education of the poor or orphan children of a township. *Mason's Ex'rs v. M. E. Church*, 27 N. J. Eq. 47; *State v. Smith*, 16 Lea (Tenn.) 664. To establish an institution for the benefit, tuition, etc., of the youth residing from time to time in New Jersey. *Stevens v. Shippen*, 28 N. J. Eq. 487. For the support of a school for white children. *Cincinnati v. Mecken*, 6 Ohio Cir. Ct. Rep. 188. For the education and tuition of worthy indigent females. *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. See, also, *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375; *In re John's Will* (Or.) 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

In *Clement v. Hyde*, 50 Vt. 716, 28 Am. Rep. 522, a trust for the education of "the scholars of the poor people" of a certain county was sustained, although the public schools were also open to them. The court say:

"The public schools being open to the scholars of the poor as well as of the rich, and being supported by taxation, it is manifest that the testator did not intend to have his bounty so applied as to relieve the taxpayers in any measure of the burden of the support of these schools. Neither did he intend to have it applied to all of the children of the poor people of the county indiscriminately; for he has designated a definite class of such children—the scholars, not necessarily those attending schools, but those children of this class who have an aptitude for learning, and who could not avail themselves, for the want of a suitable education, of the powers that the Creator has bestowed upon them, without extrinsic aid. If the trustee had applied the income arising from the trust fund in good faith, and in the exercise of ordinary discretion, in the purchase of books, payment of tuition or board of any of the class of scholars indicated, no one, we think, would doubt about his accomplishing the intention of the testator. If the trustee hesitates to take the exercise of this discretion upon him, it is clearly the province of the court of chancery to aid him by devising a scheme for the appropriation of the income of the fund. Where a trust is created for a charitable use, the application will be effected by means of a scheme, to be directed and approved of by the court of chancery."

Leeds v. Shaw's Adm'r, 82 Ky. 79, was a trust to a school district, "for the education of poor children, or for the maintenance of a good common school in said district." It was held that the beneficiaries were children residing within the district, and who were by law entitled to the benefits of the common school system of the state; and that the bequest was confined to white children, because there was then no law for the participation of colored children in the benefits of the common school system; and the same result was reached in *Moore's Heirs v. Moore's Devisees*, 4 Dana (Ky.) 354, 29 Am. Dec. 417, where there was a trust for educating "some poor orphans" of a particular county, "and to be confined to such as are not able to educate themselves."

2. But who is to select the limited number to be brought into the school under the small provision made, not exceeding \$1,500 a year? The rule stated by Mr. Perry is relied on:

"The courts in America have generally declined * * * to administer these indefinite gifts to charity or religion or education or public utility unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons."

Here there are trustees, but it is insisted that they have no power to select the charitable donees. The will appoints the trustees "for the

purpose of carrying out the full terms" of the will, and directs that they shall manage the estate. In *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516, involving this same will, the Supreme Court of Illinois held that these provisions were intended to provide for trustees to control the disposition of the fund; but that, in any event, a court of chancery might appoint a trustee for that purpose. In *Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009, a trust was created for the benefit of "widows and home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers," the property to be held under such rules and regulations as should be provided by the brotherhood. It was held that the trustee and the brotherhood had power to determine with certainty the beneficiaries. We think the will intends the trustees to manage the estate after the building should be built; and that this objection is not well taken. In any event a trustee may if necessary be appointed by the proper state court, to select the beneficiaries.

3. The most serious question, however, is whether the express direction of the will that all the income shall be used to pay the teachers must be literally executed, even though it may render the scheme abortive. Would it be a breach of trust to devote part of the income to pay for heating and other necessary expenses, or to the boys' support, so as to enable those selected to receive tuition? Or may education be regarded as the leading or dominant purpose of the charity, and effect be given to it by such a variation of the scheme as to make it practical and successful? The testator mentions the schoolhouse, the school, education and teachers; thus making education his general object and purpose. He does not expressly refer to such things as are absolutely essential to such purpose, such as heat, light, care, repairs, etc.; essential because there can be no continuous use of the building without repairs and care, no school without heat and light; possibly no teachers or students without some pecuniary help to the latter.

After reasonable provision for his only heir and her children, the testator wished to devote the rest of his property to a charity. In this he was dictated less by policy than benevolence; and it was not as an expiation, for his property did not come from public spoliation. No need to examine with a microscope the gift to ascertain whether it bears any taint of unlawful gain, or selfishness, or personal or family interest; for from all these it is absolutely free. His benevolent and philanthropic purpose was to reach an unfortunate class of boys, and bring their hearts and minds under the benign influence of education. This he endeavored to bring about by appealing to the natural rivalry between adjoining communities; thus shrewdly adopting the very best means to secure the school in his own home city. True, he also wished to perpetuate his name by calling the gift the "Wells Fund;" but this may be pardoned, and even be called laudable. Evidently he thought that "a boy is better unborn than untaught"; perhaps influenced by something he had himself missed, and valued accordingly. His dominant purpose is thus, not only worthy and laudable, but clearly outlined, lacking only in perfection of detail; and is to be construed with the greatest liberality. *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331,

17 N. E. 491; *Ould v. Washington Hospital*, 95 U. S. 303, 313, 24 L. Ed. 452. So construed, will a court of equity permit his charity to fail because he has not fully worked out the details of his plan? Or because, in practice, it is somewhat inconsistent? The whole income cannot be applied, as literally directed, to teachers' wages, since there can be no teaching without other things. To earn wages, or have education, or carry on the designated school, or make it in any degree successful, or even tolerable, there must be heat, and light, and paid labor. To mention education, a school, a building, and teachers, is to impliedly mention those things essential to their success, if not to their very existence. A literal, ironbound construction makes the plan impossible, and defeats it. A liberal one saves it, through a mere change of detail, and thus gives effect to the testator's worthy purpose. "*Qui haeret in litera, haeret in cortice.*"

A limited application of the equitable rule of *cy pres*, or the so-called "doctrine of approximation," is relied on for permitting a change of plan, by which the income, restricted by the will to teachers' wages, may be partly applied to other expenses necessarily preceding them. This is on the theory that the testator's main purpose was education, and that he could not have intended to so limit and hamper the use of the money as to defeat the very object designed. This dominant purpose to found a school and furnish the means of education being clear, imperfect or impossible details of method may be corrected, so long as the main object—education—is secured and preserved. Such correction of detail has often been adopted by the courts, and nowhere with more liberality than in Illinois. Instance the cases hereafter referred to of the *John Crerar* will, where the impossible direction to form a corporation was disregarded; and the school district trust in *Heuser v. Harris*, where an incongruous direction as to the method of electing a trustee was also disregarded. An impossible or even unlawful plan may be corrected, in order to carry out the main trust purpose. Any other course would sometimes defeat the very purpose of the trust, disappoint just expectations, and destroy gifts of great public importance and utility. While some courts have entirely rejected the rule of *cy pres*, and it has sometimes been characterized, like the evidentiary rule of *res gestæ*, as a cloak for loose reasoning, and as a means of interpretation which finds a meaning where none exists; yet its judicial application has usually been most just, enlightened, and beneficial. Where a main charitable purpose is disclosed with reasonable clearness, directions of the donor relating to management of the trust, not intended as limitations, will be regarded as directory only, and not mandatory, if necessary to preserve the trust, and carry out its leading purpose. In such cases, it will be presumed that specified details of management were meant to be governed by circumstances; and this whether they be either impracticable or illegal. Administrative duties may be varied, details changed, and the main purpose carried out *cy pres*, or as nearly as possible according to the plan prescribed by the trust instrument. A further application of the *cy pres* rule sometimes takes place when the object itself fails; as a charity to emancipate

slaves, made inoperative by their complete freedom; but it is not necessary to consider that aspect of the doctrine here.

The following cases illustrate the rule stated: When a definite charity is created, the failure of the particular mode by which its dominant purpose is to be effected will not defeat the charity, for equity will substitute another mode. Thus where the testator provided that the trustee should not make any sale or other or different alienation from a certain one indicated, but did not so phrase such provision as to make it a condition, but merely an administrative limitation in respect to the management of the trust, it was taken to have been intended to advance the dominant purpose of the will, or the maintenance of the charity; and an alienation to further such purpose was permitted. The court said that it was clear that this involved no phase of what is known as the prerogative power of *cy pres*, nor was it an instance which called for the exercise of the usual judicial power of *cy pres*. *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414. It was also said by the court in the same case, that this change of mode was not a deviation from the founder's intention as to the objects of the charity, but only from his directions as to management, varying only administrative duties, which were, no doubt, originally meant to be governed by circumstances. The difference was akin to that between the substance and its incidents, on the one hand, and form, or the rules of administrative detail, on the other; or the difference between the end in view and the means of its accomplishment.

In *McDonogh v. Murdoch*, 15 How. (U. S.) 367, 14 L. Ed. 732, cited in *Russell v. Allen*, *supra*, a charitable trust was sustained, and it was held that the testator's directions as to the management of the income "must be regarded as subsidiary to the general objects of his will, and whether legal and practicable or otherwise, can exert no influence over the question of its validity." "Assuming that the whole scheme of management should fail the charitable use will not be permitted to fail." In *re Daly's Estate*, 208 Pa. 58, 57 Atl. 180.

In *Amory v. Attorney General*, 179 Mass. 89, 60 N. E. 391, there was a trust to create a home for poor women and their young children, for a temporary home for invalid women, both young and old, and for the poor, sick, and weary, of any denomination. The home was to be administered by a sisterhood, and if it should not accept, the property was to be conveyed to a hospital for the same purposes. Both the sisterhood and the hospital refused the gift; and the master reported that the scheme could not be carried out as described in the will. It was also provided by the will that the trustees should not sell certain real estate known as "Seven Oaks." It was held that the fact that the scheme could not be carried out as prescribed was not fatal to the charity, but that it should be carried out as nearly as possible under the sanction of the court. Also, that "Seven Oaks" might be sold, especially as its sale was authorized by a codicil to the will. See, also, *Stuart v. City of Easton*, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238, citing *In re Mercer Home*, 162 Pa. 232, 29 Atl. 731, as to change of plan. *John v. Smith*, 102 Fed. 218, 42 C. C. A. 275.

When a definite function or duty is to be performed, and it cannot be done in exact conformity to the scheme of the donor, it must be performed with as close an approximation to that scheme as reasonably practicable, and thus enforced. It is the doctrine of approximation. It is not confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for; and it is an essential element of equity jurisprudence. *Philadelphia v. Girard's Heirs*, 45 Pa. 9, 28, 84 Am. Dec. 470. The doctrine of *cy pres*, in its last analysis, is found to be a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor. *Doyle v. Whalen*, 87 Me. 414, 32 Atl. 1022, 1026, 31 L. R. A. 118; *Taylor v. Keep*, 2 Ill. App. 368, 383.

In Wisconsin the Supreme Court has quite recently adopted a more liberal rule as to charitable trusts of personal property than that formerly prevailing, and the Legislature has followed by recognizing the validity of charitable trusts of real estate. See chapter 511, p. 950, Laws 1905, amending section 2039, Rev. St. 1898; Rev. St. Supp. p. 1057.

In *Kronshage v. Varrell*, 120 Wis. 161, 97 N. W. 928, a testator, after reciting that "having in mind the many catastrophes resulting from the action of the elements, and the great suffering, distress, famine, and want caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes, and, having a desire to do what I can to relieve the same," made a bequest to trustees to annually expend certain income for the purpose of relieving the wants, distress, and suffering arising from such causes, and for the purpose of aiding the victims of such accidents and catastrophes. No restriction was placed upon the trustees as to the locality where the moneys should be expended, but the will enjoined upon them to select subjects worthy of assistance, and to use their best judgment and prudence in so handling the moneys that they might be of the greatest possible assistance to suffering humanity. It was held that the bequest was not to charity generally, but defined a class of beneficiaries with such definiteness as would enable the court to determine whether any concrete expenditure was within the scheme of the testator. The court say:

"The degree of definiteness essential to the validity of any grant in trust for charity is a subject so recently treated at large, and as to which our attitude is so unambiguously declared in *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924, that we cannot justify extended review of either its history or of the writings of authors or judges upon it generally. This court has decided, disregarding the reasons which some others have deemed controlling, that there are inherent in our courts all the strictly judicial powers ever exercised by the Chancellor or the High Court of Chancery of England to find means to carry into effect a charitable purpose entertained by a testator or grantor; that such courts lack only the prerogative *cy pres* power enjoyed by the sovereign to apply all goods devised to any charitable purpose, to purposes never declared or even entertained by the donor, under certain circumstances, which prerogative power was in some degree exercised by the Chancellor by delegation from the sovereign. All that is necessary is that the deviser shall place his property in trust, and designate a charitable purpose of his own narrower than the field of charity generally. The courts can find and will then see to it that a trustee is provided, if none be designated, and that means will be found to apply the property to the purpose, if no method be prescribed. They are limited to the defined pur-

pose, and they must ascertain it from the words of the testator, but, in ascertaining it, may and will indulge the most liberal construction. *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885."

In *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924, a will gave three-fourths of the net residuary personal estate to trustees to expend in temperance work in the city of Milwaukee. The trust was sustained, the court laying down the following rules: The common-law system of trusts for charitable uses did not originate with, nor is it dependent upon, the statute of 43 Eliz. ch. 4. A trust for a particular and valid charitable purpose, as distinguished from a bequest in trust for charity generally, was sustainable in chancery before the statute of Elizabeth solely by the judicial power of the court, and to that extent such statute was merely confirmatory of the common law; and to the same extent such statute was adopted as a part of the common law of this country and prevails in this state.

In sustaining a trust of the character last above indicated, courts of equity resort to liberal rules of construction to determine the intent of the donor, enabling them to go to the limit of the general purpose indicated by the donor and do everything necessary to enforce such purpose, but not to go outside of it into the realms of prerogative authority governed by the *cy pres* doctrine strictly so called. The *cy pres* doctrine, as indicative of prerogative authority, does not prevail in this state, but, as regards liberal rules of construction of charitable trusts, applied in chancery in England independent of the statute of Elizabeth, it does prevail.

Cy pres power, as commonly understood, has two features: One, the right to exercise prerogative authority, enabling a court to deal with a bequest to a charitable use having no designated particular purpose as a bequest to charity generally, treating the purpose as the legatee, or a bequest for an illegal purpose, or some purpose impossible of execution for some reason; and the other, the right, by liberal rules of construction, to deal with a trust having a designated particular purpose, though in general terms, and enforce it within the limits of such purpose, supplying the trustee if necessary. The former is not exercised here, but the latter is. Similar definition and application of this "doctrine of approximation" have been uniformly made by the Supreme Court of Illinois. In *Heuser v. Harris*, 42 Ill. 425, lands were directed to be sold, and one-half the proceeds was to go to a certain school district, to be used for school purposes only, and to be under the control of one trustee, to be elected by "the people" of the district for the term of four years. The other half was to go to the poor of Madison county. It was objected that the scheme was utterly impracticable, because the will provided no lawful method for the election of the trustee. It was held, that if the trustee should not be elected, the district could apply to chancery to supply one; and the court would, in order to carry out the intent of the testator, by liberal intendment, appoint. "We entertain no doubt," say the court, "if the election of a trustee and his qualification are impracticable, a court of chancery, on a proper application, would remodel the will in this regard, *cy pres*, as near as possible to effectuate the intention of the testator."

In *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454, there was a trust for the erection, creation, maintenance, and endowment of a free public library; and providing for a corporation to carry out the trust. It was objected that the corporation could not be legally organized. Held that, whether this was so or not, the gift was valid; that even though the provisions for putting the library into practical operation might be held impossible of execution, the court would consider the charity as the substance, and if the designated mode failed, would provide another by which it might take effect. The same conclusion is reached in *Andrews v. Andrews*, 110 Ill. 223, *Hunt v. Fowler*, 121 Ill. 276, 12 N. E. 331, 17 N. E. 491, and *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516. Such being the rule in Illinois the federal courts will follow it, as a rule of property. *Jones v. Habershram*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 403; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795. We also think the same result would follow from an application of the liberal rules of construction adopted by the Supreme Court of the United States, and many of the states, appearing from the foregoing citations.

On the appeal from the decree denying the appellant costs out of the estate, we adopt the conclusions of the Circuit Court which follow:

"When the terms of a will are so ambiguous that resort to a court of equity is necessary to obtain a construction of the said will it may be proper for the court to order the costs of the parties to the proceeding, together with reasonable solicitor's fees, to be paid out of the estate of the testator. Such cases have arisen where the executor has filed a bill to have determined the respective rights of various legatees which under the ambiguous terms of the will are not clearly defined, and which the executor is justified in asking the aid of equity in construing. In such a case it is equitable that the common fund should bear the expenses of the proceeding. This cause however presents no such situation. Complainant seeks to have the court declare void testator's bequest to charity, and the trust failing, she would then take the property as heir. The suit is one plainly for her own interest alone, and not for the interest of the defendant trustees who have been in possession of the property for years and engaged in carrying out the terms of the will. No case has been pointed out to me in which the court has gone to the extent of allowing fees to complainant's solicitor out of a trust estate under conditions similar to those of the case at bar. The case most strongly in complainant's favor is that of *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320. Were I willing to subscribe to the doctrine of that case as to the allowance of fees, which I am not, I feel that the rule should not be further extended to embrace an allowance to the heir in this suit for securing a second adjudication of the validity of the bequest in clause 5, inasmuch as a construction thereof as made by the Supreme Court of Illinois in 1898, which was binding on all parties save the complainant herein, and under which construction of the will the parties for years have acted. The trustees neither desired nor did they need a further adjudication that the trust was valid. This suit was of no benefit to them as a guide to their future administration of the trust estate, for complainant has no standing to secure for the trustees the direction of the court as to the administration of the trust."

It may be further observed that the Circuit Court would have no jurisdiction of a suit brought merely to construe a will in order to obtain specific direction as to the duties of executors or trustees; since the "amount in controversy" would be lacking. *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 459, 6 Sup. Ct. 150. It is the appellant's claim to the estate, founded on the position that the trust provision is invalid,

which gave the Circuit Court jurisdiction. The fact that such claim renders a construction of the will necessary does not entitle appellant to counsel fees, because the jurisdiction depends on her claim as heir, and not on her right to have, incidentally, a construction of the will. The decrees of the Circuit Court are affirmed.

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GAZLAY et al. v. WILLIAMS.

(Circuit Court of Appeals, Sixth Circuit. July 30, 1906.)

No. 1,578.

1. BANKRUPTCY—COURTS—JURISDICTION—PROPERTY—TITLE OF TRUSTEES—DETERMINATION.

Where a lease of a building to a bankrupt passed to his trustee, and the lessors claimed that the lease was not assignable without their consent, the court of bankruptcy had jurisdiction of a proceeding by the trustee, in the nature of a bill to remove a cloud on his title, to determine his rights in such leasehold prior to a sale thereof.

2. LANDLORD AND TENANT—LEASES—ASSIGNMENT—FORFEITURE—CONSTRUCTION.

A lease provided that if the lessee assigned or sublet, or if the lessee's interest should be sold under execution or other legal process without the written consent of the lessors, their heirs or assigns, first had, or if the lessee or assigns should fail to keep any of the other covenants of the lease to be kept by the lessee, it should be lawful for the lessors to re-enter and declare a forfeiture. The leasehold was thereafter sold to B., subject to the terms, covenants, and conditions in the lease, under a decree in a suit brought by the lessors to foreclose their lien on the leasehold for nonpayment of rent, and, on B. becoming a bankrupt, his trustee claimed the leasehold as a part of the estate. *Held*, that the transmission of the leasehold from B. to his trustee in bankruptcy was neither a voluntary assignment of the lease nor a transfer under execution or other legal process, and did not, therefore authorize a forfeiture under the terms of the lease.

Appeal from the District Court of the United States for the Southern District of Ohio.

Oscar W. Kuhn, for appellants.

Pogue & Pogue (Province M. Pogue, of counsel), for appellee.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This appeal involves a controversy which arose in the course of the involuntary proceeding in bankruptcy against one Harry D. Brown, pending in the lower court. It is a controversy between the appellee, his trustee in said proceeding, and the appellants, who are lessors in a certain lease under which, at the time of the institution of said proceeding, said bankrupt held a certain leasehold estate. The lease covered certain premises on the east side of Vine street, between Fifth and Sixth streets, Cincinnati, Ohio, known as the "Majestic Café." It was executed July 16, 1902, and was for a period of 10 years from July 7, 1902, with the privilege of renewal for an additional 10 years, and was upon an annual rental of \$7,000,

payable monthly, to secure payment of which a lien was retained in the lease on the leasehold estate thereby granted. The original lessee was one Joseph D. Kueny, and the bankrupt acquired the leasehold estate by purchase at a judicial sale in a suit brought by appellants, lessors in said lease, against said Kueny in the superior court of Cincinnati to enforce said lien. Suit was brought April 9, 1904, and the sale was had and confirmed in June and July, 1905. Pending the suit the premises were in charge of a receiver. The petition in said suit sought a sale of the leasehold estate, "subject to the terms, covenants, and conditions contained" in said lease; but the order of sale and confirmation contained no such provision. Said Brown, immediately upon his purchase, entered into possession, made extensive improvements on the property, and paid the rent regularly until January 1, 1906. On January 17, 1906, said bankruptcy proceeding was instituted against him, and on same date the appellee, Fletcher R. Williams, was appointed receiver therein. An adjudication was had on February 19, 1906, and on February 27, 1906, appellee was elected trustee. Upon his appointment as receiver, appellee took possession of the premises, and he has been in possession ever since, as receiver, until February 27, 1906, and as trustee since then. On February 1, 1906, appellee, as receiver, paid the rent for the month of January, and on March 6, 1906, as trustee, he paid it for the month of February. Both payments were made to the appellant W. H. Gazlay, who was acting as agent for all the lessors. Said leasehold estate was appraised as part of the assets of said bankrupt at the sum of \$10,000. The controversy which arose in said proceeding concerned the leasehold estate in said premises under said lease held by appellee, and in particular the character of his title thereto. The lease contained a provision in these words:

"Provided, however, that if said rent or any part thereof shall remain unpaid for ——— days after it shall become due and without demand therefor; or if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns, is first had; or if said lessee or assigns shall fail to keep any of the other covenants of the lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate, and thereupon this lease and everything contained on the said lessors' behalf to be done and performed shall cease, determine and be void."

It was not contended by appellants that said provision affected the passage of the leasehold estate from Kueny, the original lessee, to said Brown by virtue of the proceedings in the superior court of Cincinnati, or its passage from said Brown to appellee upon his appointment as trustee, as of the date of the adjudication. But it was contended by them that a sale by appellee of said leasehold estate for the benefit of the creditors of said Brown would, because of said provision, operate as a forfeiture thereof, and that thereupon they would be entitled to enter and repossess themselves of the premises, and they seem to have notified appellee from the time of his appointment as receiver that they would not consent to such sale. In view of this contention on the part of appellants, the appellee, on March 1, 1906, filed a writ-

ten application in the lower court in said bankruptcy proceeding to have appellants brought before the court, the character of his title to said leasehold estate determined, and it quieted from the adverse claims of the appellants. Subpoena issued upon the application and was served upon all of the appellants. They appeared and moved the court to dismiss the application for want of jurisdiction in it to so proceed against them and dispose of their claim. This motion and the merits of the controversy were referred to the referee, who upheld the jurisdiction of the court and decided against appellants' claim. The matter was then brought before the lower court by a petition for review, which confirmed the order of the referee and dismissed the petition. This appeal is from that action of the lower court.

No point is made here as to that court not having jurisdiction to so proceed against appellants and dispose of the controversy between them and appellee. It is well settled that it had such jurisdiction. *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. Nor is any point made as to the appellees' right to have the validity of the appellants' claim heard and determined in advance of a sale by him of the leasehold estate. His application to that end was in the nature of a bill to remove a cloud on his title. *Blair v. City of Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801. The arguments here relate solely to the merits of the controversy.

The appellee maintains, on several grounds, that a sale by him of the leasehold estate for the benefit of creditors will not work a forfeiture thereof. He contends that this case comes within the rule laid down in *Dumpor's Case*, 4 Coke, 119b (1 *Smith's Lead. Cases*, 15). That rule is that where a lease is upon a proviso that the lessee shall not alien without the special license of the lessors, if the license is once given, the condition is annulled, removed, or destroyed; that is, has spent its force, so that it can have no effect on a subsequent alienation. Here the interest of Kueny, the original lessee, was sold to said Brown by the procurement of appellants. This, it is urged, exhausts the condition and brings the case within the rule stated. On the other hand, it is contended by appellants that their case is prevented from coming within the rule by the fact that in their petition in the state court they sought a sale of the unexpired term of the leasehold estate, "subject, however, to the terms, covenants, and conditions contained" in the lease. It is to be noted in this connection that the sale that was had was one that was contemplated by the lease, in that a lien was retained therein on the leasehold estate created thereby to secure payment of the rent.

Appellee contends, further, that the acceptance of the rent for January and February from the appellee as receiver and trustee was a waiver of the right to claim a forfeiture in case of a sale by the appellee. In answer to this contention, it is urged by the appellants that appellee, as trustee, took title to the leasehold estate, the passage of the title thereto from the bankrupt to him not being affected by the condition in the lease, and therefore he had the right to pay the rent and appellants were bound to accept it. The other ground relied upon by appellee is that a sale by him as trustee for the benefit of creditors is not

forbidden by the condition, and will, therefore, not be a breach thereof, even though the case does not come within the rule in *Dumpro's Case*. In other words, treating the case as if Brown were the original lessee and not the assignee of Kueny through judicial proceedings, such a sale is not so forbidden, and hence will not be such a breach. It was on this last ground that the lower court placed its decision in favor of the appellee. Inasmuch as we think the lower court was correct in this position, it is not necessary for us to dispose of the other two grounds relied on.

Covenants against assignment and underletting contained in leases having the force of conditions are not favored by the courts. Jones on Landlord and Tenant, § 464, thus states the attitude of the courts towards such covenants:

"Covenants against assignment or underletting are not favorably regarded by the courts, and are liberally construed in favor of the lessees, so as to prevent the restriction from extending any further than is necessary."

Judge Earl in the case of *Riggs v. Pursell*, 66 N. Y. 193, puts it more strongly. He says:

"Such covenants are restraints which courts do not favor. They are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them."

This attitude of disfavor, however, does not permit resort to sophistical reasoning to read out of such a covenant that which it really contains. It simply requires that what is claimed to be within it shall be clearly and manifestly so, and that, if there is a felt doubt as to its being within it, it be excluded therefrom. The cases go very far towards holding that the mere letter of the covenant is controlling. Illustrations of this attitude and how far it has led courts to go are abundant in the reported cases. As, for instance, it has been held that an underletting is not a breach of a covenant against assignment (*Jackson v. Silvernail*, 15 Johns. [N. Y.] 277); that an assignment is not a breach of a covenant against underletting (*Field v. Mills*, 33 N. J. Law, 254), though there are other cases holding to the contrary of this; that a sublease of a part of the premises is not a breach of a covenant against underletting the premises (*Roosevelt v. Hopkins*, 33 N. Y. 81); that placing one in charge of the leased premises as servant or caretaker to look after it during the landlord's absence is not a breach of a covenant against assignment or subletting (*Presby v. Benjamin*, 169 N. Y. 377, 62 N. E. 430); that a mortgage of a leasehold interest and judicial sale under the mortgage is not a breach of a covenant against assignment, it being the law of New York, where it was so decided, that a mortgage is not a transfer of the legal title or the possession, but a mere security (*Riggs v. Pursell*, *supra*); that a delivery of a lease or security for money loaned operating as an equitable mortgage of the term secured by the lease is not a breach of a covenant not to let, set, assign, transfer, set over, or otherwise part with the premises devised in the lease (*Doe v. Hogg*, 4 Dowl. & Ry. 266); that a sale under execution against the tenant is not a breach

of a covenant against assignment or underletting (*Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174); that an assignment by an assignee appointed in voluntary proceedings in insolvency is not a breach of a covenant not to lease, underlet, or permit any other person to occupy (*Bemis v. Wilder*, 100 Mass. 446); and that an assignment by one of two joint lessees is not a breach of a covenant against assignment by the lessee (*Randol v. Scott*, 110 Cal. 590, 42 Pac. 976). *Dumpor's Case* and those cases applying the rule laid down in it are likewise illustrations of this attitude and the extent to which it has taken the courts. Concerning that case, *Jones on Landlord and Tenant*, § 471, says:

"In the United States the rule in *Dumpor's Case*, while subject to some adverse criticism, has generally been received as settled law, though in many of the cases where the topic arose no actual decision upon the precise point was necessary."

This brings us to the case in hand. It is not necessary to consider the condition in question further than it relates to the assignment of the leasehold estate. It prohibits both voluntary and involuntary assignments. In so far as it prohibits voluntary assignments, the language is, "if said lessee shall assign this lease," and in so far as it prohibits involuntary assignments the language is, "or if said lessee's interest therein shall be sold under execution or other legal process." It is certain that passage of the leasehold estate from the bankrupt, *Brown*, to the appellee as of the date of adjudication, was not a breach of either branch of the condition. It was a passage by operation of law and not by the act of the bankrupt; and the passage was not through the medium of a sale. Indeed, it is not argued by appellants that such passage was a breach of the condition. On the contrary, it is conceded that it was not, and it is argued therefrom that the acceptance of the rent from the receiver and trustee was not an anticipatory waiver of a breach thereof by a sale by appellee for the benefit of creditors. This, then, being true—i. e., that the passage of the leasehold estate from the bankrupt to appellee was not prohibited by the condition—it would seem that a sale by the appellee for the benefit of the creditors is not prohibited thereby. It is hardly reasonable that the parties to the lease could have intended that such a passage was allowable, and yet that a sale by appellee was not, at least without specially providing that it was not. The sole purpose of the acquisition by the trustee in bankruptcy of the assets of the bankrupt is to reduce them to money and distribute the proceeds amongst the creditors; and he has no right to hold them for any other purpose, except temporarily. And a consideration of the language of the condition shows that a sale by appellee of the leasehold estate is not within its terms. It is not within the voluntary branch thereof, because, if it may be said to be a voluntary assignment, it is not an assignment by "said lessee." It is not within the involuntary branch thereof, for though it may be said to be an involuntary assignment and, possibly also (though hardly so) a sale under legal process, it is not a sale of "said lessee's interest." It is a sale of the appellee's interest held by it for the

benefit of creditors and which passed to it notwithstanding the condition, by virtue of the bankruptcy proceeding.

The case nearest to the one in hand which we have found is that of *Doe v. Bevan*, 3 M. & S. 353. The covenant there was one that the lessee, his executors, administrators, or assigns, would not assign the indenture, or his or their interest therein, or assign the premises to any person whatsoever. The covenant was simply against voluntary assignment; but it took in, not only the lessee, but also his assigns. The lessee deposited this lease as security for money borrowed and became bankrupt, and the lease was sold by direction of the chancellor to pay that debt. It was held that the assignees under the commission in bankruptcy might assign the lease to vendee without forfeiture. Lord Ellenborough said:

"The courts have construed it to mean voluntary assigns as contradistinguished from assigns by operation of law, and, further than that, that the immediate vendee from the assigns in law is not within the proviso, the reason of which is that the assignee in law cannot be incumbered with the engagements belonging to the property he takes, such as, in this case, the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property and convert it into a fund for the benefit of creditors."

Le Blanc, J., said:

"There can be no doubt that the lessee might have relieved himself from all inconvenience by expressly providing in the lease that if the lessee should become bankrupt, or shall deposit the lease with any one, then the lease should be void."

And again:

"It is clear that there has been no assignment by the lessee himself. It is also clear that the lessee's becoming bankrupt is not a breach, but the assignees under the commission have assigned. They were bound to assign, because they took only as trustees for the purpose of disposing of the property to the best advantage for the benefit of creditors; and they are compelled under the order of the court of chancery to sell it in discharge of the debt of *Whitbread & Co.*"

Bayley, J., said:

"It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and, if it is not, what act has the lessee done to avoid it? All that has followed upon the bankruptcy is not by his act, but by operation of the law transferring his property to his assignees. Then shall the assignees have capacity to take it, and yet not to dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors, for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

Instances of where the covenants involved expressly covered the bankruptcy of the lessee as well as sales of his estate under execution or other legal process may be found in the following cases, to wit: *Davis v. Eyton*, 7 Bing. 154; *Doe v. David*, 5 Tyrw. 126; *In re Ellis* (D. C.) 98 Fed. 967.

The action of the lower court is therefore affirmed.

In re McMAHON.

(Circuit Court of Appeals, Sixth Circuit. October 12, 1906.)

No. 1,530.

1. BANKRUPTCY—JURISDICTION TO DETERMINE LIENS—PROPERTY IN POSSESSION OF TRUSTEE.

A court of bankruptcy which, by its trustee, has possession of real estate of a bankrupt, has jurisdiction to determine all questions in respect to title or to liens thereon, and may entertain and determine a suit or petition by the trustee against a mortgagee of the property to set aside the mortgage as one given within four months prior to the bankruptcy and void under Bankr. Act July 1, 1898, § 67e, 30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449].

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. SAME—MODE OF REVIEW—PROCEEDINGS IN BANKRUPTCY.

Proceedings by a court of bankruptcy upon a petition filed by a trustee for an order to sell real estate, and also to bring in third persons asserting liens thereon for the purpose of determining their rights as incidental to such sale, are "proceedings in bankruptcy" as distinguished from "controversies arising in bankruptcy proceedings," and are reviewable by the Circuit Court of Appeals on petition for revision under Bankr. Act July 1, 1898, § 24b, 30 Stat. 552, c. 541 [U. S. Comp. St. 1901, p. 3431].

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Southern District of Ohio.

F. L. Rosemond, for appellant.

R. T. Scott, for respondent.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

LURTON, Circuit Judge. The matter arose thus: Benjamin F. Enos, trustee in bankruptcy of the estate of Charles L. Campbell, filed a petition in the bankrupt court, in which he stated: That he was in possession of a certain tract of land as trustee for the bankrupt. That within four months prior to the bankruptcy of the said Campbell he, the bankrupt, had made a trust deed conveying the said land to Charles S. McMahon as trustee for certain purposes therein named. Upon the ground that the trust conveyance was made within four months prior to the filing of the petition in bankruptcy the trustee denied the validity of the lien otherwise created thereunder, and sought an order to sell the property free from any lien or charge in behalf of those secured thereby. This petition also averred that many of the creditors therein secured had other security for their debts; Campbell being only a surety. The prayer of the bill or petition was that the trust deed be set aside, or, if held good, that "the trustee be required to first exhaust the property of the principal debtors before going upon that of the bankrupt surety." That Charles S. McMahon, "as trustee, be given due notice of the pendency and prayer of this petition and be required to set up any claim which he may have in said premises, within a short day fixed by the court," and that

the petitioner be ordered and directed to sell the premises free from any lien or incumbrance, "and for such other or further relief as is proper." A subpoena was issued by order of the court and said McMahon was commanded to appear on or before August 1, 1905, to answer said petition. This was duly served July 22, 1905. McMahon appeared specially to object to the jurisdiction of the court, and this he did by motion to quash the subpoena, and then by demurrer, by answer, and by every other known and unknown method of protesting against jurisdiction. The court ruled that, having possession of the property, it had jurisdiction to determine the validity of all claims to it or liens against it, and that if such adverse claimants did not choose to come in voluntarily and set up their claims they might be brought in by a proceeding such as that started by the bankrupt's trustee. At this stage of the proceedings, and before any decree upon the merits, McMahon filed his petition under the supervisory powers of this court and prayed for a review of the orders and decrees of the bankrupt court sustaining its jurisdiction.

The controlling fact in the matter of the jurisdiction of the bankrupt court is that the actual possession of the premises upon which McMahon asserts an adverse lien was in Enos, the trustee in bankruptcy of Campbell, the bankrupt mortgagor. Section 2 of the Bankrupt Act of July 1, 1898, 30 Stat. 545, c. 541 [U. S. Comp. St. 1901, p. 3420], in express terms, by clause 7, confers jurisdiction upon the District Courts, as courts of bankruptcy, "to cause the estate of the bankrupt to be collected, reduced to money and distributed, and determine the controversies in relation thereto, except as herein otherwise provided." This exception refers to section 23 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), conferring jurisdiction on the Circuit and District Courts of suits brought by bankrupt trustees in respect to "controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants concerning the property acquired or claimed by the trustees" and limiting the jurisdiction to such suits as might have been brought or prosecuted by the bankrupt if bankruptcy had not ensued, "unless by the consent of the proposed defendant." By the amendment of February 5, 1903, this jurisdiction is extended to suits for the recovery of property under section 60, subd. b, and section 67, subd. e (30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449] as amended Feb. 5, 1903, c. 487, §§ 13, 16, 32 Stat. 799, 800 [U. S. Comp. St. Supp. 1905, pp. 688, 690]).

But we are now dealing with the jurisdiction of the District Court which had possession through its trustee of the property of the bankrupt against which the protesting petitioner asserts a mortgage lien. If the District Court having possession of the res did not have jurisdiction to hear and determine claims to or against the res, unless the claimant should consent, what court did? Could the petitioner go into the state court and there assert his lien and then obtain a decree for its enforcement and thus deprive the court of primary jurisdiction of the control and custody of the controverted property? The possession of the res draws to the court jurisdiction of all questions in respect to title or liens, irrespective of citizenship. *Krippendorf v. Hyde*, 110 U. S.

276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Toledo & Rd. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155.

Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, is not an authority against the jurisdiction exercised in the case at bar. In that case the bankrupt court did not have possession of the goods in question. They were in the custody and control of an adverse claimant. What is said in *Bardes v. Hawarden Bank* about the absence of intention of Congress to give under section 2, cls. 6 and 7, jurisdiction to the District Court to entertain independent actions and suits to determine the title to property or liens thereon, refers to property not held by the bankrupt or some one for him at the date of adjudication. And so it was announced by Justice Day, in speaking for the court in *Whitney v. Wenman*, 198 U. S. 539-555, 25 Sup. Ct. 778, 49 L. Ed. 1157, where it is said:

"This case, *Bardes v. Bank*, did not determine the right of the District Court to entertain jurisdiction of a proceeding having in view the adjudication of rights or liens upon property which came into the possession of the bankrupt court as that of the bankrupt, the right to proceed concerning which would seem to be broadly conferred in the section of the bankrupt act above quoted."

This reference is to section 2, subd. 7.

The question was squarely presented in *Whitney v. Wenman*, cited above. The trustee in bankruptcy had filed what is styled in the statement of the case "a bill in equity" in the District Court, against third persons claiming liens upon certain packages of silks and other dry-goods. The trustee's petition averred that the bankrupt had never lost possession, and that his title and possession had passed to the trustee in bankruptcy. It was then averred that there had been some effort to warehouse the goods and that a transfer of the warehouse receipts as a security for money borrowed had been made to certain of the defendants. But it was averred that the whole transaction was colorable; that in fact the bankrupt had remained in possession and was in possession when the adjudication had occurred; that a receiver, appointed to hold the bankrupt estate until a trustee could be selected, had, without authority of law or of the court, wrongfully surrendered possession of the goods in controversy; and that they had been sold by the warehouse company before the appointment of the petitioner as trustee. The defendants to the "bill" were the warehouse company and the persons who held the warehouse receipts by assignment of the bankrupt. The defendants demurred to the jurisdiction. The demurrer was sustained and the bill dismissed for want of jurisdiction. The appeal was direct to the Supreme Court as a case turning upon the jurisdiction of the District Court. The decree was reversed.

After reviewing *Bardes v. Bank*, cited above, *White v. Schloerb*, 148 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, and *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, Justice Day, for the court, said:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankrupt court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and

to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property had become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine the controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the federal courts. In *re Whitener*, 105 Fed. 180, 44 C. C. A. 434; In *re Antiago Screen Door Co.*, 123 Fed. 249, 59 C. C. A. 248; In *re Kellogg*, 121 Fed. 333, 57 C. C. A. 547. In the case of the *First National Bank v. Chicago Title & Trust Company* (decided May 8th of this term) 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, in holding that the jurisdiction of the District Court did not obtain, it was pointed out that the court had found that it was not in possession of the property. Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceedings, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure."

Referring to *First National Bank v. The Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, the learned justice observed that in that case "it was pointed out that the District Court had found that it was not in possession of the property."

The proceeding to which the petitioner McMahon was made a party was not a summary one in the strict sense of that term. It did not differ in any essential from that sustained in *Whitney v. Wenman*. Nominally an application for an order to sell property of the bankrupt in possession of the assignee, it was in its essence a petition to bring in persons asserting liens for the purpose of determining the rights of such persons, and to sell the property free from all liens. The defendants were made such by subpoena and required to appear and answer or defend. It was in substance a plenary suit. In *Whitney v. Wenman* the court said of the jurisdiction to determine claims to or upon the property of the bankrupt in possession of the trustee under section 2, cl. 7, that it did not perceive "that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure."

We entertain no doubt of the jurisdiction of the District Court. Whether the necessary parties for the marshaling sought were all before the court we need not determine now. The creditors affected can be brought in by amendment if found necessary. In respect to the judgment of the District Court overruling the objections made to the court's jurisdiction, we have reached the conclusion that the action of that court was subject to review under the supervisory powers conferred upon this court by section 24b of the bankrupt act of 1898. The decision of the Supreme Court in *First National Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, seems to be an express authority to this effect.

In the case cited the question as to whether the judgment and decree of the District Court was reviewable under the supervisory powers of section 24b or by appeal under section 24a arose upon a petition filed by the bankrupt's receiver in the bankrupt court asking the direction of the court in respect to the sale of certain seeds which he claimed to have in his possession as the property of the bankrupt. No de-

fendants were made to the petition. But certain strangers appeared specially for the purpose of denying the jurisdiction of the bankrupt court over the seed in question, and averred that when the proceedings in bankruptcy were begun the seed were in the custody and possession of one of the protestants as a warehouse company and that warehouse receipts had been issued transferable by delivery, and that the receipts had been assigned by the bankrupt before bankruptcy to the other persons who had appeared to deny the jurisdiction. Upon the issue there made up as to the possession, the bankrupt court held that the receiver had never had possession, but, nevertheless, retained jurisdiction to sell the property to pay the holders of such warehouse certificates and realize the surplus for the bankrupt estate. As we have before stated, this case was taken by appeal to the Circuit Court of Appeals and there reversed upon the facts. The decree of the Circuit Court of Appeals was then taken to the Supreme Court by certiorari. That court passed upon the jurisdiction of the District Court preliminary to the consideration of the jurisdiction of the Circuit Court of Appeals. If no appeal would lie from the decree of the District Court because the matter was only subject to review under the supervisory powers of the Circuit Court of Appeals, that court had exceeded its jurisdiction in going into the facts, and the proper decree would be one reversing the decree of the Court of Appeals with direction to that court to dismiss the appeal. See 198 U. S. 288-292, 25 Sup. Ct. 693, 49 L. Ed. 1054. Upon the inquiry the court decided that "the proceeding in the District Court was a proceeding in bankruptcy and not an independent suit" and that "no appeal lay to the Circuit Court of Appeals," and that the jurisdiction of that court in such cases was confined to revision in matters of law under clause b, sec. 24. The decree of the Supreme Court was therefore that the decree of the Court of Appeals should "be reversed, with directions to dismiss the appeal and remand the cause to the District Court for further proceedings in conformity with this opinion."

In *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, the Berlin Machine Works had claimed title to property in the possession of the bankrupt's trustee by an independent intervening petition. From a decree in favor of the intervener the trustee appealed under section 6 of the bankrupt act to the Circuit Court of Appeals. That court assumed jurisdiction and affirmed the decree of the bankrupt court. This last decree was then taken by appeal to the Supreme Court. Upon the question of whether the decree was appealable or subject only to review by the Circuit Court of Appeals under its supervisory powers conferred by section 24b, the Chief Justice, speaking for the Supreme Court, said:

"If the trustee had carried the case to the Circuit Court of Appeals on petition for supervision and revision under section 24b of the bankruptcy law, the case would have fallen within *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And, as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those controversies arising in bankruptcy proceeding over which the Circuit Court of Appeals could, under section 24a, exercise appellate

jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings in respect of which special provision therefor was required (*Holden v. Stratton*, *supra*), while section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by section 2, to settle the estate of bankrupts and to determine controversies in relation thereto. *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; *Burleigh v. Foreman*, 125 Fed. 217, 60 C. C. A. 109."

We have repeatedly followed this case. See *In re First National Bank of Canton*, 135 Fed. 62, 67 C. C. A. 536; *Dolle v. Cassell*, 135 Fed. 52-55, 67 C. C. A. 526.

In the earlier administration of the bankrupt law little attention was given to the distinction between the cases appealable under section 24a and those reviewable in matters of law under section 24b, but in *Dolle v. Cassell*, *In re First National Bank of Canton*, both cited above, and in the later cases of *In re Mueller*, 135 Fed. 711, 68 C. C. A. 349, *Dickas v. Baines* (C. C. A.) 140 Fed. 849, and *Davidson v. Friedman* (C. C. A.) 140 Fed. 853, the distinction between the two remedies is clearly pointed out and each held to be exclusive of the other. To these cases we adhere as in agreement with the act as interpreted by the Supreme Court in *Elliott v. Toepfner*, 187 U. S. 327-333, 334, 23 Sup. Ct. 133, 47 L. Ed. 200, *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116, *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and *First National Bank v. Chicago Title & Trust Company*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

The distinction between cases which are "proceedings in bankruptcy" under section 24b and those which are "controversies arising in bankruptcy proceedings" and appealable under the general appellate jurisdiction of the court as confirmed by section 24a is not always clear nor easily stated. Between *Hewit v. Berlin Machine Works* and *First National Bank of Chicago v. Chicago Title & Trust Co.* there is this distinction: In the first case the stranger voluntarily came in and set up a claim against property in possession of the bankrupt's trustee. Very clearly that made one of those independent controversies which may arise in a bankruptcy proceeding or in any other where the res is in custodia legis and was appealable under section 24a. In the later case the same kind of issue arose, but it arose upon the application of the trustee for an order of sale and as incident to that the determination of a claim against the property held by one not a party to the proceeding. The latter is plainly held to be a "proceeding in bankruptcy" not appealable, but reviewable in matters of law only upon an appeal to the supervisory powers of the Court of Appeals under section 24b. The distinction we recognize and apply in this case by holding that the proper and only mode of correcting error in the case was through the supervisory powers of this court, and that the petitioner resorted to the right remedy though he had no wrong to redress.

The decree appealed from is affirmed. The court below will proceed with the cause in accordance with this opinion and as it may be advised.

Costs of this petition will be paid by the petitioner.

SPRINGFIELD COAL MINING CO. v. GORDON.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1900.)

No. 1,235.

MINES AND MINERALS—PROTECTION OF COAL MINE SHAFTS—ILLINOIS STATUTE.

The provision of Act III, April 18, 1899 (Laws 1899, p. 303), relating to coal mines, which requires that "the upper and lower landings at the top of the shaft shall be securely fenced * * * so as to prevent either men or materials from falling into the shaft," and gives a right of action for any injury occasioned by a willful failure to comply with its provisions, to which the defense of contributory negligence or assumption of risk cannot be pleaded, is intended to guard against the accidental falling of men or materials into a shaft, and has no application to a case where a man voluntarily thrust his head and shoulders through a fence into a shaft, and was struck and killed by a cage.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

C. C. Conkling, for plaintiff in error.

James E. McDowling, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the Circuit Court was to recover damages for the death of defendant in error's husband, resulting from falling into a coal mine belonging to the plaintiff in error; the verdict of the jury being for four thousand dollars, upon which judgment was entered.

The coal mine in question was operated by means of a shaft having three parallel compartments, which extended vertically down into the earth to the depth of about two hundred and fifty feet. One of these compartments was used to carry the air current into the mine. The other two, the carrying compartments, were each about ten feet in length, and seven feet in width, and were separated from any other by heavy timbers; the two cages used for hoisting purposes being raised and lowered through these compartments by means of a cable and engine—one of the cages rising through one compartment of the shaft, while the other was lowering through the other compartment, and vice versa.

Over these two compartments, at the mouth of the mine, was erected a structure of heavy timbers, which formed a part of the top works of the mine, and which was of the same relative dimensions as the openings of the shaft; its use being to raise the hoisting cages to a landing above the ground, or lower landing. As a foundation for these top works, there were heavy timbers called mud sills placed around the two compartments of the shaft, about level with the surface of the ground, and with their inside faces even with the timbering around the inside of the shaft.

The accident occurred on the west side of the west compartment, where the structure was as follows: At the corners of the mud sill on the west side, were corner pieces of twelve by twelve inch timbers, which ran up vertically above the ground, forming a part of the

top works. Running horizontally between these posts were timbers six by eight inches, called buntings, securely mortised and built into the posts, parallel with each other, and about eighteen inches apart. Running vertically from the bottom of the shaft to the shive wheel at the top of the top works, just inside these buntings, and fastened to them midway between the two corner posts, were guide rails constructed of timbers four by six inches, to which the cages were fitted, and up and down which the cages ran as they were being raised and lowered. There were also cross pieces sixteen feet in length of three by twelve inch timbers, running diagonally from each of the corner posts at the mud sill, to the other corner post. This construction was substantial and solid, of entire new timbers, and conforming to the construction usual to mines in that vicinity.

On the day of the accident the superintendent had instructed the men employed at the top of the mine to send some timbers down into the mine at the first opportunity. About two o'clock in the afternoon, all the coal which was available at the bottom of the mine having been hoisted, the top men, including Daniel Gordon, the deceased, were called down to the ground landing, to load timbers on the cages, and send them into the mine. The east cage was loaded with heavy timbers and sent down. The men at the bottom of the shaft, not having finished their part of the work when the men on the top had the other timbers ready to be sent down, Gordon, without any instruction from any one, went to the west side of the west compartment, constructed as described, to "joke" with the men below. Putting his head and shoulders between the buntings, just south of the guide rail, he began "jollyng" the men who were taking the timbers out of the cage at the bottom, telling them to hurry up and the like; and it was while he was in this attitude, with his head thrust through the buntings, that the west cage in lowering caught him, crushing him between the cage and the buntings, and killing him instantly. There was no evidence that the engineer having control of the cages had any knowledge that Gordon's head was thrust through the buntings, or that Gordon in any way was in danger of the lowering cage.

The act of the General Assembly of the state of Illinois of April 18th, 1899 (Laws 1899, p. 303, § 2), provides "that the upper and lower landings at the top of the shaft shall be securely fenced with automatic or other gates, so as to prevent either men or materials from falling into the shaft"; and also (section 33, p. 324), "that for any injury to person or property occasioned by any willful violation of the act, or willful failure to comply with its provisions, a right of action shall accrue to the party injured, or to the widow or children"; and the Supreme Court of Illinois has held that in actions founded upon these statutes, the defense of contributory negligence and assumption of risk will not lie. *Fulton v. Wilmington Star Mining Co.*, 133 Fed. 193, 66 C. C. A. 247, 68 L. R. A. 168. *Willis Coal & Mining Co. v. Grizzell*, 198 Ill. 313, 65 N. E. 74. It is upon these statutes, and this construction of them, that the defendant in error bases her right of recovery claiming such right of recovery even though

the accident was due to the fact of the deceased having needlessly put his head through an aperture in a fence that was entirely sufficient to prevent either men or materials from falling into the shaft.

Plainly the purpose of the statute was to prevent men or materials from falling into the shaft. The provision was intended to protect the men in the mine, as also the men working around the edge of the mine. And any fence sufficient to prevent either men or materials from falling into the shaft is a fence in compliance with the requirements of the statute.

The fence in question had apertures that would perhaps have permitted material of certain dimensions to fall into the shaft; and had such material fallen through those apertures, injuring some one in the mine, the case would be different from the one before us. Had Gordon himself fallen through one of these apertures the case might have been different. But in the case before us, no one in the mine was injured; no material went through the apertures; and no man fell into the mine. No case therefore is made out of a landing so insecurely fenced as to prevent either men or materials from falling into the shaft. On the contrary, the sole case made out is that of a fence, that though securely preventing men or materials from falling into the mine, was not so tightly constructed that a man might not thrust his head into the shaft.

The statute of Illinois for the protection of miners is justly strict and comprehensive. In the interest of humanity, it goes much beyond the requirements of the common law. But the limit that this statute has had set upon itself is the limit also to which the courts in its enforcement can go. The purpose of the section in question was to provide a barrier that would prevent men and materials from falling into the mine. That purpose was fully met by the fence provided by plaintiff in error. There is no command in the statute that the fence shall be made so tight that a man, consciously seeking to thrust his head into the shaft, may not be able to do so; and having done so that he may have a right of action for the consequences of his deed. And in the absence of such a purpose in the statute, the courts may not, by interpretation, supply it. In short, the case is not one that comes within any of the commands or prohibitions of the statute, nor within any of the liabilities created by the common law, and presents therefore an injury for which the law offers no remedy. The Circuit Court erred in overruling the plaintiff in error's motion, made at the close of all the evidence, to exclude the evidence; and also erred in refusing on the whole record to give to the jury an instruction to find the plaintiff in error not guilty; for which error the judgment of the Circuit Court is reversed, and the cause remanded with instructions to grant a new trial.

LEIGH v. KEWANEE MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. February 6, 1906.)

No. 1,215.

APPEAL AND ERROR—GROUNDS FOR DISMISSAL—WAIVER OR RELEASE OF ERRORS.

After an action at law had proceeded to a verdict for plaintiff, a motion for new trial had been overruled, and nothing remained but to enter judgment, the defendant filed a bill in equity in the same court and obtained an injunction staying further proceedings, on condition, however, exacted by the court and accepted by him, that he give a bond for the payment with interest of the amount of the verdict, should the injunction finally be dissolved and judgment be entered thereon. *Held*, that the giving of such bond was a waiver and release by defendant of any errors in the law action up to the granting of the injunction, and that on its dissolution he could not prosecute a writ of error from the judgment entered on the verdict for alleged errors occurring at the trial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1005.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

On plea of release of errors and demurrer thereto.

The matter under consideration is a plea of release of errors, filed in this court, demurred to by the plaintiff in error.

The case in which the plea is filed, brought here from the Circuit Court (127 Fed. 990) was a suit at law by the defendant in error, against the plaintiff in error, to recover twelve thousand dollars—the declaration being on the common counts. On this suit the trial had proceeded to the rendition of a verdict in favor of the defendant in error, for seven thousand dollars, and the overruling of a motion for a new trial, when the plaintiff in error filed in the Circuit Court his bill in equity, asking that the further prosecution of the suit at law be restrained; and upon this bill, the answers thereto, and a replication, an injunction was issued restraining the further prosecution of the suit at law, but upon this condition, that the plaintiff in error should cause to be filed an injunction bond in the sum of ten thousand dollars, conditioned among other things, that in case of the dissolution of the injunction, the plaintiff in error would pay the amount of the verdict rendered in the suit at law, together with interest thereon at five per cent. and all costs, and such judgment, if any, as should at any time thereafter be entered on such verdict.

The bond, conditioned as above, was duly filed, and a decree having been entered, was appealed from to the Circuit Court of Appeals, where, on consideration, it was reversed. *Kewanee Manufacturing Co. and Henry D. Laughlin, Appellants, v. Edward B. Leigh*, 135 Fed. 58, 67 C. C. A. 532. Whereupon the injunctive decree in the Circuit Court was dissolved, and a judgment entered in the suit at law for seven thousand, seven hundred twenty-nine dollars, and sixteen cents; which judgment is the one sought to be reversed in the proceeding in error in which this plea of release of errors is filed.

Further facts are stated in the opinion.

Jno. P. Ahrens, for plaintiff in error.

Wm. Brace, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and SANBORN, District Judge.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion.

The averments of the bill and answer upon which the injunction was obtained are fully set forth in *Kewanee Manufacturing Com-*

pany v. Edward B. Leigh, *supra*, and need not be repeated here. It is sufficient to say that the bill was predicated largely upon the alleged existence of an equitable set off not provable in the suit at law; and was disposed of in this court, chiefly because the facts set forth constituted no rightful set off, either equitable or legal. True the court held that one of the claims made by the bill could have been interposed as a defense in the suit at law; but this was a minor part of the claims upon which the bill was founded.

The suit at law was enjoined after it had proceeded to verdict and motion for new trial overruled. Nothing remained in that suit but judgment. But for the injunction the judgment presumably would have been entered at once, and satisfied at once, either by payment or execution. The effect of the injunction suit was to delay this satisfaction—to hang the suit at law in the air—and cause defendant in error to follow the equity case into the Circuit Court, and take it finally to the Circuit Court of Appeals. It is our judgment that an injunction, thus hanging up at the last moment the entry of judgment, but upon condition exacted by the court, and accepted by the plaintiff in error, that in case the injunction was dissolved, the verdict and the judgment thereon should be paid in full, is, in effect, a stipulation in court that all errors in the suit at law, up to the granting of the injunction, are waived and released. Otherwise the condition exacted for the injunction, and accepted and acted upon, would be wholly ineffective—resulting in the plaintiff in error having obtained all he asked, and being permitted to cast off with impunity all that was required of him.

The demurrer to the plea of release of errors, is overruled, the plea is sustained; and, there being no assignment of error outside of those released, the judgment of the Circuit Court is affirmed.

VEHON v. ULLMAN.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906. Rehearing Denied, October 2, 1906.)

No. 1,248.

1. BANKRUPTCY—APPEAL—MATTERS PRESENTED FOR DECISION.

Where a referee passed upon only one of a number of objections filed to the discharge of a bankrupt which he sustained, and his report was confirmed by the District Court, an appeal from the order denying a discharge brings such objection only before the appellate court for consideration.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—DISCHARGE—CONCEALMENT OF ASSETS.

A bankrupt was president of a corporation engaged in a mail order business, and, as such president prepared a list of names and addresses for use in the business, and at the same time made a duplicate thereof which he kept at his house, as claimed, to guard against its loss by fire. Both he and the corporation became bankrupt and the original list was scheduled and sold as an asset of the corporation. *Held*, that the duplicate list was also the property of the corporation, and that the bankrupt's failure to schedule it as an asset of his own did not constitute a concealment of assets which debarred him from the right to a discharge.

3. SAME.

While intent is a material inquiry on an issue as to the concealment of assets by a bankrupt, a fraudulent intent alone does not justify a refusal of a discharge unless assets belonging to his estate were actually concealed or withheld.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Thos. Cratty, for appellant.

Lessing Rosenthal, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. January 23rd, 1902, the appellant was adjudged a bankrupt, and on the 19th of June, of the same year, petitioned the District Court for his discharge. Objections having been filed by one Percy G. Ullman, one of the creditors, the petition with the objections were referred to the referee; and upon the referee's report that the bankrupt was not entitled to his discharge, and the exceptions to that report filed by the bankrupt, an order was entered refusing his discharge. From this order the appeal is prosecuted.

Some question is made as to what is the basis of the inquiry here, the appellee claiming that his thirteen specifications of objections to the bankrupt's discharge are before the court—the appellant insisting that the first, and the first only, of these specifications is the basis of the inquiry.

The order appealed from shows that the case in the District Court came on to be heard on the report of the referee, and the bankrupt's exception thereto, and that thereupon it was ordered that the exceptions be overruled; that the report and the recommendations herein be approved and confirmed; and that the petition for discharge be denied; to all of which the bankrupt entered his motion for an appeal.

Going back to this report of the referee, it is seen that the specification passed upon was that the bankrupt had concealed assets from his trustee, by omitting to schedule a list of names of customers, said to constitute a valuable asset; that the omission was with fraudulent intent; and was done knowingly, and in violation of the provisions of the bankruptcy act. No other specification having been passed upon by the referee, we are of the opinion that the specification set out is the only one that was before the District Court, and therefore the only one brought by appeal here.

The facts upon which this specification is based are not in doubt. Before his adjudication as a bankrupt, appellant was president of a corporation of his own name. The corporation was in what is known as the mail order business—a business requiring a list of names and addresses constantly "freshened up," by dropping useless names, and adding useful ones, to whom the corporation could address mail presenting its business. Appellant as president, prepared these lists, and at the same time made copies—the originals being transcribed into the corporation's books, the copies being taken by the bankrupt to his house—for the purpose, as he testifies, of making them safe against loss by fire. Eventually both appellant and the corporation became bankrupts, the

original lists being scheduled in the corporation's assets, and sold as a portion of such assets—the copies kept by appellant not being so sold in the corporation's assets, nor included in the schedule of his personal assets. And it is upon this alleged omission to include these copies in his list of personal assets, that the specifications of objection were based, and the decree appealed from denying the discharge proceeded.

On the face of this evidence it is plain that the copies kept at his house by the appellant, as well the originals spread upon the books of the corporation, belonged to the corporation. The copies were prepared by appellant, as president of the corporation, presumably at the cost of the corporation. They were copies of a list that was an asset of the corporation. As against the corporation, appellant could not have claimed them. As against the corporation, appellant would, upon a proper suit, have been enjoined from using them. The copies were, in no sense that we can see, an asset of his own, but were the duplicate only of an asset that belonged exclusively to the corporation of which he was president. Indeed, the report of the referee, and the decree based on that report, make no question but what this was the real state of title as between appellant and the corporation.

But because appellant at one time stated that he would like the list of names, that he might get again into the mail order business, and admitted that the list would be of value to some one engaged in the mail order business—that the list had in fact some value—the referee was of the opinion that the appellant's omission to schedule the lists as his own property was done with fraudulent intent. "The whole question" said the referee, "turns on the matter of intent." On this subject the referee and the District Court confirming him, have, in our opinion, misapplied the law. While intent is a pertinent inquiry, intent is not the sole inquiry. The substance of the offense is the withholding of assets; so that the true inquiry is whether, with fraudulent intent, he withheld from his schedule property belonging to his creditors. Apart from the withholding of assets, the intent constitutes no cause for denying a discharge; and the lists omitted, constituting no part of the property coming to the creditors, as already stated, there was no withholding of assets, and no case made out for a refusal of the discharge.

This view of the case results in a reversal of the decree below. We have hesitated whether merely to reverse the decree, opening the question of discharge to a new inquiry, or whether to reverse it with instructions to grant the discharge asked for. On reflection the latter seems to us to be the more equitable. The objecting creditor has had his day in court to prevent the discharge. On that day it was his duty to present to the court, not one reason only, but all the reasons, why the discharge should not be granted. We will therefore treat the objection considered as the whole case against discharge, and those objections having been passed upon on the merits, the order to be entered here ought to complete the transaction. The order of the District Court is therefore reversed, with instructions to sustain the bankrupt's exceptions to the master's report, and to grant the discharge.

MOY SUEY v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,239.

1. ALIENS—PROCEEDINGS FOR DEPORTATION OF CHINESE—CLAIM OF CITIZENSHIP.

A resident of the United States claiming to be a native born citizen, although of the Chinese race, may not be deported or banished until the right of the government to deport or banish has been judicially determined in accordance with the usual and ordinary rules of evidence.

2. SAME—EVIDENCE CONSIDERED.

In proceedings for the deportation of a Chinese person charged with being unlawfully in this country, which were resisted on the ground that defendant was a native born citizen of the United States where his testimony was consistent and explicit, giving his place of birth, residence at different times, place of attending school, and the occupation and places of business of his father and uncle, and was corroborated by the testimony of his uncle and cousin, and wholly uncontradicted, his deportation was not warranted by a finding that he had not established his right to remain in the United States "by affirmative proof to the satisfaction of the commissioner," as required by section 6, Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320].

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Benjamin C. Bachrach, for appellant.

Elwood G. Godman, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. Moy Suey, appellant, was arrested Feb. 7th, 1904, as a Chinese person in the United States in violation of section 6 of the Act of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], amended Nov. 3, 1893; the specific charge being that he was a Chinese laborer unlawfully in the United States, without a certificate of registration. At the final hearing before the Commissioner, Suey resisted an order of deportation, on the ground that he was a citizen of the United States, having been born in New York City twenty-two years previously. The Commissioner, however, found that he had not "satisfactorily established, by affirmative proof, his lawful right to be and remain in the United States," and entered an order for deportation; and on appeal to the District Court, this order was affirmed.

The evidence before the Commissioner, and the District Court on appeal, consisted chiefly of the testimony of appellant himself, and of his uncle and cousin. The appellant testified that he was born in New York City; giving the name of his father and mother; and the name of the Chinese mercantile firm of which his father was a member; also the street, and the street number of the house in which he lived up to the time he left New York. He stated further that he went to an American School at Second Avenue and Fifty-ninth Street, that he went to a Sunday School. His father having returned to China, when he was about ten years old, appellant went to live with his uncle, giving, in his testimony, the street and number of his uncle's residence,

as well as the name of his uncle. He came from New York to Chicago, according to his testimony, with his cousin, giving the name of his cousin, and the place where both he and the cousin had worked in a laundry in the city of New York. And all of this testimony, so far as the uncle and cousin were connected with it, was re-enforced by their testimony. With slight differences—differences of a character that strengthen rather than impeach the credibility of the witnesses—the testimony of all the witnesses is harmonious.

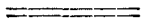
Against this the government has brought nothing, either to impeach the credibility of the witnesses, or disprove the probability of their narrative, excepting this, that when first approached by the inspector, appellant refused to talk, further than to say that he was a native of the United States, but had forgotten the date and place of his birth. There is no testimony, for instance, throwing doubt upon the fact that there was a Chinese mercantile firm of the name stated; or of the fact that appellant attended the schools named, or the Sunday School; or of the fact that the street and number named was the residence of Chinese twenty-two years ago, when appellant was born; or of the fact that the uncle and cousin lived where appellant stated they lived, and were engaged in the business that appellant stated they were engaged in; or of any other fact upon which appellant built up his case of nativity. Indeed, upon the testimony presented, were the inquiry one respecting the descent of property, or something other than deportation dependent upon appellant's nativity, the testimony thus uncontradicted would be accepted by any court as the proven record truth.

But the government claims, that under section three of the deportation act, any Chinese person or person of Chinese descent, shall be adjudged to be unlawfully within the United States, unless such person shall establish, "by affirmative proof, to the satisfaction of the judge or commissioner, his lawful right to remain in the United States"; and that this provision, in some way, nullifies the weight that would otherwise be given to the evidence referred to. Unquestionably Congress has power to exclude from our shores aliens of any birth, including the Chinese; and having that power, has the power also to prescribe the conditions on which such exclusion shall be exercised. That the conditions prescribed may be hard would, in a judicial inquiry, be of no moment, for under such circumstances the question is not one of constitutional right, but of national policy. *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; *The Japanese Immigrant Case*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721. But when a person, physically and politically present in the United States at the time he is arrested for deportation, claims that he is an American born citizen, and resist deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported

is banished, and banishment is a punishment that can follow only a judicial determination in due process of law. Black's Law Dictionary, 4 Blackstone Commentaries, 377.

True it was held in *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, that a person asserting his right to enter the country, on the ground that he is a citizen, is not entitled to a writ of habeas corpus in the absence of an appeal to the Secretary of the Treasury from the order of the inspector denying his entry; and subsequently (*United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040) that even after such appeal to the Secretary of the Treasury, and a denial of his right to enter, a person whose right to enter the United States is questioned under the immigration law may not obtain entry by writ of habeas corpus, even though the right claimed is in virtue of American citizenship—a very vigorous dissenting opinion by Justices Brewer and Peckham having been filed in the latter case. These cases proceed upon the principle that the person applying for the writ is not within the United States, but is seeking to enter or re-enter; and that as against such right of entry or re-entry, the government constitutionally may make the political department the final judges.

But there is a fundamental distinction between the case of a citizen of the country who has left the country and is asking to re-enter it, and a citizen of the country who has never left it, but whom the government is asking to deport; and while it is true, now that the Supreme Court has so decided, that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to return or not, it seems to us uncontrovertable that a citizen of the country, who has not gone out, may not be deported or banished until the right of the government to deport or banish has been judicially determined. And approached from this point of view, the case made out by appellant entitles him to a reversal of the order of the District Court. The order of the District Court, affirming the order for the deportation of appellant, is reversed, and the cause remanded with instructions to discharge the appellant.



MERCANTILE TRUST CO. v. CHICAGO, P. & ST. L. RY. CO. et al.

MERCANTILE TRUST CO. et al. v. WHEELER.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1906.)

No. 1,233.

APPEAL—REVIEW—FINDINGS OF FACT.

Findings of fact made by a master on oral testimony taken before him and approved by the trial court will not be disturbed on appeal, unless it appears that an obvious mistake was made in the consideration of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4015.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Philip B. Warren, for appellants.

Samuel P. Wheeler, in pro. per.

Henry A. Gardner, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. The only question is whether the report of the master, on which the decree appealed from is based, is supported by sufficient evidence. On every material element of appellee's case evidence was produced. The master was in the best position to judge of the weight and credibility of the testimony given orally before him, and his finding, approved by the Circuit Court, should not be disturbed by us, unless it appears that an obvious mistake was made in the consideration of the evidence. *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552. So far from this being true, we are satisfied that the finding was amply justified by the record.

The decree is affirmed.

GATES IRON WORKS v. OVERLAND GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. September 3, 1906.)

No. 2,017.

1. PATENTS—INVENTION—STONE CRUSHERS.

The Hoyt patent, No. 525,419, for an improvement in gyratory stone crushers, which consists only in making the hopper in two annular sections and so supporting the outer section that the inner one may be lifted out independently of the other to facilitate the making of repairs in the interior of the crusher, instead of making it in a single piece or in radial sections as previously done, is void for lack of invention; only mechanical skill and experience being required to devise such improvement.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 16, 17.]

2. SAME.

The Gates and Capen patent, No. 616,659, for an improvement in gyratory stone crushers, covers only a mere detail of construction, within the domain of mechanical skill, and is void for lack of invention.

Appeal from the Circuit Court of the United States for the District of Utah.

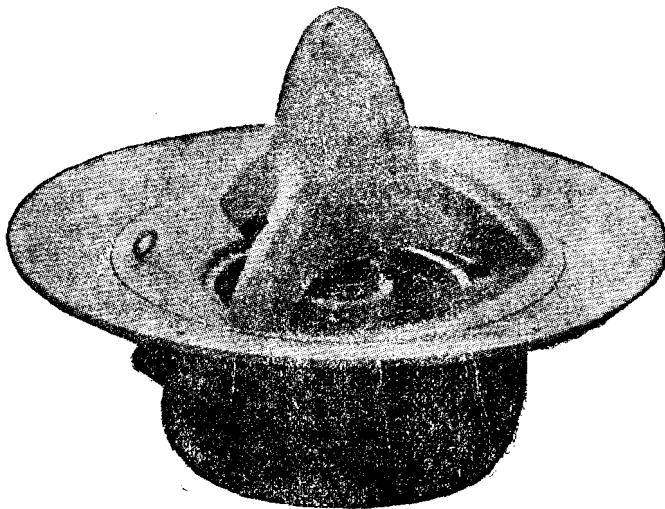
John R. Bennett and Thomas F. Sheridan, for appellant.

Charles K. Offield and Charles C. Linthicum, for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This is an appeal from a decree of dismissal of a bill for the infringement of claims 1, 2, 3, and 4 of letters patent No. 525,419, issued September 4, 1894, to the appellant, upon the application of Avery Eugene Hoyt, and of claim 1 of letters patent No. 616,659, issued December 27, 1898, to the appellant upon the application of Philetus Warren Gates and Thomas W. Capen. Both patents were for improvements in gyratory stone crushers, the art in relation to which is shown to have been

well advanced. The construction and operation of such a crusher are sufficiently described as follows: Its frame is in the nature of an upright cylinder consisting of two parts, designated as a bottom shell and a top shell, which are rigidly fastened together by means of bolts inserted in exterior flanges at the point of union. The top shell has a removable lining of sectional plates of chilled material, called concaves, forming a crushing chamber open at the top and bottom and shaped like an inverted truncated cone. Inside of this chamber and mounted upon a gyratory shaft is a crushing head of chilled material resembling a truncated cone. A spider, which is a vertical bearing box connected by two or three arms or legs with an annular rim, surmounts and is rigidly secured to the top shell. The shaft is engaged at its top in the bearing in the spider and at its lower end, which is within or below the lower shell, is mounted in an eccentric. When it is gyrated the crushing head is given a wabbling motion, like that of a top in the final effort of spinning, and is always approaching the concaves at one point as it recedes from them at another. The stone is delivered at the openings between the arms of the spider by means of a hopper and falls into the space between the crushing head and the concaves, as will be readily understood from the following representation of the top of the machine:



The hopper formerly consisted of a single piece, or of segments separated by radial lines and bolted together. It rested at its lower inner part upon the spider rim, and at its higher outer part came in contact with the surrounding woodwork or platform. This and the weight of the hopper made access to the interior of the machine for the purposes of repair or adjustment somewhat difficult, because that could be had only by removing the spider. To obviate this difficulty is the purpose of Hoyt's improvement, which, as described in the specification forming part of the letters patent, consists (1)

in dividing the hopper annularly into two parts, as indicated in the foregoing illustration, the outer diameter of the inner part slightly exceeding that of the spider rim upon which it rests, and (2) in providing the outer part at its inner portion with a flange or legs to rest upon a flange on the upper portion of the top shell of the machine, so that the spider and the inner part of the hopper can be lifted out of position without disturbing the outer part or the surrounding woodwork or platform. The specification also states that the inner part of the hopper may be formed integral with the spider, without departing from the principle of the invention. The first four claims of this patent are as follows:

"(1) A hopper for a stone crusher formed of two or more sections or rings arranged on different planes, and one section forming a continuation of the other so as to form a continuous unbroken surface in the said hopper and one of said sections being adapted to be lifted up and away from the other section without disturbing the latter, substantially as described.

"(2) A hopper for a stone crusher formed of two or more sections or rings arranged on different planes, and one section forming a continuation of the other so as to present an unbroken surface in the said hopper and the inner one of said sections resting upon an independent and different support than that upon which the section or ring immediately surrounding it rests or is supported, substantially as described.

"(3) The combination in a hopper for a crusher, of two or more sections arranged on different planes and forming a continuous unbroken surface and so constructed that either one of said sections may be removed without disturbing the other, substantially as described.

"(4) In a gyratory stone crusher, the combination of a crusher frame, a hopper constructed of outer and inner sections or rings arranged on different planes and forming a continuous unbroken surface, a gyratory shaft, a crusher head thereon, a spider mounted on said frame and supporting the inner section of the hopper, the said shaft, spider and inner hopper section being so constructed that they may all be removed without interference from the outer section of the hopper, substantially as described."

Assuming, but without deciding, that these claims adequately cover the improvement before described, in respect of both the annular division of the hopper and the means for supporting the outer section, the question is presented, does the improvement amount to invention? The advanced state of the art, as is disclosed in *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. 883, 38 L. Ed. 734, and in *Birmingham Cement Mfg. Co. v. Gates Iron Works*, 24 C. C. A. 132, 78 Fed. 350, and the common use of these machines, wherever stone was being broken or ore crushed, strongly suggest that in approaching a decision of the question we should not be unmindful of what was so well said in *Atlantic Works v. Brady*, 107 U. S. 192, 199, 2 Sup. Ct. 225, 231, 27 L. Ed. 438:

"The process of development in manufactures creates constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the

useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privilege tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

The hopper formed of two annular sections does not alter the operation of the crusher, but in that respect performs the same function in the same way as did the hopper cast in a single piece or formed of sections separated by radial lines and bolted together, so the claim to invention lies entirely in so dividing the hopper and supporting the outer section that the inner section overlying the spider rim may be handled, put in place, and lifted out of place independently of the other. Was this more than the employment of obvious mechanical expedients which would naturally occur to a skilled mechanic or engineer in the intelligent practice of his calling? We think it was not. To divide into parts what cannot be conveniently handled as a whole is elementary, if not instinctive, and to make the division of circular objects along circular lines has long been common. Indeed, the record contains several letters patent for improvements in blast furnaces antedating Hoyt's application which disclose hoppers divided into two or more annular sections for convenience in handling and in obtaining access to parts of the furnace below the inner lower sections. Of course, when this hopper was divided, provision had to be made for supporting the outer section, and this was done by arranging a downwardly projecting flange upon the inner part of that section and an outwardly projecting flange at the top of the top shell upon which the former could rest. But flanges in various forms had been so long and so generally used as a means of support or of holding parts of machinery in position that their adaptation to a situation not more complex or difficult than this did not require anything more than the application of ordinary mechanical skill and experience.

The case of *Hendy v. Miners' Iron Works*, 127 U. S. 370, 8 Sup. Ct. 1275, 32 L. Ed. 207, relied upon by the appellee, is well in point in principle. The first claim of the patent there in question was for an improvement in an ore feeder for quartz mills which consisted in mounting a feed cylinder upon a frame or foundation of timbers mounted upon rollers, so that the cylinder and frame could be readily moved when it was desired to repair the mill. The court held that the improvement did not amount to invention, saying:

"It is contended, in defense, that claim 1 of the patent is really a claim only for making the timbers movable, by mounting them upon rollers, so as to be able to move the cylinder and frame about as desired, and that this required no exercise of any inventive faculty. This seems to be the purport of the invention, as stated in the specification. It is the movable character of the frame on which the feed cylinder is mounted, so that the cylinder

and frame may be readily shifted from place to place, when repairs are desired, that is designated as the invention. When the mill is in operation, the movable feature is not brought into play. It is only when the mill is out of operation that the movable feature is to be used. The first claim does not appear to cover the functions or operation of the feeding cylinder, 1, as a part of the mill, when in operation; and, interpreting it by its own language as well as by that of the description in the specification, it covers only the mounting upon rollers of the timbers which carry the feeding cylinder. Merely putting rollers under an article, so as to make it movable, when, without the rollers, it would not be movable, does not involve the inventive faculty, and is not patentable. * * * Moreover, there is no patentable combination between the rollers which make the timbers movable and the feeding cylinder, 1, mounted upon the timbers. The union of parts is merely an aggregation. The feeding cylinder, mounted upon timbers which have rollers, operates no differently from what it does when mounted upon timbers which have no rollers."

Our conclusion is that the improvement in the hopper did not involve the exercise of the inventive faculty.

Formerly the spider rim was usually fitted in a recessed shoulder in the inner upper portion of the top shell, and its inner surface was flush with the concaves and immediately above them. This was deemed objectionable because it brought the rim within the sphere of the crushing action and thereby subjected it to wear and radial strains which it was not well calculated to withstand. It is the contention of the appellant that the first claim of the Gates and Capen patent provides for a transposition of the spider rim from the inner shoulder in the top shell to an outer shoulder recessed therein, whereby it is removed from the sphere of the crushing action. Assuming, but without deciding, that the claim is properly so interpreted, the question arises, does it cover more than a mere detail of construction within the domain of mechanical skill? The chief function of the rim, which is cast integral with the spider arms and the top bearing for the gyratory shaft, is to support that bearing and to provide a means of securely holding it in place. The rim is set in the recessed shoulder or rebate and then bolted to the top shell. Subject to the objection before named, it will equally perform its purpose whether it is set in an inner or an outer rebate, and there is nothing which renders one form of construction more complex or difficult than the other. Practically speaking, what was done was to make the depending flange upon a lid-like covering fit to the exterior of the receptacle to be covered when before it had been made to fit to the interior. It was a mere detail of construction and within the domain of mechanical skill.

The decree dismissing the bill was right, and is accordingly affirmed.

SCHWEICHLER v. LEVINSON.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,263.

PATENTS—INVENTION—COAT PAD.

The Schweichler patent No. 615,500 for a coat pad is void for lack of invention, the only feature of the device which the patentee is entitled to claim as original, in view of his acquiescence in the rejection of prior

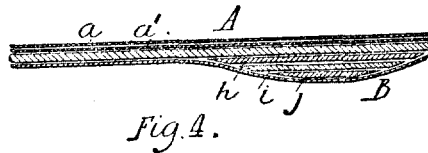
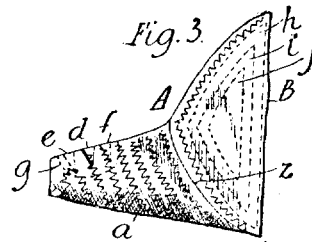
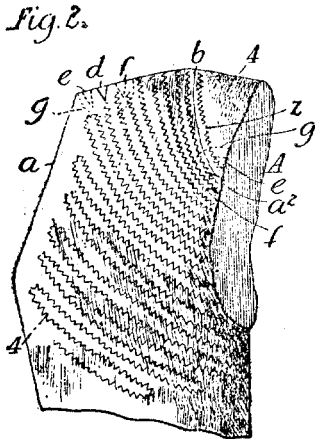
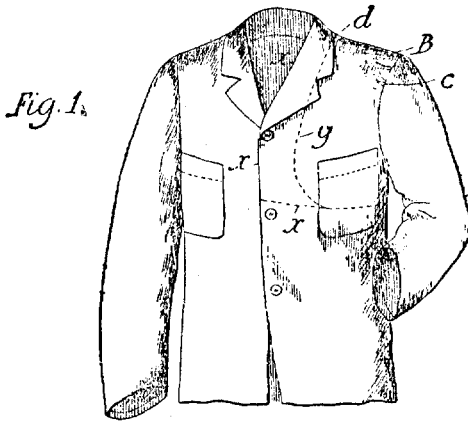
claims by the patent office, being a shoulder extension integral with the pad which does not involve patentable invention in itself nor constitute a true combination in connection with the old part but merely its enlargement or the uniting in one of two parts which had previously been sewed together.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 27-29.]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The bill was to restrain infringement of letters patent No. 615,500 issued December 6, 1898, to Carl W. Schweichler, for improvement in coat pads. On the hearing in the Circuit Court, the bill was dismissed for want of equity.

The material portion of the letters patent, with the drawings, are as follows:



"My invention relates to wearing-apparel, and is directed to improvements in pads which are especially designed for employment in coats to shape the shoulder and adjacent portions; and my invention has for its object to so construct a pad as to insure a perfect fit at this part of the garment.

"The nature of my invention will be readily comprehended from the following detailed description when the same is read in connection with the accompanying drawings, in which Figure 1 is a view in elevation of a portion of a coat, the dotted lines indicating the form and location of my improved pad; Fig. 2 is a view of the pad before being secured in position. Fig. 3 is a top view of the pad, showing the rear shoulder extension; and Fig. 4 is a sectional view on the line 4, 4 of Fig. 2.

"Referring to the said drawings by letter, A denotes the pad, and B the rear shoulder extension.

"Two forms of pads are indicated in Fig. 1, the line x showing the outline of pad for use in a coat having a stiff front extending to the edge, and y is the line of the pad for a soft-roll-front sack-coat, for a frock-coat, or for an overcoat. Obviously the size of the pad is dependent upon the size of the coat.

"The materials of the pad are two plies a a' of canvas, or, if desired, one ply of canvas and one of haircloth, and preferably the body-ply is so cut as to present the selvage or straight edge of the canvas at the front of the coat, and on these plies are laid one ply of cotton wadding and one ply of felt or padding. These plies are in the order stated basted together for convenience in handling and are then stitched in an overcasting or 'zigzag' sewing-machine.

"It will be observed by reference to Fig. 4 that the pad when in place presents the canvas or body ply next to the cloth of the garment and that the felt or padding ply is against the garment lining. In order that the pad may conform properly to the breast of the wearer, it is necessary that it be made with a slight concavity, and this is effected in the following manner: The pad is placed in the zigzag-machine with the canvas ply undermost, and the line of stitching is commenced at the point b on the shoulder extension and carried to point a² on the armhole edge of the pad, the line following the curved line z, which indicates the beginning of the shoulder extension. From this point the stitching is continued in circular or approximately circular lines backward and forward, as shown, and during the stitching operations the portion of the pad near the shoulder extension is raised, and the padding or felt is kept taut. By this method the pad is given a dished or concave form in cross-section as compared with the flat form of pad, which results in the employment of vertical lines of stitching.

"At or adjacent to the point a² on the pad I provide a V-shaped gash c and on the shoulder-line near the neck-opening a similarly-shaped gash d. The function of these gashes is to obtain a perfect fit of the garment over the shoulder and around the armhole and to allow of easy movement of the arm and shoulder. The cuts are made in the first ply of canvas, which is incapable of stretching, and are on an average from one and one-half to two inches in depth, thus allowing from one-half to three-fourths of an inch stretch in the padding. e f denote what I term 'sub-gashes,' which are provided in the second ply of canvas or haircloth, dependent upon which material is employed. These sub-gashes are made at points from one to one and one-half inches at each side of the gash proper, with the result of giving a uniform stretch at this portion of the pad. g is a piece of silesia or like material which is placed at the gashes and between the two plies of canvas or the plies of canvas and haircloth.

"In stitching the pad the felt and wadding or padding or similar material under the canvas at the gash c is stretched, say, three-fourths of an inch. When the sleeve is sewed into the armhole, the seam over the gash c is stretched about three-fourths of an inch. The back part of the coat on the shoulder-seam is held tightly full over the point of gash d. The cloth covering the fore part of the shoulder must be stretched at the shoulder-seam about one-half inch, so that an easy fit around the collar and shoulders will result.

"The shoulder extension is an integral part of the pad proper and is formed by extending the materials of the pad, as shown. This extension is, however, provided with a number of extra plies of wadding, which diminish gradually in width and give to the under side of the extension a convex form, which enters the hollow place on the shoulder of the wearer. The extra plies are lettered h, i, and j and are secured by being basted at the armhole edge, and when the sleeve is sewed in the edge nearest the armhole is basted in the armhole-seam.

"My improved pad, as previously stated, will be made in sizes for different size and shape coats. With the use of the pad not only is a perfect fit obtained, but the arm and shoulder are permitted free movement without impairing the shape of the garment."

The claims relied upon are as follows:

"1. A coat-pad made up of plies of stretching and non-stretching material secured together by substantially circular lines of stitching to give a concave form to the pad, the plies of stretching material being superimposed on the other plies, gashes and sub-gashes in the plies of non-stretching material, and a shoulder extension integral with the pad and provided with additional plies of material gradually diminished in size and stitched together at the edge only, substantially as described.

"2. A coat pad made up of plies of stretching and non-stretching materials secured together by substantially circular lines of stitching to give a concave form to the pad, and a shoulder extension integral with the pad and provided with additional plies of material gradually diminished in size and stitched together at the edge only, substantially as described."

The file wrapper and contents show that when the patent was first applied for, the claims were set out as follows:

"1. A coat pad made up of plies of stretching and non-stretching materials and having gashes formed in the non-stretching material substantially in the manner and for the purpose set forth.

"2. A coat pad made up of plies of non-stretching materials having gashes and sub-gashes therein as described, and superimposed plies of stretching material substantially as and for the purpose set forth.

"3. A coat pad made up of plies of stretching and non-stretching materials secured together by substantially circular lines of stitching to give a concave form to the pad, substantially as and for the purpose set forth.

"4. A coat pad and an integral shoulder extension thereof made up of plies of stretching and non-stretching materials stitched together as described, said extension being provided with additional plies of material gradually diminishing in size, substantially as set forth."

These were rejected upon each of the following patents: Smith, No. 236,267, Jan. 4, 1881; Dreyer No. 541,079, June 18, 1895.

Thereupon the claims above set forth were stricken out, and the following claims substituted:

"1. A coat pad made up of plies of stretching and non-stretching materials secured together by substantially circular lines of stitching to give a concave form to the pad, the plies of stretching material being superimposed on the other plies, and gashes and sub-gashes on the plies of non-stretching material, substantially as and for the purpose set forth.

"2. A coat pad made up of plies of stretching and non-stretching materials secured together by substantially circular lines of stitching to give a concave form to the pad, and a shoulder extension integral with the pad, and provided with additional plies of material gradually diminished in size and stitched together at the edge only, substantially as described."

Claim one as thus set forth was again rejected, claim two being allowed.

Thereupon claim one as above set forth, was stricken out, and the following substituted:

"1. A coat pad made up of plies of stretching and non-stretching materials secured together by substantially circular lines of stitching to give a concave form to the pad, the plies of stretching material being superimposed on the other plies, gashes and sub-gashes in the plies of non-stretching material,

and a shoulder extension integral with the pad and provided with additional plies of material gradually diminished in size and stitched together at the edge only, substantially as described." And thereupon both claims were allowed.

Other patents exhibited in the record are No. 199,780, Jan. 29, 1878, to C. L. Bradley, No. 236,267, Jan. 4th, 1881, to D. T. Smith, and No. 541,079 June 18, 1895, to S. Dreyer.

No serious question is made that the defendant has not copied the complainant's patent.

The further facts are stated in the opinion.

Francis A. Hopkins, for appellant.

Frank A. Helmer, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. It will be observed that claim one of the patent as amended, and for the second time rejected, embodied the plies of stretching and unstretching materials, secured together by substantially circular lines of stitching, to give the pad a concave form; also that the plies of stretching material should be superimposed by other plies; also that there should be gashes and sub-gashes on the plies of stretching material. This is exactly the combination of the first claim of the patent as allowed, and sued upon, except that in the first claim as allowed, a shoulder extension integral with the pad, and provided with additional plies diminished in size and stitched together at the edge only, is added. And a comparison of the second claim, as allowed, with the file wrapper and contents shows that it was this addition of a shoulder extension, integral with the pad, that brought about the allowance of the second claim also. The patentee having accepted these rejections, the patentability of his alleged invention must be determined upon the proposition: Did what was added (the shoulder extension integral with the pad) to what was already old (all the other elements enumerated) make the combination thus completed a patentable invention?

The Dreyer patent showed a pad that went over the top of the shoulder, the exact extent of this shoulder extension being left undetermined in the description of the patent. It was shown also that a shoulder pad of the character of the Schweichler extension, except that they consisted of two parts sewed together, had been in use prior to Schweichler's pad. What Schweichler did, therefore, was to make definite in description that which Dreyer had left indefinite; or possibly to unite in one pad what previously had been two pads sewed together.

We do not think that these variations amount to patentable invention. The mere extension of the pad over the shoulder blade would be obvious, it seems to us, to any person who would wish to cover that portion of the body with a pad. Besides, the pad in all other respects being old, its mere extension is not true combination. Nothing is thereby added to the functions of the pad. At most, the extension is a mere enlargement of what previously had been in use—an enlargement that carried with it the exact thought, and the exact mechanism, that characterized the original pads.

The decree must therefore be affirmed.

KUHLMAN ELECTRIC CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,190.

1. PATENTS—VALIDITY—UNANTICIPATED ADVANTAGES OF INVENTION.

A patent will not fail because the principal advantages of the invention prove to be different from the one chiefly in the patentee's mind, if there be in the concept an actual advantage and the structure embodying it discloses patentable invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 15.]

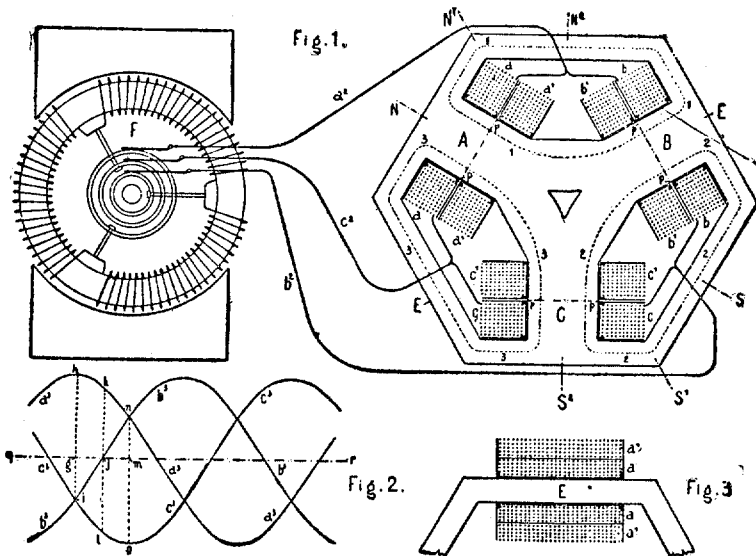
2. SAME—INFRINGEMENT—ELECTRICAL TRANSFORMER.

The Dobrowolsky patent, No. 422,746, for an electrical transformer was not anticipated, and discloses patentable invention. Also *held* infringed.

Appeal from the Circuit Court of the United States for the District of Indiana.

The bill in the Circuit Court was to restrain infringement of letters patent No. 422,746 issued March 4th, 1890, to Michael Von Dolivo Dobrowolsky, for a new and useful improvement in electrical induction apparatus for transformers; resulting in a decree sustaining the validity of the patent, and finding the appellant guilty of infringement of the same; and ordering an accounting, and a perpetual injunction.

The Dobrowolsky patent, together with the drawings, is as follows:



My invention relates to electric induction apparatuses or transformers whereby an alternating current of given tension is converted into a current of different tension, and its object is to raise the useful effect of such apparatuses. The apparatuses of this kind, as heretofore employed consist, substantially, in two coils, one for the primary and one for the secondary or induced current, and a core or envelope of iron common to both coils, which is magnetized by the action of the primary current, and whereby the strength of the magnetic field of the latter is increased. The magnetism thus produced is alternating,

like the primary current—i. e., the polarity of the core is rapidly changed by every alternation of the current—one-half of each phase of the same producing a north pole at one end and a south pole at the other end of the core, while the other half-phase produces poles of opposite denomination. By this constant and rapid changing of the poles a considerable portion of the energy of the primary coil is uselessly converted into heat, and consequently wasted.

For the purpose of avoiding this loss of energy I proceeded as follows: A plurality of pairs of coils, each pair consisting of a primary and a secondary coil, are placed upon as many cores of iron, forming three or more closed or nearly closed magnetic systems, and preferably arranged in a circle, and the primary coils are connected to a dynamo-electric machine which produces a number of alternating currents whose phases are shifted in respect to each other by a fraction of a phase, so that the maximum impulsions acting in the individual coils succeed each other, and which currents on leaving the dynamo unite to form a single current or groups of currents. Preferably the coils are placed in the same order in which the phases of the different currents whereby they are excited follow one another. Under these conditions the total amount of magnetism in the system of combined cores will always be the same, while the magnetic axis is continuously shifted forward. The magnetism of each core consequently increases and decreases and changes its polarity with comparative slowness, so that the heating of the cores and loss of effect is considerably reduced. The means for producing currents of the said kind may be such as are set forth in the specification of another patent application of mine filed on the same day as the present one.

In the annexed drawings, Figure 1 is a sectional view of a transformer of my invention in connection with a dynamo for producing alternating currents of continuously-shifting phases. Fig. 2 is a diagram serving to explain the operation of the apparatus. Fig. 3 shows a modification of the latter.

A B C, Fig. 1, are three iron cores, a b c three primary coils, and a' b' c' three secondary coils placed on the respective cores A B C. The said cores are connected together at one end directly and at the other end by means of the bars E, so that three closed magnetic circuits are formed, which are indicated in the figure by the broken lines 1 2 3.

F is a dynamo connected to the coils a b c by the respective wires a² b² c², and which produces alternating currents whose phases of vibration are shifted in respect to each other by one-third of a phase, as shown by Fig. 2, in which the wave-line a³ indicates the vibrations and phases of the current generated in one of the coils of the dynamo and the lines b³ c³ those of the second and third currents induced in the other two coils of the said dynamo, the parts of the wave-lines above the horizontal line q r representing the positive portions of the currents and the parts below this line the negative-current portions. The machine by which these currents are obtained will not be described here, as it does not form any part of my present invention. Supposing, now, the coils a b c to be arranged in such manner that a positive current circulating in any one of them will produce a north pole at the outer end of the core of the same, and starting from the moment indicated on the line q r, Fig. 2, by point g, the condition in which the apparatus is at the time will be the following: The first current represented by the wave-line a³ is at its positive maximum, measured by the ordinate g h, while the currents b³ and c³ are negative and of the inferior but equal strength determined by the line g i. The coil a therefore produces a strong north pole at the outer end of the core A and the coils b c south poles of less but equal force at the outer ends of the cores B C. The resultant magnetic center line or magnetic axis of the system of cores will therefore in this case pass lengthwise through the core A and in the middle between the cores B and C, as indicated by the line N S, Fig. 1, N and S being, respectively, the north pole and the south pole. At the next moment (indicated by the point j, Fig. 2) the positive current a³ has decreased and the negative current c³ has increased in strength, so as to be proportionate to the respective ordinates j k and j l (which are equal) while the current b³, being at its changing-point from negative to positive, is zero. Consequently there is then a north pole at the outer end of core A and a south pole at the outer end of core C, while the core B is not

acted upon by the coil b. The magnetic axis will therefore have the position N' S'. At the moment indicated by point m, Fig. 2, the negative current c^3 is at its maximum, measured by ordinate m o, the positive current l^3 has decreased further, so as to be proportionate to the ordinate m n, and the current b^3 has become positive again and is of like strength as current a^3 . There will therefore then be a strong south pole at the outer end of core C and north poles of lower but equal strength at the ends of the cores A B. This causes the magnetic axis to assume the positions N² S². The said axis is thus continuously shifted forward or rotated about the center of the magnetic system. Besides, if the collective strength of all the currents is maintained uniform, as is actually the case in my arrangement, the total value of the magnetism produced thereby will be the same at every moment. By the said shifting of the magnetic axis currents are induced in the secondary coils a' b' c' , which may be employed either separately or conjunctively.

It is evident that the described transformer may have any number of cores from three upward; but there must be at least as many cores as there are alternate currents acting on the same.

In Fig. 1 the primary and secondary coils are shown arranged in juxtaposition. They may, however, also be placed one around the other, and, instead of being located on the cores A B C, &c., they may be disposed on the peripheral bars E, as shown by Fig. 3. The only difference in the latter case is that the distribution of the poles of the cores relatively to the coils will be modified. Moreover, the body of iron forming the system of cores may be made in two or more pieces placed close to or in contact with each other. Thus, for instance it may be divided on the lines p p, Fig. 1, and in such case the magnetic system, instead of being a perfectly-closed one, may be called "nearly closed."

In consequence of the described construction of my improved transformer and of its combination with a machine for producing alternating currents of shifted phases, the total amount of magnetism present in the magnetic system remains constant and the polarity of the system is changed comparatively smoothly. The energy required for such changing is therefore less, a considerably smaller amount of energy is lost by conversion into heat, and a higher useful effect is obtained. For the purpose of securing the best effect it is, however, necessary to provide means for avoiding Foucault or eddy currents by constructing the aforesaid cores of thin iron plates or in other known manner.

The claim sued upon is as follows:

An induction apparatus consisting in a number of cores of iron, forming together three or more closed or nearly closed magnetic systems, primary and secondary coils placed on said cores, electric circuits connected to the primary coils, and means for creating in the said circuits alternating currents of successive phases for the purpose of causing a continuously-progressive shifting of the magnetic axis and maintaining nearly constant the total amount of magnetism, substantially as described.

The patents principally relied upon by the appellant, are the Tesla patents, No. 381,968, issued May 1st, 1888; No. 381,970, issued May 1st, 1888; No. 382,282, issued May 1st, 1888; No. 390,413, issued Oct. 2nd, 1888; No. 390,414, issued Oct. 2nd, 1888; No. 390,439, issued Oct. 2nd, 1888. The only other patent cited is that to C. S. Bradley, No. 409,450, issued Oct. 20th, 1889.

The further facts are stated in the opinion of the court.

Clifton V. Edwards and Thos. F. Sheridan, for appellant.
Edward Rector and L. F. H. Betts, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion:

The object that Dobrowolsky seemed to have chiefly in mind was to avoid the useless converting of energy into heat by the constant and

rapid changing of poles of the transformer apparatus then in use. 'As things have turned out, this has not proven the chief actual advantage of the Dobrowolsky apparatus. The actual advantage of the Dobrowolsky transformer—an advantage not denied in any quarter—is the combination in one unitary structure of apparatus to transform the currents, instead of having the transformation go through three separate transformers. Besides this, the amount of iron in the three smaller transformers is proportionately larger than that required for the Dobrowolsky transformer, so that there is a great advantage in the latter, both with respect to bulk and cost. And besides this, also, is the saving of the loss of energy.

Now though these advantages be different from the one chiefly in the patentee's mind, the invention will not on that account fail, if there be in the concept an actual advantage, and the structure embodying it evinces patentable invention; for a patentee is entitled, not only to what he specifically sees, but to what has been brought about by his invention, even though not at the time actually seen.

But it is said that the transformer of the Dobrowolsky patent is in all essential respects anticipated by the invention of Tesla, and that the claim as written, "closed or nearly closed" includes in principle the transformer of Tesla; that though Tesla's transformer is not so nearly closed, the difference is a difference of degree only; in short neither transformer being entirely closed, the "nearly closed" of Dobrowolsky and the not closed of Tesla cannot be differentiated.

A reference to the Tesla patent shows that while in the Dobrowolsky patent the magnetic lines of force complete their circuit through the cores of the other coils, in the Tesla patent the magnetic lines of force are completed through the air or open space within the ring. In the Dobrowolsky apparatus the several cores of iron form three or more closed magnetic systems, and the lines of force due to any one of the three coils must complete their circuit through the iron cores of the other two coils, or the lines of force of two adjacent coils must pass in common through a core; in the Tesla apparatus, there are no closed magnetic systems whatever—only a single continuous annular core of iron. The lines of force of any of the coils in the Tesla apparatus cannot by any possibility complete their circuit through the remaining coils. Nor can the lines of force of two adjacent coils complete their circuit through the core.

Now these are differences, not of form, but of function—differences between two magnetic systems, not because one is, in form merely, more nearly closed than the other, but because by reason of the structure, the magnetic lines of force in the one must complete their circuit through the open air, while in the other the circuit is completed through iron. And it is because the conductivity of iron differs from the conductivity of open air that the operation of the Dobrowolsky patent is essentially and functionally different from the operation of the Tesla patent.

It is apparent then that the phrase used in the Dobrowolsky claims, "nearly closed," is not meant as an expression merely of degree. The phrase was meant as the statement of the function of the magnetic sys-

tem. There must, in such unitary system, be enough of the core to bring about unitary action. Beyond that a closed core is not an essential; and to the extent only, that it is not functionally needed, it may, according to the terms of the claim, out of consideration of economy or weight, be left more or less open. In short, the phrase, "nearly closed," was meant solely to convey this thought: That consistent with a system that would complete the magnetic lines of force substantially through iron as distinguished from air, in the manner pointed out, the structure might be left open to save weight and expense; but that the limit of the area to be left open is the point where the further presence of iron would be superfluous. "Closed or nearly closed" thus has a distinct functional significance, differentiating it from any apparatus that did not have this purpose in view.

In view of the advantages that have followed transformers of the Dobrowolsky character, and of its unanticipated method of applying the laws of electricity, (though the laws themselves were well known) we think that the patent in suit evinces patentable invention; and the appellant's device, coming in every respect within the thought embodied in the patent in suit, the decree ought to be affirmed.

BIRDSBORO STEEL FOUNDRY & MACHINE CO. v. KELLEY BROS. & SPIELMAN.

(Circuit Court of Appeals, Third Circuit. August 3, 1906.)

No. 18.

1. EQUITY—BILL OF REVIEW—DILIGENCE IN DISCOVERY OF EVIDENCE.

In case of a bill of review, based upon after-discovered evidence, the question of diligence is necessarily a preliminary one, to be considered and passed upon at the time application is made for leave to file the bill. Having been once disposed of when the bill is allowed, it will not be again considered, and a denial in the answer of the averment of diligence made in the bill raises an immaterial issue.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 1115.]

2. PATENTS—ANTICIPATION—COIL CLASPS FOR BELTS.

The Jackson patent, No. 433,791, for a coil clasp for uniting the ends of belts, etc., is void for anticipation, so far as it relates to belts, by a device long used in paper-making machines for uniting the ends of belt pulp conveyors.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 142 Fed. 868.

Wm. C. Strawbridge, for appellant.

Horace Pettit, for appellees.

Before DALLAS and GRAY, Circuit Judges, and HOLLAND, District Judge.

HOLLAND, District Judge. This is an appeal from a decree of the Circuit Court for the Eastern District of Pennsylvania, entered

February 1, 1906, setting aside a former decree of the said Circuit Court, and dismissing a bill of complaint in cause 49, October sessions, 1898. A bill in equity was filed in the Eastern District of Pennsylvania, October sessions, 1898, by the plaintiff, for infringement of letters patent No. 433,791 for a coil clasp. The petition was sustained, and an injunction issued against the defendants restraining them from infringing the same. (C. C.) 120 Fed. 282. Upon an appeal to the Circuit Court of Appeals of this Circuit, the decree of the lower court was sustained, and the appeal dismissed and injunction continued. 123 Fed. 882, 59 C. C. A. 370. Upon the petition of Kelley Bros. & Spielman, the Circuit Court of Appeals, on April 27, 1905, made an order permitting the petitioners to make application to the Circuit Court of the United States in and for the Eastern District of Pennsylvania to file a supplemental bill, in the nature of a bill of review, for the purposes set forth in the petition and in accordance with the prayer thereof. 136 Fed. 855, 69 C. C. A. 599. On July 5, 1905, after argument in the Circuit Court, a decree was entered and leave given the defendants to file a supplemental bill in the nature of a bill of review. 138 Fed. 833. After final hearing upon the supplemental bill, a decree was entered February 1, 1906, by the Circuit Court, setting aside the former decree and dismissing the bill of complaint in the said cause No. 49, October sessions, 1898. From this latter decree an appeal was taken to this court.

The facts are sufficiently stated in the opinion of the learned judge of the court below on the final hearing on the supplemental bill. As we agree with him in his reasoning and conclusions of law at which he arrives, as set forth in that opinion, we adopt the same as our own, which is as follows:

"The evidence which is now presented is the same as upon the hearing of the petition for leave to file the present bill, and as was before the Court of Appeals, when permission was obtained to reopen the case; the respondents having made no attempt to impeach or refute it. The bill as a result must be sustained, for the reasons given in allowing it to be filed, unless in the light of the argument which has been made I find myself unable to adopt and follow the views which were then expressed. The new evidence brought forward to invalidate the patent, which was discussed at that time, was with regard to the alleged use of a similar device for fastening together the ends of leather driving belts, by Franz J. Maier, in his spring bed works at Trenton, N. J. The character as well as the use of the fastener was testified to by Maier with considerable definiteness and particularity, and he was corroborated by others who worked in the shop. But the device was only sparingly employed, and in the end was entirely abandoned, and no sample of it was therefore able to be produced. Neither was the time fixed with any great degree of certainty, being given as somewhere from 1885 to 1888, or possibly after that, although all the witnesses unite in saying that it was before the removal of the shop from Warren street, Trenton, where it was first located, which is said to have occurred in April, 1889, a date, by the way, which was that of the application for the patent in suit. The weakness of this evidence is that it rests wholly in parol; there being nothing by way of records or material exhibits to substantiate it, and the anticipating use relied upon to avoid the patent being thus made to depend on the uncertain memory of witnesses, after a long lapse of years, in which they have had no occasion to keep alive their remembrance of the occurrence testified to. This feature of the case was

commented upon in the opinion allowing the present bill, but was not regarded as sufficient at that stage of the case to call for withholding assent. My hope was that further investigation on both sides would result in the evidence being either so strengthened as to leave it in no uncertainty, or so discredited as to make it altogether unreliable. I have to confess to some perplexity, now that it remains unchanged.

"In the Barbed Wire Patent Case, 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 161, and in *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153, attention is called to the high character of proof which is required with regard to an alleged prior use in order to overturn a patent; it being declared that it should be shown by evidence so cogent as to leave no reasonable doubt in the mind of the court as to the occurrence of that which is testified to. The argument employed in the first of these cases to discredit the anticipatory use which was there set up may also, with adaptive changes, be repeated here; for, if Maier, as he states, had in successful use a device of the kind which he describes, it is certainly remarkable that he should have applied it to the fastening together of his coil bed springs, which he forthwith proceeded to patent as something worth the while, and yet failed to do anything with it as a belt fastener, for which, according to the sequel, it was particularly valuable, which he does not seem to have seen. In the latter capacity it evidently was not a success, or it would not have been given up, thus raising the doubt whether the device was in fact the same as the one in suit; or, if not that, inducing the belief that it was of such rudimentary and imperfect character as to stand as an unsuccessful and abandoned experiment, of which the law takes no account. Moreover, if unsupported evidence, such as this, is not—according to the cases cited—to be accepted without serious reservation, when offered in the beginning, much more it is not, upon a rehearing, when the unsuccessful party is seeking to regain the place he has lost, after the proofs have been sifted and it has been found what they particularly lack. It is possible that, if these considerations had been given due weight at the former hearing, a different result would have been reached, although it is to be remembered, as was noted at the time, that only the *prima facie* character of the proofs was passed upon.

"I propose to say nothing further, however, upon this branch of the case, allowing what has been said, both then and now, to stand for what it may be worth; for I am convinced, as I was not convinced before, that there is a real and unquestionable anticipation of the patent, in the device found in paper-making machines—both Fourdrinier and cylinder—for fastening together the ends of belt conveyors, employed for taking up, carrying, and draining the pulp. These fastenings, which according to the evidence have been in use anywhere from 20 to 40 years, consist in spiral coils inserted into the spaces or apertures found in the fabric, and, being intermeshed, are locked together by means of an intersecting pin; thus corresponding in both form and function with the device in suit. The attempt is made to distinguish them by the suggestion that the belts in use in paper-making machines are mere conveyors, and not power belts, such as those on which the fastenings in suit are employed. But the terms of the patent are general, and apply to belts of every description; the use of the device on machine or power belts being a mere adaptation, and not an independent and characterizing function. Nor even so, indeed, has it escaped challenge as being beyond the scope of the patent, which is not thus to be controlled by it. *Kelley Bros. & Spielman v. Diamond Drill & Machine Co.* (C. C.) 123 Fed. 382, 59 C. C. A. 370, *Acheson, J.*, dissenting. Neither is any comparison to be made with the Rowat or Schpakowsky patents, which were considered at the original hearing and held not to be anticipations, so as to make what was said of them applicable here. As is there pointed out, these are belts, and not belt fasteners, and while the common construction of intermeshing coils, locked with a pin, may be employed, having regard to the result aimed at, they differ widely from anything which we have here. It is further said, however, that the open meshes of the wire cloth, used in paper machines, through which the coils are inserted, are not the same as the apertures, made for the pur-

pose in leather belt ends, or other similar fabrics, the edges of which are to be fastened together. But here, again, the generality of the patent is not kept in mind, which is satisfied with a row of holes or apertures, however produced, through which the spiral coils may be inserted, 'whereby'—in the terms of the patent—'strips are formed within each coil.'

"It is finally contended that the interlocking pin, in use in the wire cloth fasteners, is so light that it bends under the strain and runs through the coil zig-zag, thus being irremovable, and not fulfilling the patent. But this does not change the essential character of the construction as an anticipation. All that would be necessary to make the pin movable would be to have it stouter, and it certainly involves no invention to enlarge or thicken this feature of the device for that purpose. Moreover, it is asserted, without contradiction, that the pull of power belts is often so great as to bend the pin in exactly the same way, making it similarly unremovable. The significant thing in both devices, which causes the one to stand in the way of the other, is that, for the purpose of conveniently fastening together the ends of the belt or fabric to be united, spiral coils are inserted into such ends through holes substantially equidistant apart, the overlapping spaces within the coils being thus able to be brought together and intermeshed, and a pin run through to lock them. The construction in each is thus the same, as is the purpose to be accomplished, which is effected in the same manner. This character of fastening, which is shown by the numerous references brought forward at the original hearing from various arts to be by no means novel, is thus proved to have been in actual use long prior to its discovery and adaptation by the present inventor as a means of conveniently uniting belt ends, the very art by which its novelty is sought to be maintained. Here is a clear anticipation, against which it is impossible to contend, and the patent, to the extent that it is overreached by it, must be declared to be invalid.

"It is said, however, that in order to be entitled to the benefit of this evidence, the parties who rely upon it were bound to show that in the exercise of reasonable diligence it could not have been produced before, and that this was put in issue by the bill and answer, and should therefore have been duly proved. It is no doubt true that before granting a rehearing the court is to be satisfied upon this point; every party being required to bring forward, once for all, at the original hearing, all the evidence which is accessible to him, and not having the right to be heard again, except where something calculated to change the result has been passed by which could not with reasonable diligence have been previously discovered and supplied. But, in the case of a bill of review based upon after-discovered evidence, the question of diligence is necessarily a preliminary one, addressed to the court, to be considered and passed upon at the time that application is made for leave to file the bill, which will be denied, unless it appears that the party has been diligent and that the evidence was not fairly within his reach. 2 Dan. Chan. Prac. 1578; *Dumont v. Des Moines Valley Railroad*, 131 U. S. Append. clx, 25 L. Ed. 520. It is not to be left open, to come up on the hearing of the bill itself. *Lewellyn v. Mackworth*, 2 Atk. 40; *Hodges v. Mullikin*, 1 Bland (Md.) 503. And having been once disposed of, when the bill is allowed, it is not necessary to go into it again. In the present instance not only was the question of diligence of necessity before the Court of Appeals when application was made for leave to reopen the case, but it was also before this court when leave to file the bill of review was given. It is true that in the opinion filed on the latter occasion the ability of the complainants, with proper diligence, to have secured the evidence with regard to the alleged prior use by Maier at the Trenton Spring Bed Works was the only thing discussed; and whether the other evidence, which is now made the particular reliance of the court, was reasonably accessible was not apparently considered or passed upon. But, if the mistake was made of not doing so, it will not help matters to make another. Or, if need be, going back to the question, I will say that I am as well satisfied with regard to this as I was with regard to the other. The use of the device in con-

troversty, to fasten together the ends of belt conveyors in paper-making machines. was by no means an obvious one, and might well have escaped notice in the prosecution of ordinary inquiry, particularly with the prominence which has been given to, and the stress which has been laid upon, the subject of power belts, which is still persisted in. The discovery, as stated by counsel, was an accident, the result of a chance disclosure, which I can well believe, and there certainly has been no lack of diligence since then in making use of it. As shown by the authorities cited above, as well as by the approved forms in use (3 Dan. Chanc. Prac. 2065, 2067), the averment of diligence found in the bill, and the denial of it made in the answer, raised, therefore, an unnecessary and immaterial issue, and counsel for the complainants committed no error in disregarding it. Some doubts on the subject, it is true, have been entertained (Story, Eq. Pl. § 420, Miff. & Tyler, Eq. Plead. & Prac. 186, 3 Encycl. Plead. & Prac. 591) and views to the contrary expressed (Dexter v. Arnold, 5 Mason, 308, Fed. Cas. No. 3,856). But they must yield, in my judgment, to what has been otherwise directly decided. If counsel for the respondents had other ideas of the matter, and so failed at the proper time to take the steps which he would have done to contest the claim of diligence, the only thing that could now be done would be to reopen the case and go back to that point in it, which will hardly be insisted on, considering the desire of all parties to have this litigation reach a finality.

"Being satisfied then, by the showing which has been made, that the device in suit was anticipated in the way stated, and that, by reason of this the decree sustaining the patent is in error, and works an injustice, the same must be set aside, and a new decree entered, declaring the patent invalid to the extent that it is here relied upon, and dismissing the bill, which, under all the circumstances, will be without costs to either party. Let a decree to that effect be prepared by counsel."

The decree of the Circuit Court is affirmed.

GENERAL ELECTRIC CO. v. CROUSE-HINDS ELECTRIC CO.

(Circuit Court, N. D. New York. October 8, 1906.)

No. 7,055.

PATENTS—SUIT FOR INFRINGEMENT—COSTS ON PARTIAL RECOVERY.

Rev. St. §§ 973, 4922 [U. S. Comp. St. 1901, pp. 703, 3396], which provide that a plaintiff or complainant recovering judgment or decree for infringement of part of a patent shall not recover costs where the claims of the patent were too broad, and no disclaimer was entered before suit, apply to a suit in which certain claims of a patent are held valid and infringed, while other independent claims infringement of which is alleged are held invalid, and in such case the complainant is not entitled to recover costs.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 607-612.]

In Equity. Motion to amend decree by giving to complainant two-thirds costs; also for order directing defendant to pay \$150 costs awarded in satisfaction of the expense incurred by complainant in submitting certain witnesses for cross-examination pursuant to an order of the court made September 26, 1905.

S. O. Edmonds, for the motions.

Arthur E. Parsons, opposed.

RAY, District Judge. The complainant brought suit in equity to restrain alleged infringement by defendant of claims 5, 6, and 7 of United States letters patent No. 489,682, dated January 10, 1893, issued to the complainant as assignee of one Metzger, and also for an accounting.

The invention claimed in the patent relates to sockets adapted to receive the bases of electric lamps or other translating device and to connect their terminals with a suitable supply circuit. This court held claims 5 and 7 valid and infringed, and held claim 6 invalid, and directed a decree for an injunction and an accounting as to claims 5 and 7, and dismissed the complaint as to claim 6. The decree provided that neither party should have costs as against the other. The complainant now contends that, having sustained its case as to claims 5 and 7, it should recover two-thirds costs, notwithstanding the fact that the defendant successfully defended as to claim 6. The bill of complaint alleged the validity of claim 6, and that defendant had infringed same. No disclaimer has ever been filed.

The defendant relies upon section 973 and section 4922 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 703, 3396] to sustain its contention that the complainant is not entitled to any costs. Are these sections applicable to this case? I think they are. The complainant here claims to have been the original and first inventor or discoverer of the device mentioned and described in claim 6 of the patent. This court has held that he was not the original and first inventor thereof. This court has held that in view of the prior art no invention was disclosed in this combination. A decree has been rendered in this suit for the complainant

for the infringement of a part of the patent, to wit, claims 5 and 7, and has held that the complainant's patent was too broad, and that his suit was too broad. I do not think this section can be confined in its application to a suit upon one claim of a patent, where it is held that the claim is too broad. In such a case, even if the claim covers a patentable invention, if it is too broad, and no disclaimer has been filed as to any part of the claim, the complainant cannot recover at all or maintain his suit for an injunction, and hence there could not be a decree or judgment for the complainant in such a case.

Attention is called to *Johnson v. Foos Manufacturing Co.* (C. C. A.) 141 Fed. 73, and also to *Ide et al. v. Trorlicht, Duncker & Renard Carpet Co. et al.*, 115 Fed. 137, 55 C. C. A. 341, and especially to the remarks of the court at page 150, 115 Fed. (55 C. C. A. 341), where it is said, citing cases:

"Where a suit is brought upon several claims of one or more patents, and the complainants succeed in obtaining relief upon some of the claims, but fail to recover upon others, an equitable division of the costs, proportioned to the expense of litigating the respective claims, should be made, because the defendants are not justly liable for the costs of litigating those claims upon which the complainants were entitled to no relief."

This language was used by the Circuit Court of Appeals in awarding costs in that court. The Circuit Court of Appeals reversed the decree of the court below and held that the appellants should recover one-half of their costs in that court, and remanded the case to the Circuit Court with directions to dismiss the bill as to three of the claims and to enter the usual decree for an injunction and an accounting upon two of the claims, but "without costs to either of the parties to the suit up to the time of the entry of the decree." If in the court below the complainant was entitled to any costs whatever, why was it not suggested or left to the court below to award half costs or apportion the costs?

In *Johnson v. Foos Manufacturing Company*, *supra*, on rehearing, the Circuit Court of Appeals held:

"Rev. St. §§ 973, 4922 [U. S. Comp. St. 1901, pp. 703, 3396], which provide that a plaintiff or complainant recovering judgment or decree for infringement of part of a patent shall not recover costs, where the claims of the patent were too broad, and no disclaimer was entered before suit, do not apply to the costs in an appellate court, where the decree below dismissing the suit is found erroneous, and the complainant was compelled to appeal to obtain the relief to which he was entitled."

This seems to draw the distinction in a case like the one at bar between the award of costs by the Circuit Court and the award of costs by the Circuit Court of Appeals on appeal. As seen, it is there held that the provisions of the Revised Statutes above quoted have no application in the Circuit Court of Appeals, where the decree below was erroneous, and the complainant was compelled to appeal to obtain relief to which he was entitled. See, also, *Kahn v. Starrels*, 136 Fed. 597, 69 C. C. A. 371.

In *Johnson v. Foos Manufacturing Co.* (C. C. A.) 141 Fed., at page 89, the court says, after citing the sections hereinbefore referred to:

"The effect of these provisions is to save the claims which are valid if they are definitely distinguishable from those parts of the patent claimed without right, whether there has been a disclaimer or not. But, if there has been no disclaimer entered in the Patent Office before suit brought, it is specifically provided that the patentee shall not recover any costs."

Cases are cited sustaining this contention.

In the case at bar claims 5 and 7 are definitely distinguishable from claim 6, and therefore it was within the province and power of the court to hold these claims valid. If, however, the court had found that there was valid invention disclosed in either of those claims, but that the claim was too broad, and claimed more than the patentee was entitled to, then it would have been compelled to hold those claims invalid and to have dismissed the bill as to them, unless a disclaimer of the excess had been filed. After a careful examination of all the cases cited, I am of the opinion that the decree as to costs is correct, and the motion is therefore on that branch of the case denied.

We then come to the motion for an order directing or compelling the payment of \$150 provided for in a prior order of the court.

While evidence was being taken in the case, the depositions of one Weber and one Stahl had been taken in chief on behalf of the complainant herein on rebuttal. A motion was made to expunge the depositions of these witnesses on the ground that no opportunity had been given for cross-examination. The court on said motion ordered as follows:

"Ordered, that said motion to expunge be denied: that complainant produce said witnesses Weber and Stahl for cross-examination on at least three days' notice to be given defendant's solicitors, and that within 48 hours after the completion of the depositions of said Weber and Stahl the defendant pay to complainant's solicitor the sum of \$150 in satisfaction of the expense incurred by the complainant on submitting said witnesses for cross-examination."

There was a companion suit in which evidence was being taken involving patent 7,055, known as the "Sargent Patent." A written notice was served that evidence would be taken in that case October 3, 1905, at the office of Benjamin B. Hull in Schenectady, N. Y. I am not furnished with any written notice that the witnesses above mentioned would be produced in this case for further cross-examination, but the record shows as follows:

"Schenectady, N. Y., Oct. 3/05.

"Met pursuant to notice. Present—Mr. Edmonds for complainant; Mr. Hey for defendant. Complainant's counsel notes that this session is held in accordance with the direction contained in the judicial order of September 26, 1905; the witnesses referred to in such order, Messrs. Weber and Stahl, being presented for cross-examination. Counsel for defendant states that on Monday, October 2d, he wired counsel for complainant that he would not cross-examine the witnesses Weber and Stahl. Complainant's counsel then, in further accordance with the provisions of the order of September 26th, states that the depositions are completed, and asks the examiner to have such depositions verified by the respective witnesses."

I am not furnished with any evidence further than this record that the telegram therein mentioned was sent, or, if sent, that it was received. Mr. Edmonds was there for the complainant, and Mr. George W. Hey, now deceased, for the defendant. It was noted in

the minutes that this hearing in this case, not the companion case, was held pursuant to notice, and no protest was made. It was further entered on the minutes by complainant's counsel that the session was held in accordance with the order above referred to, and no protest or denial of this fact was made, or, if made, no such protest or denial was entered in the minutes. On the other hand, defendant's counsel stated that a telegram was sent that the presence of the witnesses would not be required, inasmuch as they would not be cross-examined. It was then stated that the depositions were completed.

It seems to me that with this record I am compelled to hold that some sort of notice was given that these witnesses would be produced for cross-examination at the time and place mentioned. Mr. Hey is dead, and cannot speak; but his silence and seeming acquiescence in the record that was made indicates clearly that the parties were there under a notice in this case and under a notice that these witnesses would then and there be produced for cross-examination. There is no evidence that the telegram, if received, was received in time to obviate the necessity of the attendance of the witnesses or of counsel. Had that fact been made to appear, I should decline to compel the payment of the sum directed to be paid by the order of September 26, 1905. If such a telegram was received, and complainant's counsel could have avoided the necessity and expense of the attendance of these witnesses, it was his duty to have done so. I cannot presume that complainant's counsel attended at Schenectady for cross-examination in this case, when it was unnecessary to do so.

I think there should be an order directing the payment of the money specified in the order made September 26, 1905.

BALL BEARING CO. v. STAR BALL RETAINER CO.

(Circuit Court, E. D. Pennsylvania. August 2, 1906.)

No. 28.

1. PATENTS—INFRINGEMENT—BALL BEARINGS.

The Simonds patents, No. 449,968 and No. 449,959, each for an improvement in ball bearings, construed, and, as limited by the prior art to the precise structure shown, are neither of them infringed by the device of the Keiper patent, No. 686,617.

2. SAME—TESTS OF INFRINGEMENT—INTERCHANGEABILITY.

The interchangeability in use of two devices is an important test in determining the question of infringement.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 370-381.]

In Equity. On final hearing.

Augustus B. Stoughton, for complainant.

Julian C. Dowell, for respondent.

HOLLAND, District Judge. This suit is brought for the purpose of restraining the defendant from an alleged infringement of two patents, Nos. 449,968 and 449,959, issued to George F. Simonds April

7, 1891, for improvements in ball bearings. They relate to bearings in which spherical rollers or balls are employed to diminish friction. The first, No. 449,968, relates to that class of ball bearings in which spherical rollers or balls are employed to resist end pressure or thrust, and the second, No. 449,959, to that class of ball bearings in which rollers or balls are employed with free lateral play while in use to resist radial pressure.

The patentability is disputed and infringement denied as matters of defense. It will be necessary to consider only the latter, as I am of the opinion that the evidence clearly shows the defendant's device is entirely dissimilar from those made in accordance with the patents in suit. The prior art in this class of invention shows the field to have been well covered by prior patents down to the time the Simonds patents, which now belong to the plaintiff, were issued, and the plaintiff is therefore restricted to the precise device described in his patent. The language of Justice Shiras in *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973, is applicable to the facts in this case:

"Coming as he does in the train of numerous inventors that had preceded him, whose inventions had been patented and put into practical use, we must conclude that Boyd, if entitled to anything, is only entitled to the precise devices described and claimed in his patent. Of course, it follows that if the defendant's specific devices are different from those of Boyd, no combination of such devices could be deemed an infringement of any combination claimed by Boyd."

And even though the two devices produced the same effect, so long as they are not primary patents and there is no substantial identity in the character of the two combinations, there is no infringement of the earlier patent. *Singer Company v. Cramer*, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437. An examination of the devices clearly shows that there can be no interchangeability in their use, and the evidence is to the same effect. This is an important test in determining the question of infringement. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; *Fay v. Mason*, 127 Fed. 325, 62 C. C. A. 159.

The claims of patent No. 449,968 are as follows:

"(1) An annular ball-retaining cage consisting of a tubular body having a central opening to receive a central support and provided with flanges having lateral openings that surround the central opening, in combination with spherical rollers or balls that are held in said cage and project through said lateral openings to resist end pressure or thrust, said balls being arranged to revolve freely in all directions and removable in a body with the cage, substantially as described.

"(2) An annular ball-retaining cage consisting of a central tubular body having end flanges provided with lateral openings, in combination with spherical rollers or balls that are held between said flanges and project through the lateral openings to resist end pressure or thrust, substantially as described.

"(3) In a ball bearing, the combination, with a central support, of a removable annular cage consisting of a tubular flanged body provided on opposite sides with lateral openings, and a series of spherical rollers or balls confined in said cage in such a manner as to revolve freely in all directions and projecting therefrom in position to resist end pressure or thrust, said cage and balls being removable in a body, substantially as described."

It will be seen that in each claim there is a distinct specification of the tubular body having flanges in which there are lateral openings, and that the balls project through said lateral openings to resist end-pressure or thrust.

The claim in No. 449,959 which it is alleged has been infringed by the defendant is as follows:

"In a ball bearing, the combination, with spherical rollers or balls, of a removable annular cage in which the balls are retained in a body and in which they have free lateral play and are capable of revolving in all directions, said cage being independent of the bearing surfaces, against which the balls act and between which said cage is adapted to move, whereby the said balls are free to move in varying lines, so that all parts of the bearing surfaces will be subject to the rolling contact of said balls and the wear and friction distributed, substantially as described."

The object of this invention is to provide an improved annular cage independent of the bearing surface, and in which the balls for sustaining or resisting radial pressure will be retained in a body so as to be removable with the cage and capable of revolving in all directions with free lateral play, whereby they are free to move in varying lines in such a manner that all parts of the bearing surface will be subject to the rolling contact of said balls, and the wear and friction evenly distributed and reduced to a minimum. Claim 2 of this patent, for the use of the device in claim 1 in combination with a device for resisting radial pressure and end thrust, is not alleged to be infringed by the defendant.

The records of the Patent office in evidence show that claim 1 of this patent must be confined to a removable annular cage in which the balls are retained in a body, and have "free lateral play," and are capable of "revolving in all directions," said cage being independent of the bearing surface, against which the balls act and between which the said cage is adapted to move, whereby the said balls are "free to move in varying lines, so that all parts of the bearing surface will be subject to the rolling contact of the balls and the wear and friction distributed, substantially as set forth." A number of claims had been submitted and rejected, until the one now found in this patent was finally adopted and approved, which is restricted to a device for resisting radial pressure where the balls have "free lateral play" and move "in varying lines."

The defendant's device is manufactured under letters patent issued to H. B. Kieper November 12, 1901, and is now owned by the defendant company. The preferred form of this invention, as set forth in the specifications, is "a ball-retaining device consisting of a ring-shaped portion or base constructed integrally with a series of standards rising or springing from its inner edge in the plane of the axis of the ring and terminating in flaring or sector-shaped flanges, which are arranged at right angles to the standard proper, and overlie or extend transversely of said ring, the latter having its outer edge upturned, so that the balls may be sprung into the spaces formed for receiving and confining them between adjacent standards and be held in such spaces by contact with said upturned edge and outturned flanges when the retainer is removed from the ball-race or bearing." The charac-

teristics and distinguishing features of defendant's ball retainer are a circular base having a series of standards rising or springing from its inner edge only, said base being imperforate and concave, or having its outer edge upturned, and said standards having sector-shaped or flaring ends, which are bent or turned outwardly, so as to overlie the circular base, whereby suitable spaces are formed for receiving and confining a ball between each pair of standards; the balls being inserted by forcing them into the spaces past the points of the sectoral portions of the standards, which yield sufficiently for this purpose and snap back into place, so as to confine the balls in said spaces and prevent them from dropping out when the retainer is removed from the bearings, but permitting the removal and reinsertion of the balls without dismembering or mutilating the retainer. Defendant's device differs materially in structure from the Simonds patents, and neither is capable of use in the same situation or for the same purpose as that for which the other is specifically intended.

The device of Patent No. 449,968 has a central tubular body, which is provided with end flanges, each having lateral openings therein, and spherical rollers or balls, which "project through said lateral openings to resist end pressure or thrust." The only points of contact permitted by this construction are at diametrically opposite sides of the cage, contact being made at such points with the plane vertical surface of a stationary box in which the shaft is supported and the corresponding surface of a collar or shoulder on the shaft. The device claimed under patent No. 449,959 is intended to sustain or resist radial pressure, and consists of a cage made by drilling an annular series of chambers in a ring or hollow cylinder of suitable metal; said chambers being extended from one side of said ring nearly to its other side. The chambers are open on the periphery and corresponding inner surface of the annular cage, and are closed at one end by the solid uncut portion of the cylinder and at the other end by a removable cap, which is arranged to permit the insertion and removal of spherical rollers or balls, and to confine or retain them in place within the cage, so that they can be readily manipulated in a body. Between the chambers are the arms or crosspieces, which form the walls of the said chambers and afford attachment for the cap, which is provided with orifices to engage pins on the ends of said arms or crosspieces. The capacity of these chambers is such as to allow the spherical rollers or balls free lateral play, so that they will constantly present new bearing surfaces, and will shift their position to roll on and bear against a more extended area of the concentric sleeves, thus reducing the liability of wear to a minimum, besides diminishing friction and sustaining the required radial pressure.

In the first Simonds patent both sides of the flanges are provided with apertures for the balls, so that each ball can project on both sides of the retainer and come in contact with both sides of the bearing surface, so that the end thrust or pressure is directly transmitted through the balls in lines parallel with the axis or rotation of the rotary part; and in the defendant's device a conical bearing surface passes through the base of the ring and comes in contact with the

balls, the balls coming in contact with the other bearing surface only at a point or points farther from the axis of rotation than the points where they contact with the cone. Hence, in the use of the defendant's retainers, the direction of thrust is at an angle to the axis of rotation and not parallel with it. There can, therefore, be no interchangeable use of these devices. The defendant's construction serves an entirely different purpose from that of the plaintiff, and is not a competitive device.

The conclusion at which we arrive is that the Star ball retainer, manufactured by the defendant, does not infringe any claim of either patent belonging to the plaintiff in this case, and the bill is therefore dismissed.

AMERICAN MERCERIZING CO. et al. v. HAMPTON CO. et al.

(Circuit Court, D. Massachusetts. August 7, 1906.)

No. 44.

PATENTS—ANTICIPATION—PROCESS FOR MERCERIZING FABRICS.

The Thomas & Prevost patents, Nos. 600,826 and 600,827, for processes of mercerizing vegetable fibers and fabrics, are void for anticipation by the Lowe English patent, No. 4,452, of 1890.

In Equity.

Bartlett, Brownell & Mitchell and Louis C. Raegener, for complainant.

George S. Roberts & Bro. and Henry F. Harris, for defendant.

LOWELL, Circuit Judge. This is a bill in equity to restrain the infringement of letters patent No. 600,826, issued to Thomas and Prevost for improvements in processes of mercerizing vegetable fibers, and No. 600,827, issued to the same persons for improvements in treating vegetable fibers or fabrics for dyeing purposes. The following claims are in suit:

"No. 600,826.

"(1) The herein-described process of treating vegetable fiber for giving it a silky luster and feel, which consists in subjecting the material to stretching, mercerizing it, maintaining the tension during the operation of mercerizing and, when such operation is completed, relaxing the tension, as set forth.

"(2) The herein-described process of treating tightly-spun long-fibered vegetable fiber for giving it a silky luster and feel, which consists in subjecting the material to a stretching action, next subjecting the tightly-stretched material to the action of a mercerizing fluid until it assumes a parchment-like appearance, and finally washing or otherwise removing the mercerizing fluid, maintaining the tension upon the whole until the mercerizing fluid is removed, substantially as and for the purpose set forth.

"(3) The herein-described process of treating vegetable fibers, which consists in first stretching, then subjecting the stretched material to the action of a mercerizing fluid until it assumes a parchment-like appearance, next subjecting the material to a greater tension while under the action of the mercerizing fluid until a peculiar silky luster appears, maintaining the tension while washing or otherwise removing the mercerizing fluid from the material, substantially as and for the purpose set forth."

"No. 600,827.

"(1) The herein-described process of treating vegetable fiber for giving it a silky luster and feel, which consists in subjecting the fibers to the action of a mercerizing fluid, without tension, and then during the mercerizing action, that is after the fiber is wetted by the mercerizing fluid and before the removal or neutralization of the said fluid, subjecting the material to a stretching action sufficient to produce a silky luster and feel and prevent shrinkage, substantially as and for the purpose set forth.

"(2) The herein-described process of treating vegetable fiber for giving it a silky luster and feel, which consists in subjecting tightly-spun long-fibered vegetable fiber to the action of a suitable mercerizing fluid, without tension at the outset, and then subjecting said tightly-spun fiber to such a stretching action that a silky luster and feel are produced said stretching action taking place after the fibers are wetted by the mercerizing fluid and before the removal or neutralization of the said fluid, substantially as and for the purpose set forth."

"(6) The herein-described process of treating vegetable fiber for giving it a silky luster and feel, which consists in subjecting the material to the action of a mercerizing fluid, without tension at the outset, then subjecting said material to a stretching action, and continuing and increasing the stretching of the material while it is exposed to the action of the mercerizing fluid until a silky luster is produced thereon, and finally neutralizing or washing it to remove the mercerizing fluid, substantially as set forth."

The defendants denied the validity of the patents, and their infringement. In order to explain the controversy, the history of the mercerizing process and its discovery must be given at some length.

In 1850, John Mercer took out a patent in England, No. 13,296 of that year, for "Improvements in the Preparation of Cotton and other Fabrics and Fibrous Materials." Therein his invention was stated to consist "in subjecting vegetable fabrics and fibrous materials, cotton, flax, etc., either in the raw or manufactured state, to the action of caustic soda or caustic potash, dilute sulphuric acid, or chloride of zinc." This treatment caused cloth and fiber to shrink, to become thicker, closer, and heavier, and especially to acquire "greatly augmented and improved powers of receiving colors in printing and dyeing." The process had little or no commercial value, because the treatment caused a shrinkage of the fiber which left the product practically unfit for use. Rec. p. 484.

In 1889 and 1890, Lowe took out two patents in England, No. 20,314 of 1889, and No. 4,452 of 1890. The latter is relied upon by the defendants as an anticipation of the patents in suit. It concerned "improvements in the treatment of materials composed of cellulosic fibers (such as cotton and flax), through which treatment a better appearance or finish and increased strength and a greater power of assimilating coloring matters and dyes is induced." Lowe's process consisted in treating cloth or yarn with caustic soda; shrinkage being prevented by stretching during or immediately after the treatment. Lowe's process thus differed from Mercer's in two respects: First, in a limitation of the mercerizing process to a treatment of cotton or flax with caustic soda, instead of extending it to a treatment of any vegetable fiber with either alkali or acid; and, second, in stretching the cloth or yarn before drying it. "The material so treated will possess all the advantages of being considerably stronger, having a greater capacity of absorbing natural moisture, having a more regu-

lar, close, and glossy appearance, and of taking up many dyes and coloring matters more readily and economically, while at the same time the objection of having been shrunk is obviated." There is no evidence that Lowe's process, under his name, ever went into commercial use.

On March 23, 1895, Thomas and Prevost, the patentees of the patents in suit, filed an application in Germany, of which country they were citizens, for a patent concerning a process for "the dyeing of cloths woven from raw material out of mixed (animal and vegetable) fibers, to attain color effects which hitherto were not attainable by dyeing the raw goods in the piece." "The vegetable fiber (for example, cotton) is, as is well known, chemically altered by the treatment with strong alkalies or acids." "At the same time, the cotton acquires a very great affinity for all dye-stuffs and mordants." "In order to avoid the shrinking or narrowing of the goods, the cotton, either before the weaving or spinning, is treated with the above-named substance; or the already made raw goods, stretched by the use of a special mechanical contrivance into a condition of full width, is passed through the fluid preparation mentioned, and is washed in the same state." Apparently Thomas and Prevost then intended to stretch only the woven fabric, leaving the mercerized yarn to be woven after shrinking. Their amended specifications of June 20th, however, contemplated stretching either yarn or cloth. The claim was as follows:

"Process of enhancing the affinity of vegetable fiber to be dyed, for dye-stuffs and mordants by preliminary treatment with strong bases or acids, characterized by this: That the vegetable fiber in the form of skein, or already woven, or finally loose before the spinning, is exposed in a tensely stretched condition to the action of bases or acids, and during retention of this condition is washed out, until the internal fiber-tension has relaxed, for the purpose of avoiding the shrinking of the fiber."

It will be noticed that this patent, like that of Mercer, contemplated the treatment of any vegetable fiber with either alkali or acid. Rec. pp. 4, 5.

A proceeding to annul this patent, No. 85,564, was brought in the German Patent Office, based chiefly upon the English patent to Lowe. The patentees resisted the annulment, and argued that the patent, notwithstanding the breadth of its claim, was limited in effect to the dyeing of mixed fabrics in the piece, and that this was the gist of their invention. In other words, they sought to save the patent by narrowing the claim by reference to the specifications. Rec. pp. 17, 19, 24, 26, 29. Nothing was said about the silky luster given by mercerization under tension. The court held that the claim was broader than the invention described in the argument of the patentees, and it annulled the patent on the ground that the invention described in the patent had been anticipated by Lowe. The course of the litigation exhibited an attempt by the patentees to narrow their invention and the patent which protected it to the mercerization of a mixed woven fabric, a process not used by the defendants. On the other hand, if the German patent were construed in its broader sense, and were treated as analogous to No. 600,826, here in suit, the paten-

tees did not seriously dispute anticipation by Lowe. The controversy was between the German patent and that of Lowe. The decision of this controversy depended upon a determination whether the German patent was similar to No. 600,826, in which case anticipation by Lowe was practically admitted, or was limited to the mercerization under tension of mixed fabrics in the piece, in which case it might stand. The German court gave the patent the first-mentioned construction. Rec. pp. 26, 49.

On September 3, 1895, Thomas and Prevost filed in Germany an application for another patent stated to be for an improvement in the process of mercerizing. It differed from the earlier application chiefly as to the time when tension should be applied. The second patent specified that mercerization should take place without initial tension, but that tension should be applied before the acid or alkali had been washed out. On April 4, 1896, in the course of litigation, the silky luster given by mercerization under tension was first mentioned, and at the same time was considerably emphasized. Letters written to the patentees by their customers indicate plainly that mercerization under tension, suggested by the patentees in order to dye better the cotton constituents of a mixed fabric, was found to be valuable chiefly because of the silky luster which it imparted to the cotton. This result was not at first known to Thomas and Prevost, and was first discovered, some months after their first application, either by them or by some other person using their process. Rec. pp. 73, 229, 504. The first specific mention of it is in a letter dated February 11, 1896 (Rec. p. 81), though a vague suggestion of it appears in a letter to the patentees, written in June, 1895. Lowe had noted the result five years earlier, when he mentioned the "glossy appearance" of the cotton treated by his process, though want of considerable experiment had prevented him from appreciating fully the importance of his discovery. The patentees did not distinguish between a stretching of the fiber to a length greater than it had before mercerization, and restoring the fiber to that length. As between stretching the fiber or merely bringing it back to its original length, the patentees' language was vague; e. g. Rec. pp. 2, 58, 60, 72, 79, 170.

The German Patent Office refused to issue the patent as originally applied for, but after much argument, on July 30, 1898, allowed a claim as follows, No. 97,664:

"A modification of the process described in the patent No. 85,564 as well as in the English patent No. 4,452 of the year 1890, for the mercerization of cotton under tension characterized in this wise: That the cotton saturated with soda-lye is subjected to a considerably stronger distending force than has been obtained by normal application of machines hitherto customarily used for like purpose in skein and piece dye-works, so that even long-fibered and hard-spun cotton can be stretched out to its original length and beyond, and the fiber by the mercerization under tension acquires a lasting silk-like luster in consequence of alteration of its structure." Rec. p. 204.

The gist of the invention patented was thus declared to be the use of machinery of extraordinary stretching power in the mercerization of long-fibered and hard-spun cotton. Rec. p. 233. Lowe was recognized as a pioneer. Indeed, the subsequent annulment of No. 85,-

564, for the reason that it had been anticipated by Lowe, left Lowe the only pioneer. Proceedings to annul No. 97,664 were soon begun. The lower court held that the invention described in the original application was anticipated by Lowe, that the extraordinary distending force was not introduced into the application until 1897, and that before 1897 the process of stretching had become old in the art. The Court of Appeals affirmed this decision, impervious to the argument that the Thomas and Prevost "invention is a German one and deserves national protection." Rec. p. 181. It assumed that the original application had been anticipated by Lowe, and that the patent as granted was limited to the use of extraordinarily strong machinery to stretch long-fibered cotton. The patent was annulled upon the ground that, as granted, it did not correspond to the original application upon which it was necessarily based. The German courts thus held consistently that Thomas and Prevost had invented nothing, except perhaps the application of machinery of extraordinary strength to the stretching of long-fibered cotton. As nothing concerning the nature of this machinery was disclosed, the decisions left nothing patentable to Thomas and Prevost.

On September 26, 1895, Thomas and Prevost applied for a patent in England. The application concerned the matter of both the German applications. It contained no reference to gloss or luster. The claims were as follows:

"(1) The herein-described improvement in treating vegetable fibers for dyeing purposes with alkaline lyes or with acids consisting in subjecting the vegetable fiber (in the hank or as a woven fabric) for the purpose of preventing shrinking of the fiber whilst firmly stretched to the action of the bases or acids and then washing the fiber whilst still stretched until the internal stress or tension thereof has ceased substantially as and for the purposes set forth.

"(2) The herein-described improvement in treating vegetable fibers for dyeing purposes with alkaline lyes or with acids consisting in subjecting without stretching the vegetable fiber (in the hank or as a woven fabric) to the action of bases or acids and then—whilst it is still wet with the lye and shrunken—stretching same to its original length and breadth and thereafter washing same while stretched as before substantially as and for the purposes set forth."

The application was opposed by Lowe, and a patent was refused accordingly. Later Lowe agreed with Thomas and Prevost to withdraw his opposition. Following the English statute, an application was made to the Solicitor General for leave to file new evidence and to reopen the case, so as to permit the patent to be issued either after amendment or by way of reversing the action of the English Patent Office. The Solicitor General refused the application, holding that after Lowe's objection had once been entertained the public had an interest in the contest, which could not be satisfied by an agreement between the contestants. A later application by Thomas and Prevost, September 18, 1896, resulted in a patent, No. 20,714 of 1896, after Lowe had withdrawn his opposition thereto. A patent based upon a bargain with the real inventor and an earlier patentee has no weight as an argument in this case. It follows that the English Patent Office held unequivocally that the invention claimed in the patents in suit was anticipated by Lowe. In Germany, the birthplace of the alleged in-

vention, and in England, the home of the Lowe patent, the latter was held to anticipate everything of real value in the applications of Thomas and Prevost.

Many patents were granted to Thomas and Prevost in countries of continental Europe. In some of these silky luster was mentioned; in others this characteristic was not noticed. No proof has been made of the patent laws of these countries, and so this court is not informed what weight should be attached to the patents therein granted. The application for No. 600,826 was filed in the American Patent Office June 4, 1896. It did not distinguish between mercerization of cotton and flax, and of all vegetable fibers generally. It made no distinction between mercerization by alkalies and by acids. The patent to Lowe was not noticed in the American Patent Office. No. 600,827 was applied for January 22, 1897. The application sought to patent mercerization without tension at the outset; the tension being applied altogether after the fiber is wetted. It is true that the specifications, especially page 2, lines 32-34, are vaguely expressed in this respect, and the complainants' expert has argued that "without tension" means "no such tension before mercerizing as is contemplated and necessary for the production of a silk-like luster," whatever that degree of tension may be. This contention, however, is altogether at variance with the claims in suit.

In No. 600,827, Thomas and Prevost further sought to state invention as follows: While "it is common to treat fibrous materials with certain mercerizing fluids and other mordants while such material is held in a more or less stretched condition," "we are not aware that any one prior to our invention has discovered the important fact herein disclosed, namely, that the fibrous material when subjected to a sufficient stretching action during the mercerizing process will be given a peculiar silk-like luster." But, if the process is unchanged, the discovery of a new result does not constitute invention. If reliance be placed upon some specific degree of stretching, not practiced before, we find that the patent states that "it is sufficiently definite for a proper understanding by those skilled in the art to say that the material must be so stretched during the mercerizing process that the individual fibers will be elongated and the silk-like luster will be produced." The patentee thus says in effect:

"I seek a patent for mercerizing under tension to produce a silky luster. I am aware that mercerizing under tension has been common, but no one has hitherto noticed that a silky luster results. I cannot say how much tension is necessary to produce this luster. It is enough to say that the tension must be sufficient."

This is not to state an invention, and, moreover, as has been seen, Lowe's patent states both tension and resulting gloss. Thomas and Prevost never showed, and, so far as appears, never knew, whether mercerization under tension, or tension after mercerization, whether tension to maintain the fiber at its original length, or tension to increase this length, best imparted the silky luster sought. The evidence shows that it may be produced in all these ways. Having proposed to mercerize mixed fabrics under tension for the sake of an

improvement in dyeing, they discovered by themselves, or were informed by some manufacturer who used their process for its original purpose, of the wonderful and unexpected luster. They did not first invent the process, for Lowe described it clearly. There is no proof that they were the first to notice the luster, because: (1) The time, place, and manner of its first observation in Germany is not shown; and (2) It had been observed five or six years earlier in England by Lowe. They did not invent any detail of the process, which made the result better or more certain than did the process described by Lowe, for their patents in substance disclose nothing as to the time of tension, except that it must be before the yarn is dried, and nothing as to the degree of tension, except that it must be enough and not too much. They do not distinguish between the vegetable fiber that will take on an attractive luster, and the fiber that will not, or between the alkalis which are effective for the purpose, and the acids which are practically useless. Their language does not go beyond Lowe's statement that "fibers such as cotton and flax," "mechanically stretched whilst subjected to the action of or treatment by the sodium hydrate," or subjected "to a stretching process or operation after the sodium hydrate bath, but necessarily before the fabric has lost its temporarily pliable condition," have "a more regular, close and glossy appearance." Of the two Lowe is the more specific.

Summarizing the history, we find that Mercer first suggested the process which has since gone by his name; but he did not distinguish between different kinds of vegetable fiber, nor between the application of acids and alkalis. As the shrinkage was uncontrolled, no practical result followed from his invention, and the silky luster, which is by far the most important result of mercerization, was not suspected by any one. Forty years later Lowe first discovered and suggested mercerization under tension. He further improved upon Mercer by differentiating the various kinds of vegetable fiber and limiting the process of mercerization to "cellulosic fibers (such as cotton and flax)." He also limited his mercerizing agent to caustic soda, and thus pointed out the practical limitations of the art. He discovered that the process would give to the cotton mercerized a glossy appearance, but he did not fully recognize the importance of this result. His invention did not go into practical use, probably by accident, and so the emphasis which experiment would have put upon the luster did not arise from his discovery. Thomas and Prevost, perhaps independently, discovered mercerization under tension. At first they knew nothing of the luster thus imparted; that is to say, they offered no suggestion beyond Lowe's as to the method, and they knew less than did Lowe of the result. But their process came into use, and by their experiment, or by that of others, the silky luster was found to be all important. Thomas and Prevost then tried to save themselves from the anticipation of Lowe by suggesting unimportant differences. These attempts have failed wherever there has been a contest. Thomas and Prevost bought out Lowe, but the success they thus secured in Great Britain and elsewhere is unavailing in the United States, where Lowe's invention belongs to the public. It follows that the claims in

suit are anticipated by the British patent to Lowe, and the bill must be dismissed with costs.

Bill to be dismissed, with costs.

GRAY v. GRINBERG et al.

(Circuit Court, E. D. Pennsylvania. October 8, 1906.)

No. 39.

PATENTS—SUIT FOR INFRINGEMENT—JURISDICTION IN SUIT AGAINST NONRESIDENT.

Evidence considered, and *held* not sufficient to sustain the burden of proof resting on a complainant, in a suit for infringement of a patent against a nonresident defendant, to show an actual sale of an infringing article by defendant within the district which was essential to give the court jurisdiction.

[Ed. Note.—Jurisdiction of federal courts in suits relating to patents, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

In Equity. On final hearing.

Mark W. Collet, for complainant.

H. Cobb Kennedy and Horace Pettit, for respondents.

J. B. McPHERSON, District Judge. This is a suit for the alleged infringement of design patent No. 37,301, issued to the complainant in January, 1905, for "a new, original and ornamental design for lamps." The validity of the patent is attacked, and much of the testimony bears upon this defense; but, in my opinion, the case must be decided upon another point, and the validity of the patent must be left for determination in some other suit.

The point referred to is the complainant's failure to prove a *prima facie* case of infringement. The bill admits that the defendants are citizens of the Southern district of New York, and the jurisdiction of this court to entertain the controversy depends, therefore, upon the truth of the averments that they have a regular and established place of business in the Eastern district of Pennsylvania, and have been, or are, committing acts of infringement within this district. I agree with the decision in *Westinghouse Electric Co. v. Stanley Electric Co.* (C. C.) 116 Fed. 641, that, since the commission of an act of infringement within the district has been made essential to the jurisdiction of the court, it is necessary to prove a completed act, and not merely a threat, or an evident purpose, to infringe upon the rights of the patentee. Indeed, the complainant does not dispute the correctness of this position, but undertook in conformity therewith to prove that the defendants had sold in this district a lamp that infringed his patent. As it seems to me, however, the evidence that was offered upon this point leaves the matter in so much doubt that he cannot be said to have sustained the burden of proof that undoubtedly rested upon him. In brief, the evidence was this: The complainant sent two witnesses to the defendants' store in Philadelphia, where they were shown certain lamps, of which the exhibiting salesman said that the firm had sold many

in Philadelphia. Instead of buying one of these lamps and producing it for inspection before the examiner and the court, so that it might be certainly determined to be either genuine or counterfeit, the witnesses contented themselves with testifying to the declarations of the salesman, and with adding that the lamps shown to them by him were "a good representation," or were "substantially identical," with the picture of a lamp called the "Majestic lamp," which is averred to be the infringing article. The defendants did not deny that they had advertised the Majestic lamp in certain numbers of a periodical that were offered in evidence. A lamp of the complainant's design was then produced before the examiner, and afterwards in court, and the comparison between this lamp and the picture in the periodical was relied upon to complete the proof that the lamp which, according to the declarations of the salesman, had been sold in Philadelphia by the defendants, infringed the complainant's patented design.

Admittedly, therefore, there is no direct proof of a sale, and the question for decision is whether the evidence fairly justifies the inference that an infringing article was sold in this city. If the declarations of the salesman are to be rejected as incompetent hearsay, the remaining evidence is clearly insufficient; and, even if they are to be received as the declarations of an agent concerning the business in which he was employed at the time, I still regard the proof as falling short of the legal measure. It cannot be overlooked that the advertisements do not refer to the defendants' store in Philadelphia at all, but to their place of business in New York; and that the two witnesses do not testify that the lamps which they saw in Philadelphia were marked Majestic, or were even so named by the salesman, but merely that they were good representations of the picture in the advertisements, or were substantially identical therewith. Further, whatever force this rather indefinite testimony may have, concerning the likeness between the picture and the lamps seen in Philadelphia, is greatly impaired by the fact, which appears in complainant's record and is also admitted in the brief of his counsel, that the defendants had formerly been customers of the complainant's firm, and had bought lamps from them of the patented design. These trade relations existed in the early part of 1904, and probably later in that year; and, as the two witnesses who visited the defendants' store in Philadelphia were there in April and May of 1905, it is evidently very difficult, if not wholly impossible, to pronounce with positiveness, or even a fair degree of probability, whether the lamps that were seen in 1905 were of the complainant's genuine design, and had been previously bought from his firm, or were infringing copies. The decision is more difficult, because the complainant avers that the genuine and the counterfeit lamps are so nearly alike that only a close examination can distinguish between them; and, if this be true, and if he had it in his power, but failed, to offer to the court the opportunity of making such an examination as might reasonably satisfy an observer whether the lamps seen in Philadelphia were genuine or not, he can hardly complain if the evidence that he does offer on this point is scrutinized with some degree of care. For the reasons thus indicated, I cannot avoid the conclusion that he has not produced the

proper degree of proof, and that the evidence is not sufficient to satisfy the court that infringing lamps have been actually sold in this district.

Apparently feeling the force of these objections, which were vigorously urged at the final hearing of the cause on June 26, 1906, the complainant presented a petition on July 7th, asking that the case might be reopened to permit him to offer further proof concerning the sale of an infringing lamp. I have carefully considered the affidavits that were presented in support of this motion and in opposition thereto, and I am of opinion that the complainant has not made out a sufficient case for rehearing, within the established rules governing the practice of the courts upon such motions. A rehearing must therefore be refused.

A decree may be entered dismissing the bill of the complainant, with costs.

CUSHMAN & DENISON MFG. CO. v. DENNY.

(Circuit Court, S. D. New York. July 17, 1906.)

PATENTS—INVENTION—WIRE PAPER CLIP.

The Kelley patent, No. 761,635, for a wire paper clip comprising two triangular-shaped bodies having a base line in common is void, for lack of patentable invention in view of the prior art.

In Equity. On final hearing.

Edward C. Davidson, for complainant.

Almon Hall, for defendant.

PLATT, District Judge. Usual action for infringement of Patent No. 761,635, granted to Arthur F. Kelley, May 31, 1904, claims 7 and 8 being at issue. I quote them:

"(7) A wire paper-clip comprising two triangular-shaped bodies having a base-line in common for both, one triangle lying within the other with the wire composing the sides thereof in the same plane and touching, the smaller triangle being formed by extending the wire straight from one end of the base line longitudinally and inward to the central, longitudinal line of the clip, thence backward and outward longitudinally in a straight line to the other end of the base-line; and the larger triangle being formed by extending the wire straight from said second-named end, longitudinally and inward to the longitudinal center of the clip outside of the smaller triangle, and beyond the end thereof, thence backward and outward longitudinally in a straight line also outside of the smaller triangle to the first-named end, substantially as and for the purpose set forth.

"(8) A wire paper-clip comprising two triangular-shaped bodies having a base-line in common for both, one triangle lying within the other; the smaller triangle being formed by extending the wire straight from one end of the base-line longitudinally and inward to the central, longitudinal line of the clip, thence backward and outward longitudinally in a straight line to the other end of the base-line; and the larger triangle being formed by extending the wire straight from said second-named end, longitudinally and inward to the longitudinal center of the clip outside of the smaller triangle and beyond the end thereof, thence backward and outward longitudinally in a straight line also outside of the smaller triangle to the first-named end, substantially as and for the purpose set forth."

The defendant is shown to have sold clips made by the Weis Binder Company, Toledo, Ohio, which are substantially the same as clips made by the complainant, who invokes the Kelley patent which it owns by assignment. The story connected with this suit is a remarkable one, and casts a strong light upon what may be done at the Patent Office, if the applicant's path is carefully tended by his attorneys. By way of premise, it may be said, that the invention which suggested itself to Kelley and to Robert Gorton, hereinafter to be discussed, can only be discovered by an exceptionally agile mind when the investigator has carefully studied Clough No. 276,001, April 17, 1883.

From the record, including "Complainant's Exhibit, File Wrapper and Contents, Patent in Suit," supplemented by "Defendant's Exhibit, Interference Record, Kelley v. Gorton," we gather the following facts: The patent to Kelley in suit and the patent to Robert Gorton No. 761,631, were issued on the same day. Gorton's, it will be noticed, being four numbers earlier than Kelley's. Each assigned a half interest to the other.

That situation came about in this way: The two applications were placed in interference. Kelley fixed the date of his invention at about August 1, 1900. Gorton fixed the date of his invention on November 16, 1898. Thereupon Kelley sought out Gorton, and they arranged to own the patents jointly and divide all benefits. They had different solicitors, but Kelley at once discharged his and employed Gorton's. At the same time and place Gorton and Kelley filed mutual concessions of priority, the first three counts in the interference going to Gorton and the rest to Kelley.

It will be noted that the claims conceded to Gorton fit Fig. 1 of Kelley's drawings; in fact, Fig. 1 of Gorton's drawings is the same as Kelley's Fig. 1 turned over. The clip of Gorton's claims is precisely the clip of the patent in suit. The complainant comes into court with this cloud upon its title, and it is not perceived that the *prima facie* validity of the patent has been established. Take another view of the matter. Kelley's original application had but one claim, which contained, *inter alia*, the following: "One triangle lying within the other with the wire composing the sides thereof in alignment laterally and touching." This claim was amended and a new one containing the same limitation was rejected on the patent to Clough. Later, without solicitation, the Patent Office allowed the claim, and threw it into interference with Gorton's nine claims. Thereupon Kelley disclaimed Gorton's nine, and limited himself to his restricted claim. Then the examiner said that his claim was not patentable in view of Gorton's nine claims, and he must fight his interference on those nine claims or be driven out of the office patentless. Kelley obeyed, and then the examiner advised him to restore his erased and limited claim, and Kelley obeyed again. Then follows the story told above.

Thus appears the curious case of an inventor being compelled by the Patent Office to make claims which he had expressly disclaimed, and which had been properly rejected; of a patent issued as the result of an interference in which the opposing parties had the same attorney; and of two patents issued on the same day for the same

thing. Aside from these considerations, it is not thought that in view of the prior art, either Kelley or Gorton produced anything worthy to be designated with the word invention, and fit to be surrounded with the solemn pomp and ceremony of Patent Office proceedings. The patent to Clough, 276,001, *supra*, shows a clip possessing each of the elements of the Kelley clip, operating in the same way, and producing the same results. There is no difference at all, except that in the Clough clip the loops at the extremities farthest from the base have a greater radius of curve, but the examiner, speaking on that subject, said:

"It is true that Clough's device is D-shaped, while applicant's is triangular, but it is not apparent that the different results obtained by the applicant, *if there are any*, are such as to warrant the grant of a patent for applicant's device in the face of Clough."

(The italics are mine.)

Kelley did not answer this, but as has been shown, took his patent at last with this claim in it. The examiner's criticism is still pertinent and persuasive, despite the argument of counsel and the opinion of the expert.

One last word. The defendant manufactures under the Weis Patent, 767,458, August 16, 1904, which claims a paper clip "formed of a single piece of wire bent into an elongated acute-angled triangle, and into a smaller less acute-angled triangle having the same base as the larger triangle," etc. If Kelley was patentable over Clough, then Weis is entitled to a patent over Kelley, and it will be noticed that when it comes to making the clips, the complainant avails itself of the suggested modification upon which Weis got his patent. The complainant, therefore, is a confessed infringer of the patent of the manufacturer against whom it complains. The complainant insists that the defendant's exhibit "Interference Record" should be eliminated from the case on technical grounds. It has received its due share of importance in this hurried opinion; but, on the whole, it is not material whether it be considered in or out of the record. I think that it belongs there as a part of the case, but my final conclusion would be the same without it.

Let the bill be dismissed.

UNITED STATES FASTENER CO. v. WERTHEIMER et al.

(Circuit Court, S. D. New York. July 19, 1906.)

No. 8,879.

PATENTS—INVENTION—GLOVE FASTENER.

The Douillet patent, No. 440,020, for the socket member of a glove fastener having a head of pearl or other material, is void for lack of invention, in view of the prior art, which showed the same construction of a button having a sheet-metal head.

In Equity. On final hearing.

John P. Bartlett and Donald Campbell, for complainant.
Livingstone Gifford, for defendant.

PLATT, District Judge. This is a patent suit in the usual form, based upon alleged infringement of letters patent No. 440,020, dated November 4, 1890, to L. A. Douillet, for improvement in buttons. I quote the only claim:

"The socket member of a glove-fastener, consisting of a head of pearl or other material having an outwardly-flaring annular kerf, a flanged open-ended eyelet expanded by contact with the walls of said flaring kerf when pressed into its seat and retaining the material by means of the flange, and with a central cavity for the reception of a spring-stud, substantially as herein set forth."

The principal defense is lack of invention treated in a variety of ways, and in one aspect of the case noninfringement. It is undoubtedly an important matter and has been elaborately presented. It has been carefully examined, and I think that I have absorbed every phase of the contention as it strikes the opposing parties. I am, therefore, not disposed to apologize for the abbreviated form in which lack of further time compels me to couch some of the reasons which compel my final conclusion.

There was a time, not so very long ago, when the art with which this matter is connected was a difficult one, and when those steps which would in ordinary cases appear to be subtle refinements were in this one entitled to consideration as practical advances in invention. Whatever might have been said, however, as to the bearing of common eyelet buttons upon what the complainant claims is a distinct art, to wit, the snap-fastener art, was put at rest after *Kent v. Simons* (C. C.) 39 Fed. 606, had been decided and published. In that suit the complainant claimed under the Mead patent of September 1, 1885, No. 325,430. The defendant manufactured under the Raymond patent, No. 369,883, of September 13, 1887. The defense then relied upon was anticipation, shown in prior button patents, especially in the Capewell patent, February, 1869, the Hazeltine English patent of 1870, and the Huddart English patent of 1863. The Capewell and Hazeltine patents show an eyelet expanded in an outwardly flaring kerf, and Huddart shows solid heads composed of "pearl, ivory or bone," right alongside of the sheet-metal heads. This condition of affairs permeates the entire list of ordinary button patents. It was therefore plain that in the eyelet button art it was well understood how to permanently attach an eyelet to a solid pearl button by means of an annular flaring kerf with a central cavity. The citations therein failed by a hair's breadth of being adequate references, and Judge Colt gives the reason for that failure. The defendants had contended that the Mead patent was for an ordinary button, and that the use of it with a spring-stud was incidental. But the judge says that the principal object of the Mead invention was the "production of an improved button adapted for use with a spring-stud," and the addition of a shank and its use as an ordinary button was incidental to the dominant purpose. He thought that Mead had a new combination and an improved result; "that improvement consisting largely in the convenient form of the central opening for receiving the spring-stud, while at the same time preserving the button finish." So

the Mead patent was adjudicated to be valid, and snap-fastener sockets became well known.

We may take the Raymond socket, which had been used by the defendant in *Kent v. Simons*, as a fair illustration. In this a sheet-metal head was used, and although the snap-fastener is made by "building up" through the use of several parts, the controlling idea of complainant's patent is present. It is the socket head of a glove fastener, and it has an "outwardly flaring kerf" and a flanged eyelet which expands by contact with the walls of the kerf, which, when pressed down into its seat, will be retained therein by means of the flange, and it has a central cavity to receive it. Nothing is lacking, except that the head is not of "pearl or other material," which may be said to include solid pearl, because the specification says so, although the claim does not. The complainant's argument is that he has simplified the Raymond construction, which argues invention, and that the Raymond device would not teach the ordinary mechanic how to use solid pearl or other material to attain the same result. Mr. Livermore, the expert who supports the patent in suit, was also the expert who supported successfully the Mead patent in *Kent v. Simons*, and in rebutting expert Bentley in that case he pointed out precisely the same features to distinguish the Mead patent from the prior art which he now uses to save the Douillet patent. All through this case it is plain that he expects the grace which saved the one to be now applied in favor of the other.

At the present day it is well understood in the art how to apply a spring-stud to the underside of a metal button by using a kerf and central cavity, and it is certainly no invention to do the same thing to a solid pearl button. The patentee's firm had the Raymond patent, and it is significant that almost as soon as they were defeated in *Kent v. Simons* he made an attempt to avoid both Mead and Raymond by application for the patent in suit. He must have known how thoroughly buttons and snap fasteners had become welded into a single art by the doings in that suit. His journey through the Patent Office was an interesting one. He was met by the button references, just as Mead had been. He made the same arguments to get away from the buttons, practically the same language was suggested to and accepted by him, and, in a word, he got at last substantially Mead's idea over again, with pearl in the place of sheet metal. If the Patent Office can be permitted to continue in such a complaisant humor as it was at the time of granting this patent, it would be rather easy in many cases to extend the grant of monopoly upon a bright idea long beyond the statutory term. I have traveled all the paths opened up to me in this suit, and at the end of each of them I reach the same conclusion.

Let the bill be dismissed.

CONSOLIDATED RUBBER TIRE CO. et al. v. FIRESTONE TIRE & RUBBER CO.

(Circuit Court, S. D. New York. July 20, 1906.)

No. 8,992.

PATENTS—INVENTION—RUBBER TIRE WHEEL.

The Grant patent, No. 554,675, for a rubber tired wheel, discloses invention and is valid; the rocking or tilting of the tire when compressed on either side being an inherent function, when the tire is made in accordance with the directions of the patent. Also, *held* infringed.

In Equity. On final hearing.

Thomas W. Bakewell, Paul A. Staley, and Border Bowman, for complainants.

Charles C. Linthicum, for defendant.

PLATT, District Judge. This is a patent suit in the usual form, alleging infringement of Grant patent, No. 554,675, February 18, 1896, for a rubber tire. Judge Thomas sustained this patent in *Rubber Tire Wheel Co. v. Col. Pneu. W. Co.* (C. C.) 91 Fed. 978, and wrote a well-sustained opinion in support of his conclusion. The defeated parties in that cause have become by business arrangements connected with the complainants in the present suit.

Several other judges followed the reasoning presented by Judge Thomas, until it happened that Judge Wing had the matter up in the Circuit Court for the Northern District of Ohio, Eastern Division, and on December 9, 1901, he came, after an independent examination, to the same conclusion. His decision was reversed by the Circuit Court of Appeals for the Sixth Circuit on May 6, 1902. 116 Fed. 363, 53 C. C. A. 583. That tribunal was composed of very able and learned judges, from whose opinion it would be unwise to differ, unless the opposite conclusion were so obvious as to compel the mind and conscience. Judge Thomas, in sustaining the patent, was convinced that in a general way no tire prior to Grant really did what Grant's tire did; that it required Grant's specific combination of parts to accomplish his results; that all combinations except Grant's lack harmony and disclose discordant notes; that therefore Grant did more than select and aggregate; that he actually invented something. He found, among other things, that the specific arrangement of channel and tire was such that the rubber tire, when sharply compressed on either side, had a tendency to rock, or tilt, in the channel-iron; one wire acting as a pivot and the other as a retaining force, so that the tire would reseal itself. This he thought was functional and inherent in the device when made according to the specifications.

The Circuit Court of Appeals, Sixth Circuit, found the turning point in the case to be at that point. They concede that if the old parts selected from old combinations perform a new function, or operate in a new way to produce a new and beneficial result, enough will have appeared to constitute invention. They say that the rocking and resealing idea is not expressed in the specifications, and that

it is not necessarily present in the device made under them, because the retaining wires must not be so tight that the wire would break or the rubber be cut before the tilting and reseating could take place, and must be loose enough to permit the rubber to move slightly, but not so loose as to permit the rubber to fall out of the rim of its own accord. This tension would depend upon the whim of the workman. The specifications being silent as to this function and the proper tension of the wires to permit the function, it is not an inherent characteristic of the device as explained. The following is a verbatim segment of the opinion:

"But, if the retaining wires were tightened to their full tension when their ends were welded or otherwise united, this capacity to rise or yield to the excessive strain applied to the rubber is not shown to exist."

The court practically admits that if the tilting movement had been mentioned, or even if a direction could be found in the specifications that the wires should be applied at the proper tension, it would be enough; but, taking the situation as they found it, they were convinced that the patent was "void for want of patentable novelty," and dismissed the bill.

In the suit at bar the complainants insist that they have settled by ample proof the question of the tipping capacity of the Grant tire. They claim to have shown beyond dispute that the rocking or tilting quality is inherent in the Grant construction, and that it cannot be destroyed by the tightness of the wires, but will be present and operative when the last extremity of tension, prior to breaking, has been reached. They say that defendant's expert clearly concedes the actual existence of that mode of operation in the Grant patent, which was the turning point in the Sixth Circuit appellate decision. It is fortunate for me that the patent in suit has been so thoroughly analyzed by so many eminent judges, for all of whom I have a deep regard. I am thereby relieved from what would be an agreeable, but exhaustive, bit of work. It is enough to say that upon the record as made up and presented to me the patent in suit is undoubtedly valid. I think that Grant evolved a meritorious and beneficial device, having great utility, and that it certainly required inventive genius of a high order to bring together different parts of old devices and to combine them in such a way as to give the world his tire. Many had tried before and failed. Many have tried since and failed. It is improbable that Grant's construction will be improved upon in our day, and it is beyond the bounds of possibility that so great a success can have sprung from an accidental feature, which just happened to be there, and, unsolicited, gave the world that great boon which the patentee believes himself to be entitled to be credited with, and about which the court has become satisfied that he is right.

The defendant denies the title in complainant. The complainant bought all assets, tangible and intangible, of the Rubber Tire Wheel Company, and is in possession. I think that there is enough shown to warrant the suit, especially as the important matter is to pass upon the validity of the Grant patent.

Defendant also denies infringement; but I think that "Complainant's Exhibit No. 3, Defendant's Rubber Tire Wheel," although obtained in a rather devious manner, is sufficient to settle the technical question of infringement, when the Grant patent is construed as I think it ought to be construed. It is true that in the exhibit as it now appears the vertices of the angle in the rubber tire do now and then come above the top of the rim; but non constat that it was always so, and, as I have said above, at any rate, it is enough for the main purpose of the suit.

Let the usual order be entered for the complainant.

BREIDIN v. NATIONAL METAL WEATHERSTRIP CO.

(Circuit Court, W. D. Pennsylvania. August 11, 1906.)

No. 39.

1. JUDGMENT—CONCLUSIVENESS—PATENTS—SUIT FOR INFRINGEMENT—CONCLUSIVENESS OF PRIOR ADJUDICATION.

A decree in a prior suit for the infringement of a patent is none the less conclusive between the parties on the issues of validity and infringement because it was merely interlocutory, when the second suit was commenced, where it is set up therein as an adjudication by a supplemental bill, after having ripened into a final decree.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1161, 1162.

Effect of previous decisions in patent cases on Circuit Court of Appeals, see notes to *National Cash Register Co. v. American Cash Register Co.*, 3 C. C. A. 565; *Thomson-Houston Electric Co. v. Hoosick Ry. Co.*, 27 C. C. A. 427; *United States Freehold Land & Em. Co. v. Gallegos*, 32 C. C. A. 475.]

2. PATENTS—RIGHT TO PLEAD PRIOR DECREE OBTAINED PENDING SUIT.

The owner of a patent, who has obtained an interlocutory decree adjudging its validity and infringement, is not required to wait until it has become final before bringing suit against the defendant for infringement by the same device in another district; nor is he precluded, by the fact that evidence has been taken in the second suit, from pleading therein the final decree when obtained in the first suit as an adjudication.

In Equity. Suit for infringement of letters patent No. 424,905, for a weather strip, granted to Abert Clinton Sims April 1, 1890. On final hearing.

L. S. Bacon, for complainants.

Charles M. Clarke, for defendants.

ARCHBALD, District Judge.¹ This is a suit for the infringement of a patent for a metal weather window strip, issued to A. C. Sims April 1, 1890. The bill was filed September 26, 1904, and answer having been promptly made, contesting the validity of the patent and denying that it had been infringed, the case was duly put at issue, upon which proofs have been fully made. It appears, however, that at the time suit was brought there was pending in

¹Specially assigned.

the United States Circuit Court for the District of Maryland, a prior suit by these same plaintiffs on the same patent and for the same infringing device, against one Moses Solmson, the defendants' agent, in which suit the defendants appeared and made defense, employing counsel and paying the expenses. That suit was brought to a hearing June 24, 1904, and on August 22d an opinion was rendered sustaining the patent and finding that it had been infringed; claims 2 and 3, the same as here, being the ones relied on. *Bredin v. Solmson* (C. C.) 132 Fed. 161. A decree was thereupon entered, September 10th, awarding an injunction, directing an account, and referring the case to a master; and on appeal taken this was affirmed February 21, 1905 (*Solmson v. Bredin*, 136 Fed. 187, 69 C. C. A. 203), following which, the case having been remanded, a final decree was entered January 10, 1906, on the coming in of the report of the master. The present suit followed directly upon the interlocutory decree in that one, and it is conceded was inspired by it; being recited in the bill, which thus proceeds, in part at least, on the strength of it. By the supplemental bill the final decree has now been brought in, and the question is as to the effect to be given to it.

It is not disputed but that, by intervening and contesting the former case as they did, the defendants became privies to the result, and it is admitted that the issues are the same, except as other alleged anticipating devices have been introduced, assailing anew the validity of the patent. But the point is made that at the time the present bill was filed, and issue joined, the other suit was merely in an interlocutory stage, and the decree by which the patent was sustained and an account directed was thus persuasive only; (*Rumford Chemical Works v. Hecker*, 2 Ban. & A. 351, Fed. Cas. No. 12,133; *Harmon v. Struthers* [C. C.] 48 Fed. 260), requiring the suit in hand to be prosecuted independently to the end. This fails, however, to distinguish between the effect to be given to the case at that stage of it and at the one to which it subsequently attained. Having been brought to final judgment, and the matters which are here litigated having been examined and passed upon, it has now been immutably determined, by the decision of the court where it was pending, that, contrary to the contention of the defendants, the patent is valid, and that the weather strip which they manufacture and vend infringes upon it. It is difficult to see how anything could be more conclusive than this, or what use there is in the doctrine of *res judicata*, if it is not to so prevail here. Suppose the decision had been the other way; is there any question that the defendants by a cross-bill, in the nature of a plea puis d'arrein continuance at law (1 Dan. Chanc. Prac. 607), could have brought it in and had effect given to it? And, as estoppels must be mutual, why, then, may not the plaintiffs do the same thing, by supplemental bill, now that it is the other way? Or suppose, after a final decree in favor of the plaintiffs, either here or there, the defendants were found to be infringing in another district; would not a bill lie there, based solely on such decree, and would not the defendants be bound? And yet what difference is there in principle from what we have here, the decree in the Maryland case having been brought in by

the supplemental bill and made paramount, the same as if suit had been originally based upon it, for which the recitals in the original of the pending suit and the interlocutory decree laid ground?

Authorities upon the subject are not wanting, which present the exact situation and confirm the conclusion so reached. Thus, in *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 980, 6 C. C. A. 661, it was held that a decree in a prior suit for the infringement of a patent is none the less conclusive because it was merely interlocutory at the beginning of a second one, in which it is set up as a bar after having ripened into a final decree. So, in *Penfield v. Potts*, 126 Fed. 475, 61 C. C. A. 371, the fact that a decree which constituted an adjudication as between the parties to a second suit did not become final until after an interlocutory decree had been entered was declared not to affect it as a bar when presented before final decree therein. And in *Duffy v. Lytle*, 5 Watts (Pa.) 120, and *Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766, it was said that a prior judgment upon the same cause of action sustains the plea of a former recovery, although the judgment (conversely to what we have here) is in an action commenced subsequently to the one in which it is pleaded. "The date is of no consequence," says Thompson, J. "It is the fact of an adjudication upon the same subject-matter, and between the same parties, which gives effect" to it.

It is said, however, that new references have been introduced, and that there are thus new issues. But issues and evidence are not to be confounded. The issues are not changed, whatever be the evidence to sustain them; the question of the validity of the patent and the infringing character of the defendants' device being the only ones involved in either suit. A new attack is made upon the patent by the introduction in evidence of other alleged anticipations; but the issue, notwithstanding this, remains the same. These references, moreover, existed and were equally available to the defendants, then as now; and it is established beyond question that, where a party has been once finally heard, he is concluded, not only as to the defenses which were made, but also as to all that might have been. *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195; *Sacks v. Kupferle* (C. C.) 127 Fed. 569. As is said in *Gordon v. Ware Nat. Bank*, 132 Fed. 444, 65 C. C. A. 580, a prior judgment on the merits between the same parties is conclusive, whether right or wrong, and as well as to everything which might have been considered, as actually was. It was accordingly held in *Empire State Nail Co. v. American Solid Leather Button Co.*, 74 Fed. 864, 21 C. C. A. 152, that a decree formally declaring the validity of a patent sued on, although that was not the issue directly made, is conclusive in a subsequent suit between the same parties and their privies, with regard to a similar infringing device.

But it is further said, that there was nothing to prevent the plaintiffs from relitigating the questions at issue, and that, having brought the present bill without waiting for a final decree, and thereby chosen to treat them as still open, putting the defendants to the expense of a contest on the merits, they are not in a position to foreclose the matter, as they now seek to do. But there was nothing which required the plaintiffs to defer bringing suit, which would have left the de-

defendants to continue to infringe in the district, undisturbed; and the question of the validity of the patent and the infringing character of the defendants' device being admittedly open at the inception of the suit, however persuasive the interlocutory decree in the other case might have been in their favor, there was nothing to do but to proceed as they did until by a final decree they were in a position to conclusively assert it. This certainly did not preclude them from bringing in that decree when it came, by which of necessity the other proofs were superseded; nor did it amount to a waiver to take them meanwhile, which, so far as the plaintiffs were concerned, could not well have been avoided. *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 980, 6 C. C. A. 661. If the defendants were thereby put to unnecessary expense, they have only themselves to blame for it. No effort was made to stop it by pleading the other suit in abatement, as they might have, and, having chosen to contest on the merits, as they did in the face of the interlocutory decree which had been rendered, they have no equity to urge now that the final decree, as they might have expected, has gone against them. As, then, the decision so made not only renders unnecessary, but precludes, any further examination of the questions passed upon, whatever the temptation be to go into them, the patent must be sustained, without more, and infringement found, and an accounting ordered.

Let a decree to that effect be drawn in favor of the plaintiffs, with costs.

SIMPLEX ELECTRIC HEATING CO. v. LEONARD. et al.

(Circuit Court, S. D. New York. July 7, 1906.)

1. PATENTS—INFRINGEMENT—BILL—PARTIES.

Where, in a suit to restrain the infringement of a patent, the facts alleged and admitted showed that defendant L. used the L. Co. merely as a name or cloak under which to commit acts of infringement, that L. was bound by a decree in favor of plaintiff in another suit for infringement, and that the L. Co. was really the same thing as L. himself, the company was bound by such decree, and both were therefore proper parties to the bill.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 470-472.]

2. SAME.

In a suit to restrain the infringement of a patent, a party who was alleged to be encouraging the manufacture and sale by the other defendants of the infringing device and was closely connected with the transactions complained of was a proper party to the bill.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 470-472.]

In Equity.

Duncan & Duncan, for complainant.

Kenyon & Kenyon, for defendant.

PLATT, District Judge. In view of the action about to be taken, an elaborate statement of the controversy in suit seems unnecessary.

Suffice it to say that the court offered an attentive ear at the hearing, and has refreshed its recollection by a careful reading of the bill and demurrers, and of the briefs presented by counsel.

The reasons presented against the propriety of making Leonard and the Leonard Company joint defendants are not at all persuasive. The facts alleged and admitted show that Leonard uses the Leonard Company merely as a name or cloak, under which the acts of infringement are committed, and that the privity between Leonard and the defendant in the Connecticut suit was such that Leonard is bound by the decree in that suit, and that the Leonard Company, being really the same thing as Leonard himself, is also bound by the decree. Their joint interests appear all along the line.

One hesitates for a moment as to the Carpenter Enamel Rheostat Company, but upon reflection, it comes to this. The Morford patent 490,034, January 17, 1893, and the Carpenter patent 447,023, February 24, 1891, are identical. The latter has been found by the Patent Office and by the Circuit Court in Connecticut to have been mistakenly issued, and Morford has been found to be the original inventor. The Carpenter Company has a nonassignable license under the Morford patent, but it has stopped making thereunder. The Carpenter Company has also an exclusive license under the Carpenter patent which received a mortal blow in the Connecticut decision. Not content with stopping the making of rheostats for which it could be held to account under the Morford license, it aids the other defendant, the Leonard Company, by permitting the use of its rights under the Carpenter patent; and so, to use the language of the bill, is encouraging the manufacture and sale by the other defendants of the infringing device. The bill does not seek recovery from the Carpenter Company for royalties which may be due under the Morford license.

It is not especially important in the exploitation of the alleged injuries that the Carpenter Company should be joined as a party defendant, but its connection with the story is so close, and so inextricably interwoven with the main cause of complaint, that it will be taken in as a proper party defendant. All the doings are not only alleged to have been joint, but, upon examination, they are found to have been, in fact, joint. H. Ward Leonard is so plainly the party in control, with power to pull the wires which produce the results, that he cannot hide behind the subterfuge that he was merely an officer of the companies, and obtain personal immunity under the Glucose Case (C. C.) 135 Fed. 540.

Let the demurrers be overruled, and the defendants required to answer on or before the next rule day.

BEID-ARCHER CO. v. NORTH AMERICAN CHEMICAL & ENGINEERING CO. et al.

(Circuit Court, S. D. New York. August 1, 1906.)

PATENTS—INFRINGEMENT—INJUNCTION—LACHES.

A bill to restrain the infringement of a patent was verified June 27, 1906, and was accompanied by a motion for a preliminary injunction returnable July 12th. The bill was filed June 28, 1906, and the subpoena served July 29th following. The patent was dated July 9, 1889, and expired July 9, 1906. The bill did not fix the date of the alleged infringement, beyond the allegation that it occurred within six years prior to the filing of the bill, complainant knowing at the time the bill was filed that it could not be brought to the attention of the court in time to obtain injunctive relief; and the only proffered excuse for complainant's laches was that there was no appointed sitting of the court at which complainant could be heard until three days after the patent expired. *Held* that, the sole practical purpose of the bill being to collect damages, it would be dismissed for laches.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 468.]

C. V. Edwards, for complainant.

Jas. H. Griffin and Griffin & Bernhard, for defendant.

THOMAS, District Judge. The bill, verified June 27, 1906, accompanied by a motion for a preliminary injunction returnable July 12th, was filed June 28, 1906, and the subpoena was served June 29, 1906. The patent, dated July 9, 1889, expired July 9, 1906. The date of the alleged infringement is not fixed, beyond the statement that it occurred within six years prior to the filing of the bill. When the complainant filed the bill, it knew that it could not be brought to the attention of the court in time to obtain injunctive relief, and the sole practical purpose was to use the court for the purpose of collecting damages. The proffered excuse, that there was no appointed sitting of the court at which the complainant could be heard until three days after the patent expired, emphasizes the laches of the complainant. During the six years mentioned the motion could have been heard each week, save during July, August, and September, when motions were heard once in two weeks. And the complainant neglected each and every of all such opportunities, and waited until the period when such a motion could not be brought to hearing before the expiration of the patent. Under such state of facts the court should not entertain jurisdiction.

Motion to dismiss the bill is granted.

UNITED STATES v. 83 SACKS OF WOOL AND 5,974 SHEEPSKINS.

(District Court, D. Maine. September 29, 1906.)

No. 189.

CUSTOMS DUTIES—PROCEEDINGS FOR FORFEITURE OF PROPERTY—CERTIFICATE OF REASONABLE CAUSE.

On judgment for claimant of property seized by officers of the customs service for forfeiture, on the ground that it was fraudulently imported, a certificate of reasonable cause should be entered by the court as provided by Rev. St. § 970 [U. S. Comp. St. 1901, p. 702], although the verdict of the jury was clearly right, under the evidence, where it is affirmatively shown that the officers who instituted the proceedings acted in good faith and on reasonable ground of suspicion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 154.]

In Matter of Certificate of Probable Cause, under Rev. St. § 970 [U. S. Comp. St. 1901, p. 702.]

Isaac W. Dyer, U. S. Atty.

Orville D. Baker, Guy Murchie, and Marshall McKusick, for claimant.

HALE, District Judge. This is a case of seizure of property alleged to have been fraudulently imported into the United States. The proceedings were taken under the familiar theory of the revenue law in cases of seizure and forfeiture that it is the property, and not the owner, which offends. The property is the defendant in the proceeding, it is alleged to be the guilty thing, and is susceptible of being tried and condemned. The owner gets notice along with the rest of the world, and may appear to claim and defend his property.

In this case the owner, the Calais Tanning Company, appeared and defended the suit, alleging that the property was free from fault; that it was properly introduced into the United States, and not smuggled. After a long trial before the jury, at Bangor, at the June term of this year, the verdict of the jury was in favor of the claimant, and an order of restoration was granted.

The case now comes before the court under section 970 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 702], which is as follows:

"When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: provided, that the vessel, goods, wares or merchandise be, after judgment, forthwith returned to such claimant or his agent."

Under the above section, the learned attorney for the government moves the court to find reasonable grounds of seizure and to cause a proper certificate thereof to be entered upon the record.

The trial before the jury was long and conducted with the utmost care and ability on both sides by learned and eminent counsel. The court expressed no opinion, but allowed the jury the fullest scope in the examination. The jury rendered a verdict for the claimant. At the announcement of the verdict, I stated to the jury that I should have come to the same conclusion myself if the question of fact had been submitted to me. The testimony offered by the claimant company was satisfactory and convincing. The whole testimony in the case, taken together, was not sufficient to satisfy any fair tribunal of the guilt of the alleged offending property.

The claimant would now be entitled to his costs, but for the statute to which I have referred. This statute is for the purpose of obtaining from the court a judicial finding as to whether there was a reasonable cause of making the seizure; and, if there was such reasonable cause, the main purpose of the statute is to protect the person at whose instance the seizure was made, should an action of trespass be brought against him by the defendant for the wrongful seizure of property. It is for the purpose of ascertaining by a judicial finding whether the prosecution was justifiable, even though by the verdict it was determined that the property was not guilty of the charge preferred against it.

The term "reasonable cause" is not different in meaning from the term "probable cause" found in section 909 [U. S. Comp. St. 1901, p. 679]. In that section it becomes the duty of the court to pass upon the question of probable cause, before the claimant shall be required to proceed, and before the case can be submitted to the jury. But the question of reasonable cause arises, under section 970, after the case has been fully tried, and a verdict has been rendered.

The courts do not draw any substantial distinction between the meaning of the two expressions, but in many cases have held both to have the same meaning. *Stacey v. Emery*, 97 U. S. 642, 24 L. Ed. 1035.

In *Averill v. Smith*, 17 Wall. 82, 21 L. Ed. 613, in speaking for the Supreme Court, Mr. Justice Clifford said:

"Proof of probable cause, if shown by the certificate of the District Court which rendered the decree discharging the property, is a good defense to an action of trespass brought by the claimant against the collector who made the executive seizure, provided it appears that judicial proceedings were instituted, and that the charge against the property was prosecuted to a final judicial determination. Where the respondent prevails in such an information, the court, says Mr. Parsons, gives to the prosecuting or seizing officers a certificate of probable cause, if in their judgment he had such cause for the seizure, and that, he says, protects the officer who made the seizure from prosecution for making the same; and he adds that the final decree of the court in a case of forfeiture regularly before the court is conclusive. * * * Probable cause, he says, means less than evidence which would justify a condemnation, and the same author says, if the court before whom the cause is tried shall cause a certificate or entry to be made that there appeared to be a reasonable cause of seizure, the seizing officer shall be protected from all costs, suits, and actions on account of the seizure and prosecution. Differences of opinion existed for a time as to the legal meaning of the term 'probable cause,' but it is settled that it imports circumstances which warrant suspicion, and that a

doubt respecting the true construction of the law is as reasonable a cause of seizure as a doubt respecting the fact."

The court refers to *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381, as deciding two propositions, namely:

"(1) That the certificate that there was reasonable cause of seizure would be a good bar to an action commenced after the decree of condemnation.

"(2) That the decree of acquittal, if accompanied by a denial of such a certificate, establishes the fact conclusively that the seizure was tortious, and that the owner of the property is entitled to his damages for the injury."

It will be seen, then, that the expression "probable cause" and the expression "reasonable cause" have been held by the courts to mean substantially the same thing.

In *Locke v. U. S.*, 7 Cranch (U. S.) 339, 3 L. Ed. 364, Chief Justice Marshall held that this expression "means less than evidence which would justify condemnation, and in all cases of seizure has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by Congress." In *Munns v. De Nemours*, 3 Wash. (C. C.) 37, Fed. Cas. No. 9,926, Mr. Justice Washington defines "probable cause" to mean "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense of which he is charged." *Stacey v. Emery*, *supra*.

It is clear that the certificate called for under this section of the statute should not be granted by the court, unless it is clear that the evidence warrants it, for it has been held by the courts that the action of the District Court in this regard cannot be reviewed, and very important results may depend upon such action. *U. S. v. Abatoir Place*, 106 U. S. 160, 1 Sup. Ct. 169, 27 L. Ed. 128; *Averill v. Smith*, *supra*.

But, on the other hand, the court ought to grant this certificate where the testimony shows affirmatively that the officers who instituted the proceedings were acting in good faith and under circumstances which would justify a reasonable suspicion; for, unless government officers shall feel assured that they will receive the protection of the courts in cases where they have acted faithfully, carefully, and reasonably, they may become too timid in the performance of their grave and important duties.

In the case at bar the issue is thus brought before the court whether the evidence is sufficient to show that the agents of the government, at whose instance the seizure was made, had such ground of suspicion as would warrant a reasonably cautious man in the belief that the property seized had been smuggled. It is not my purpose to discuss in detail the testimony touching this point. In order to entitle the government to the certificate under this section of the statute, it is clearly incumbent upon it, as I have just indicated, to induce belief in the mind of the court by affirmative evidence that the complaint was made on a reasonable ground of suspicion.

After carefully considering the evidence upon which the proceedings were taken, I am satisfied that, while such evidence would not

justify a condemnation of the property, it was sufficient to induce a reasonable suspicion in the minds of those who instituted the proceedings.

A certificate of reasonable cause of seizure may be entered.

UNITED STATES v. LOY TOO.

(District Court, N. D. New York. September 28, 1906.)

1. ALIENS—PROCEEDINGS FOR DEPORTATION OF CHINESE—APPEAL.

A Chinese person, ordered deported by a commissioner, may appeal to the district judge as a matter of right under the statute, and, in the absence of a rule of court requiring it, an order of the judge allowing the appeal is unnecessary; the service of notice of appeal on the commissioner and the district attorney, and the filing of such notice with the clerk, being sufficient. An order of the judge, however, is necessary to stay the execution of the commissioner's order pending the appeal.

2. SAME—EVIDENCE CONSIDERED.

Evidence considered, and *held* to sustain the finding of a commissioner adverse to the claim of a Chinese person that he was a native of the United States.

Appeal from the Judgment of Deportation made by Benjamin L. Wells, United States Commissioner in and for the Northern District of New York, March 9, 1906.

H. E. Owen, Asst. U. S. Atty.

R. M. Moore, for defendant.

RAY, District Judge. The first question raised is that the appeal herein was allowed by a district judge of the Southern District of New York at a time when the district judge of the Northern district of New York, in which district the proceeding was had and the judgment pronounced, was present in the district and engaged in the performance of his duties, and no other district judge had been assigned or designated to act in said district. That therefore there has been no legal appeal, as the district judge who allowed the appeal was without jurisdiction to act in the premises. The second point is that, on the whole evidence adduced, it was the duty of the commissioner to find that the defendant was born in the United States, and that he is a citizen thereof and entitled to be and remain in this country.

The appellant answers to the first proposition that in these Chinese cases no allowance of an appeal is necessary, that the service of a notice of appeal is all that is demanded by the law in order to perfect it. It is conceded, however, that an order staying the execution of the judgment of deportation must be obtained from a judge having jurisdiction, if deportation is to be delayed pending the appeal. That the mere taking of an appeal does not stay the execution of such judgment. That the Chinese person ordered deported may appeal to the district judge of the district in which the judgment of deportation is pronounced is unquestioned. This right is given by statute, but the mode and manner of taking the appeal

is not pointed out. This, I think, is matter of practice and may be regulated by rules made by the district judge. I find no authority requiring an appeal to be allowed by the judge. It is taken as matter of right. A notice of appeal must be in writing, and it should be filed with the clerk of the court, a duplicate served on the commissioner pronouncing the judgment, and another or triplicate notice should be served on the United States Attorney for the district. The judge should be applied to for an order staying the execution of the judgment of deportation pending the appeal, but the defendant cannot be admitted to bail. In this case a notice of appeal was duly served, and a return has been made by the commissioner, and deportation has not been made. The allowance of the appeal was unnecessary, and, if a nullity, does not affect the validity of the appeal taken. In this district the allowance of the appeal has always accompanied the appeal and an order staying execution of the judgment. This course of procedure was adopted for the protection of the defendant. A departure therefrom may result in the deportation of a defendant pending the appeal. The marshal must have notice and be stayed, else it is his duty to execute the judgment. As to the second point it is clear that the judgment of the commissioner was not only justified by the evidence, but right.

The defendant undertook to prove by a Chinese person, one Gong Lack, that he, defendant, is the son of the brother of witness and was born in the United States. The witness so testified. The government then proved by undisputed evidence that July 3, 1903, Gong Lack was sworn as a witness on the application of one Gong Wing for readmission into the United States. That on that hearing in answer to the following questions, Gong Lack testified as follows:

"Q. Are you married? A. Yes. Q. Any children? A. Yes. Q. How many? A. Two. Q. Where were they born? A. In China. Q. Have you any brothers? A. Yes. Q. How many? A. One. Q. Is he married? A. Yes. Q. Has he any children? A. Yes; he has two boys and one girl. Q. Where were they born? A. In China. Q. Any sisters? A. No."

If the evidence given by the witness on that examination was correct and true, the evidence given on this trial before the commissioner as to the place of defendant's birth was incorrect and untrue. The witness undertook to convince the commissioner that he did not understand on the former hearing that he was being interrogated as to his brother and his brother's children and their place of birth, but as to the applicant there for readmission, said Gong Wing, and his children and their place of birth. That he had reference in his former answers to such person and to his children. The explanation was quite plausible and cunning, but not convincing with the commissioner, and is not convincing here. The questions and answers were plain and direct.

The judgment or order of deportation is affirmed

In re ST. LOUIS ICE MFG. & STORAGE CO.

(District Court, E. D. Missouri, E. D. July 5, 1935.)

No. 899.

BANKRUPTCY—PRIORITY OF LABOR CLAIMS—RIGHTS OF ASSIGNEE.

Bankr. Act July 1, 1898, c. 541, § 64b, par. 4, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], which accords priority of payment to wages due to workmen, clerks, or servants earned within three months prior to the bankruptcy, does not give such right of priority to one who advanced money to a corporation prior to its bankruptcy, and while a going concern, with which to pay its employes, and took assignments of their claims as security.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 536.]

In Bankruptcy. On review of order of referee.

The following are the facts as certified by the referee:

On December 1, 1905, J. W. Floyd presented to the referee for allowance against the bankrupt estate a claim in the sum of \$559.02. The facts out of which said claim arose are as follows: On July 20, 1905, claimant paid to bankrupt the sum of \$559.02, and took bankrupt's note therefor, dated on said day, and payable to the order of claimant one day after date, with interest from date at the rate of 6 per cent. per annum. At the time said money was paid to bankrupt by claimant, it was agreed that bankrupt should use part of the money, to wit, the sum of \$419.80, to pay the wages then due to its employes for labor performed by them between July 5, and July 19, 1905, and that upon payment to the said employes of the respective amounts due them, they would severally assign to claimant the amount of the debt due them from bankrupt for wages, and that said debt so assigned to claimant by said employes, should be held by claimant as collateral security for the debt due it by bankrupt, amounting to \$559.02, and evidenced by note before referred to. Bankrupt, upon receiving said sum of \$559.02 from claimant, paid to its employes out of said money the sum of \$419.80, being the amount of wages due said employes for services performed as workmen, clerks, or servants, within three months before the date of the commencement of proceedings in bankruptcy; and said employes, upon receiving the sums due them, severally executed a written assignment to claimant of the several sums so paid them.

Upon the foregoing facts, claimant contended that he was entitled, under the terms of section 64b, par. 4, Bankr. Act, July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], to have part of his claim, to wit, said sum of \$419.80, allowed as a preferred claim for wages. The referee denied the request of claimant to have the claim so allowed, and on December 1, 1905, made an order, allowing the entire claim as an ordinary unsecured debt in the sum of \$559.02.

Geo. R. Lockwood, for claimant.

Alexander Young, for trustee.

FINKELNBURG, District Judge (after stating the facts). Referring to the statement of facts contained in the referee's report and the question therein certified for review to this court, I desire to say that, in my opinion, the claim of priority here made does not come within either the letter or the spirit of the bankrupt law. Section 64b, subd. 4, Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], requires two conditions in order to make it operative, viz.: first,

the wages for which priority is claimed must be due to workmen, clerks or servants; and, second, such wages must have been earned by them within three months before proceedings in bankruptcy.

In the case here under consideration the wages for which a priority is claimed are not due to any workman, clerk, or servant of the bankrupt; they are claimed as due to third persons who advanced money to pay certain workmen about two months prior to the institution of the proceedings in bankruptcy, and while the defendant corporation was a going concern, and those third persons now claim a priority accorded to the workmen under assignments from the latter made at the time the money was advanced. Clearly the claimant is not within the letter of the law, nor do I think he comes within the spirit of the law. It was not the intention of the bankrupt law, and I think it is not within the policy of the bankrupt law that this privilege and advantage accorded to a workman should become the subject of trade and barter, or that it should become a quasi negotiable security to be used as collateral. It was intended to give a preference to a certain class of creditors favored by the law, provided such a class be in existence when the bankruptcy occurs. The privilege has a personal character, and cannot be transferred to others not belonging to that favored class. It was intended to ameliorate to a certain extent the hardship which might otherwise be inflicted on a class suddenly thrown out of employment and with wages in arrears. If earned within three months the law has humanely provided for this class of creditors in such an emergency to the exclusion of all others.

The creditor who now comes does not fall within the class which the law intended thus to favor, and no such emergency has in fact arisen. The workmen were paid several months before the bankruptcy occurred. Besides, I think if these privileges or priorities could be assigned and traded in, it might lead to abuses and complications in various ways not intended by the law, and some of which have been pointed out by Lochren, J., in *Re Westlund* (D. C.) 99 Fed. 399. I have concluded to follow that decision, and the decision of the referee will therefore be confirmed.

QUAINTANCE v. UNITED STATES.

(Circuit Court, S. D. New York. December 19, 1905.)

No. 3,931.

CUSTOMS DUTIES—CLASSIFICATION—COTTON CLOTH OF IRREGULAR TEXTURE.

Held that in order to come within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 305, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1656], for "all cotton cloth not exceeding one hundred threads to the square inch counting the warp and filling," it is not necessary that the goods should be uniform or homogeneous throughout, and that the provision includes openwork fabrics which contain nowhere more than 100 threads to the square inch and of which substantial portions have no warp and other substantial portions no filling.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,928 (T. D. 26,062), which reversed the assessment of duty by the collector of customs at the port of New York on goods imported by W. B. Quaintance.

These goods were classified as etamines under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 131 [U. S. Comp. St. 1901, p. 1662]. Among the contentions made by the importer were (1) that the goods were dutiable as manufactures of cotton not specially provided for, under Schedule I, par. 322, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]; and (2) that they were "cotton cloth" as defined in paragraph 310, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], and were therefore subject to the provision in paragraph 305, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1656], for "all cotton cloth not exceeding one hundred threads to the square inch counting the warp and filling. Said paragraph 310 reads as follows: "The term cotton cloth, or cloth, wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton in the piece or otherwise, whether figured, fancy, or plain, the warp and filling threads of which can be counted by unraveling or other practicable means."

The following description of the goods and statement of the board's conclusions are taken from the opinion of the board:

De Vries, General Appraiser. Exhibits 2 and 3 represent "oriental stripes." These goods are cotton fabrics in the piece, with alternating close-woven stripes and a variety of fancy reticulated openwork like lace netting, in different colors and varying widths. The close-woven stripes, which gradually increase toward the selvage of the fabric, are composed almost entirely of warp, and the openwork of filling threads. In substantial portions of the fabrics there are no warp threads, whilst in other substantial portions of the fabrics there are no weft threads. In substantial portions of the fabric its fabrication is of the ordinary warp and weft process, while in other substantial portions its fabrication seems to have been accomplished by processes other than the warping and weaving of threads. * * * There is no uniformity or homogeneity of warp or weft threads in very substantial portions of the fabric; and the board so finds as facts herein. * * * The board is of opinion that a cotton fabric from substantial portions of which are absent either warp or weft threads * * * does not come within the definition of cotton cloth as defined by said paragraph 310, and is not within the provisions of any one of the countable provisions—paragraphs 304 to 309, inclusive. * * * They are not both warp and weft threads. * * * Such goods, in our opinion, are properly dutiable as manufactures of cotton not specially provided for, under the provisions of paragraph 322.

The importer contended that the board erred in sustaining this contention rather than his alternative claim that the goods should have been classified under the provision in paragraph 305 above quoted, and by evidence introduced in the Circuit Court showed that in no part of the fabrics in question did the count of threads exceed 100 to the square inch. At the argument counsel for the importer relied on the decision in *U. S. v. Ulmann* (C. C. A.) 139 Fed. 3, which was rendered after the board's decision now in question was made, and in which it was held that flax drawnwork was within Schedule J, par. 346, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663], where flax fabrics are made dutiable according to count of threads.

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

CRONIN v. AMERICAN LINEN CO.

(Circuit Court, D. Rhode Island. September 11, 1906.)

No. 2,809.

NEGLIGENCE—ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE—MANNER OF PACKING GOODS FOR SHIPMENT.

A shipper of goods packed in bales and tied with ropes is under no duty to the carrier or its servants to see that the ropes are strong enough to withstand a pull sufficient to move the bale, nor is a bale not tied with ropes having such strength such an inherently dangerous thing as to render the shipper liable for an injury to a teamster who threw his weight upon the rope in moving the bale while on his wagon with such force that when the rope broke he fell to the ground.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 27.]

At Law. On demurrer to declaration.

John P. Beagan, for plaintiff.

James M. Morton, Jr., for defendant.

BROWN, District Judge. The declaration alleges that the plaintiff, while engaged as a teamer in carting bales of cloth weighing from 300 to 400 pounds, took hold of one of the ropes by which a bale was secured, and pulled upon it in order to adjust said bale in position upon his wagon; that the rope broke, throwing the plaintiff from a great height to the ground, fracturing his leg, and inflicting other injuries. The negligence with which the defendant is charged is the failure to use a rope sufficiently strong to move the bale, or to support the plaintiff and keep him from falling.

It seems to be a novel proposition that a shipper of goods, tied in bales by means of ropes drawn lengthwise and crosswise, is bound to see that each of these ropes is strong enough to withstand a pull sufficient to move the bale, or to support and keep from falling a man who throws his weight upon the rope in moving the bale. It also seems a novel proposition that a carrier or a teamster is entitled to assume that he may safely pull upon such a rope, and to entrust his bodily safety to it by placing himself in such a position that if the rope breaks he will suffer a fall. No authority has been cited to sustain either of these propositions.

It is alleged that said ropes "furnished the only reasonable and practicable means of hauling and manipulating" said bale; that the defendant knew or ought to have known that the bale was subject to be hauled by the ropes; and it is argued that the defendant held forth "the implied invitation that this bale was securely held, and that the plaintiff, relying upon that implied invitation, was injured."

It is a matter of common knowledge that pulling upon one of the ropes used for the purpose of tying together a bale of this kind is not the "only reasonable and practicable means of handling it;" and the demurrer cannot be regarded as admitting an allegation to this effect. A bale of this kind may be handled by the hands of a sufficient number of men, or by suitable ropes or tackle furnished by the carrier; and it is ordinarily the duty of a carrier who has

received goods to exercise his own judgment as to the means of handling the goods, and to provide such means. The plaintiff was not a servant or employé of the defendant, and the defendant owed him no duty to provide him with appliances suitable for moving the bale.

The doctrine of implied invitation or assurance and reliance thereon is entirely inapplicable to a case of this kind. Assuming the truth of the allegation that the defendant had knowledge that it was customary to pull upon the ropes in moving the bales, such knowledge did not convert it into an insurer of the sufficiency of the ropes for the purposes of the carrier or its servants, or relieve the carrier or its servants from taking ordinary care to see that a rope used for tying was also sufficient to support such a pull as was necessary in moving the bale.

It cannot be said that a bale tied with ropes sufficient to secure it, but not sufficient to haul it by, is in its nature so imminently dangerous as to require it to be classed with "inherently dangerous things," like explosives.

Assuming that a reasonable man should have foreseen the possibility that in the course of handling a workman might seize and pull upon the rope without examining it and break it, it does not follow that a reasonable man should have guarded against so remote a risk as that the workman should blindly trust himself to the support of the rope while in a position where a break would expose him to a dangerous fall.

In *Pollock on Torts*, pp. 36, 37 (quoted with approval in the opinion of the Circuit Court Appeals for this circuit in *Berlin Mills v. Croteau*, 88 Fed. 860), 32 C. C. A. 126, it is said:

"A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all," etc.

In *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, the general rule is stated:

"That where the cause of the injury is not in its nature imminently dangerous; where it does not depend upon fraud, concealment, or implied invitation; and where the plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained."

The declaration does not show any breach of a duty owed by the defendant to the carrier or its servants, and does not show that the defendant recklessly or negligently exposed the plaintiff to danger from "an inherently dangerous thing."

Demurrer sustained.

UNITED STATES v. THOMAS MEADOWS & CO.

(Circuit Court, S. D. New York. June 22, 1906.)

No. 3,728.

CUSTOMS DUTIES—CLASSIFICATION—WAFERS—BISCUITS—CONFECTIONERY.

Sweet crackers, known as "wafers and biscuits," in which the proportion of the sweetened centers to the pastry envelopes, is large, but in which flour is used to a substantial extent, are not dutiable either directly or by similitude as "confectionery," under Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 212, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647].

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,830, T. D. 25,731, which reversed the assessment of duty by the collector of customs at the port of New York on certain imported merchandise, which was classified as confectionery under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 212, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], for "sugar candy and all confectionery not specially provided for."

Albert H. Washburn (Charles Duane Baker, Asst. U. S. Atty., and Earl D. Babst, Special Asst. U. S. Atty., on the brief).

Walden & Webster (Henry J. Webster, of counsel), for importers.

PLATT, District Judge. The merchandise in suit consists of four exhibits. Exhibits A and C were invoiced as "Arctic and President Wafers," respectively; Exhibits B and D as "Acorn and Philippine Biscuits," respectively. The collector assessed them under Act July 24, 1897, c. 11, § 1, Schedule E, par. 212, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647] at 50 per cent. ad valorem. The importers protested, and after a hearing, the Board of General Appraisers sustained the protest and placed them under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], as unenumerated manufactured articles. The government seeks a review, and much additional testimony has been taken.

It is not an easy matter to draw an exact dividing line between candy and pastry. In early days an apothecary was called a confectionary or confectioner, because he used sweets to disguise the nauseous taste of his medicines, and thus by analogy, we have come to look upon the confectioner as the master of the art of making candy and confections. When the last tariff act was passed the word confectionery had a rather broader meaning in England than in this country. The sugar wafers of neither country had, however, so attracted the attention of the Congress as to receive special recognition. They had been imported ever since the war in large quantities, and the proportion between the sweetened centers and the pastry envelopes had gradually changed in favor of the former, but they were always treated by the authorities and by the trade as products of the baker's art until within the last year or two. There has been some effort of late in the trade to treat similar articles as confections, but even so interested a party as the National Biscuit Company has catalogued them under the general term of biscuits, and the merchandise in suit has been generally

bought, sold, and listed in the wholesale trade as biscuits or crackers. The local interest has now become so large and effective that an attempt is made to classify them, for tariff purposes, as a product of the confectioner's art; and so the issue confronts us. Confections on the one hand, sweetened biscuits and sugar wafers on the other: Shall they all be classified as confectionery, or shall the latter two remain where they have long stood as products of the baker's or pastry cook's art?

In both arts we can find considerable quantities of sweetening, and on the baker's side may be instanced the sweet cookies of our childhood days. In one way, however, the line of demarcation is strongly emphasized. The confectioner uses practically no flour, and the baker always uses it; in varying quantities, it is true, but in every case to a substantial amount. As the sugary proportion increases in the baker's art, the point will soon be reached where, if the flour shall be used at all, that use will be purely incidental. When its sole use shall be, as the government puts it, to form an envelope to contain a confectionery filler, it will be a mere trick, or subterfuge, to point out its presence. As I view the matter, that time has not yet arrived. The sweetened centers of the merchandise in suit would be disagreeable and nauseating without the disguise offered by the harmonious assimilation therewith of the pastry exterior. These reasons, as well as others, offer a satisfactory answer to the similitude contention put forward by the government. After the substantially uniform treatment by the trade and authorities for many years of merchandise very much like that in suit, though with possibly a trifle less sweetening, as products of the baker's art, it would be, as I view the matter, judicial legislation to change the classification at this moment.

The decision of the Board of Appraisers is affirmed

UNITED STATES v. KUTTROFF, PICKHARDT & CO.

(Circuit Court, S. D. New York. June 14, 1906.)

No. 3,651.

1. CUSTOMS DUTIES—CLASSIFICATION—BROMOFLUORESCIC ACID.

Bromo fluorescic acid is dutiable as a coal tar color or dye under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627].

2. SAME—COLOR OR DYE.

An article which contains all the essential elements and determining characteristics of a color or dye, needing only to have its coloring properties rendered accessible by dropping it into water containing an alkali, is a color or dye within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627].

3. SAME—CONSTRUCTION—CONGRESSIONAL INTENT—CUSTOMS PRACTICE.

Where customs authorities have for many years consistently classified an article under the same provision found in successive tariff acts, it may be assumed that Congress, by constantly repeating such provision, understood what the practice had been and gave some weight to it.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,766, T. D. 25,523, in which the Board of General Appraisers reversed the assessment of duty by the collector of customs at the port of New York.

Charles Duane Baker, Asst. U. S. Atty.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

PLATT, District Judge. The merchandise in suit has for a long time been commonly known as bromofluorescic acid.

Paragraph 15 of the act of July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627] is as follows:

"15. Coal-tar dyes or colors, not specially provided for in this act, thirty per centum ad valorem; all other products or preparations of coal tar, not colors or dyes and not medicinal, not specially provided for in this Act, twenty per centum ad valorem."

The collector, under that paragraph, assessed duty at thirty per centum ad valorem. The importers protested, and the Board of General Appraisers, upon the testimony of one witness, found that it was "a chemical compound; a coal-tar preparation not a color or dye; not medicinal, and that it is an acid used as a material in combination with other substances in the manufacture of coal-tar colors and dyes." Upon these facts, the board sustained the protests, and placed the merchandise, under paragraph 15, at 20 per centum ad valorem. The government asked for a review, and much testimony has been taken in court on both sides. The merchandise in question is conceded to be a product of coal tar, not medicinal, and not provided for in the tariff act outside of paragraph 15. A single question then confronts us, and that is whether or not it is a color or dye.

The testimony before the court is voluminous, and the contention pro and con has been vigorously conducted. As far back as the tariff act of 1883, merchandise like that in suit has been imported, and since January 14, 1887, customs authorities have consistently and continuously insisted upon its classification as a coal-tar color, under provisions which were substantially the same as in the present act. For many years the importer was engaged in an attempt to get it upon the free list as an acid, but it was treated by the Treasury Department as a coal-tar color, and was so maintained. Now, finding that there is no chance for the free list, an attempt is made to classify it as a coal-tar preparation not a color.

When we are looking to find what Congress meant by constantly repeating similar provisions in successive acts, we must give some weight to the Department's action, as hereinbefore described. We may assume, as was done in the Crucible Steel Case, 137 Fed. 384, 69 C. C. A. 576, that Congress understood the dividing line which had been adopted by the customs authorities in regard to this particular class of merchandise.

As to commercial designation, there does not appear to have been any uniform, long-continued practice. With the trade it seems to have gone largely as "bromo," and some thought it ought to be called a color, and others thought not. Such views were rather judicial than commercial. It was certainly sold in its imported condition to color

houses to be used in the manufacture of lakes, with recipes for its treatment attached thereto. Fortified then, by the departmental construction, and with little, if any, help from the trade, we come back again to the main question, is it or is it not a color or dye? The importer says that it lacks just one treatment, which seems to me to be the very shadow of a shade of a treatment, before it becomes practically a color or dye. He says that as imported, it is no more a color or dye than dough, before it is baked, is bread, and that any other theory rests upon the veriest splitting of hairs.

Let us look for a moment at the other theory. At one stage of the chemical developments from coal tar we reach fluorescein, which is concededly a color. By adding bromine we get the merchandise in suit. It contains all the essential elements and determining characteristics of a color or dye. It not only does not need, but will not endure, anything added to it or taken from it to make it a practical color or dye. Nothing is to be done, except to treat it in a purely incidental way. It is inherently and substantially a color or dye, largely deterred from immediate use by a binding acid. Drop it into water which has been treated with common soda, and its bonds will be at once loosened, and its coloring properties will be rendered accessible, without any other possible change, chemical or otherwise. To say that it is not a color or dye, and that Congress knew that it was not when it made paragraph 15 law, is merely a verbal matter. It is slightly soluble at the start, and if it be held that because its solubility must be increased by an alkali, it is not a color until that has been done, then a large number of generally recognized coal-tar colors will go under the ban, because they also must be loosened by an alkali.

The decision of the Board of General Appraisers must be reversed, and the merchandise classified as a "coal-tar color or dye."

UNITED STATES v. SCHALL & CO.

(Circuit Court, S. D. New York. June 20, 1906.)

No. 3,906.

1. CUSTOMS DUTIES—CLASSIFICATION—COMFITS—MARRONS.

The term "comfits" in paragraph 263, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], is practically synonymous with "confections," and includes boiled marrons (chestnuts) preserved in syrup.

2. SAME—MARRONS—NUTS—SIMILITUDE.

Marrons (chestnuts) preserved in syrup are not dutiable as "nuts" under paragraph 272, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652]; nor do they resemble nuts sufficiently to be dutiable at the same rate by virtue of the similitude clause in section 7 of said act, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below see G. A. 5,908 (T. D. 26,007), which reversed the assessment of duty by the collector of customs at the port of New York on certain merchandise, which the board held dutiable as nuts

under paragraph 272, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], either directly or by virtue of the similitude clause in section 7 of said act, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

W. Wickham Smith, Sp. Asst. U. S. Atty., and D. Frank Lloyd, Asst. U. S. Atty.

Hatch & Clute (J. Stuart Tompkins, of counsel), for importers.

PLATT, District Judge. The merchandise in suit is prepared, before it is imported, in the following manner: A large chestnut, grown in Southern France, Italy, and Spain, called a "marron," is stripped of its covering, and the inner meaty portion is boiled in plain water to make it soft and palatable; it is then immediately placed in a light syrup to preserve it, and a vanilla flavoring is added to increase its delicacy. Those broken in this operation are sent over in fragments, and those which retain their shape are sent whole. The whole marron brings a better price than the broken pieces.

To place such an article, either directly or by similitude, in the class of "nuts of all kinds, shelled or unshelled," which is the catch-all paragraph 272, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652] after almonds, filberts, and peanuts have been specified in the three preceding paragraphs, at different rates for those shelled and for those not shelled, is intolerable. If it cannot be placed in paragraph 263, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], it certainly ought to be classified as a nonenumerated manufactured article, under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693] because it has advanced far beyond the merchandise referred to in paragraph 272; but with that matter we have no concern in this suit. Commercial designation does not affect the question. So far as the merchandise in suit is concerned, we are bound to use plain, ordinary, common sense in our interpretation of paragraph 263.

The important part is:

"263. Comfits, sweetmeats, and fruits preserved in sugar, * * * not specially provided for in this Act, one cent per pound and thirty-five per cent. ad valorem."

If the principle of similitude is to be applied now, as it has been by the board of appraisers in fitting the merchandise into paragraph 272, it would not be a far cry at all to take advantage of "fruits preserved in sugar," but we are not forced into that position. To my mind, the word "comfits" is broad enough to comprehend the merchandise in suit. It would be unfair to suspect that the Congress had a moment of tautological relapse when it placed the words "comfits" and "sweetmeats" in the same paragraph. The legislative mind must have found a distinction, and if we can find it, we may be helped out of our dilemma.

We turn to the dictionaries in common use in 1897, and we find that one of the definitions of a comfit is "a confection." The two words are practically synonymous. In the Century Dictionary we find that a confection may be either liquid or dry, and that one of its

meanings is: "Something prepared or preserved with sugar or syrup"; and so it is no straining of language to hold that a chestnut, which is only palatable in the condition which it has reached after boiling, if placed in syrup to be preserved in that condition, is a comfit. The board admitted a doubt, but felt constrained to give the importer the benefit, under the well-recognized rule. I discover no shadow of doubt as to the propriety of using paragraph 263. The importer makes the point that the word "syrup" appears in the comfits paragraph of the Acts of 1883, 1890 and 1894, and is omitted in the like paragraph of 1897; but as the syrup used as a preservative is simply sugar and water, and the sugar furnishes the preservative part, there is no real distinction. "Syrup" was undoubtedly omitted from the last act as a superfluous word.

The decision of the board is reversed, and the action of the collector sustained.

OTT v. DOROSHOW.

(District Court, D. New Jersey. September 24, 1906.)

BANKRUPTCY—FRAUDULENT SALE OF PROPERTY BY BANKRUPT.

A sale of a stock of goods by an insolvent shortly before his bankruptcy held void, as made with intent to defraud his creditors, it being shown that it was made during an adjournment of an action against him by a creditor, for less than half the value of the property, and that no part of the proceeds was paid to his commercial creditors, and no evidence being offered by the purchaser to show his good faith or to corroborate his own testimony as to the payment of the price.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 264.]

In Equity. On final hearing.

Wilson, Carr & Stackhouse, for complainant.

French & Richards, for defendant.

LANNING, District Judge. The proofs in this case convince me that the alleged sale to the defendant, Doroshow, by the bankrupt of the whole of his property, being a stock of merchandise in his store and a horse and wagon, is void as against the bankrupt's creditors. No evidence whatever was offered by the defendant against the proofs of the complainant. The testimony of the defendant, given by him when he was examined at a meeting of the creditors of the bankrupt, was offered in evidence by the complainant, and not objected to. In that testimony he declares that a bill of sale was delivered to him for the property, which he claims he purchased from the bankrupt for \$1,058, and that it was in the hands of his counsel. This statement was twice made by him in the course of his examination. The bill of sale, however, was not produced. He also says that he thinks the consideration money was paid by him to the bankrupt in the presence of Miss Felds, but she was not called as a witness to corroborate his statement. He also says that the consideration money, except about \$300, which he drew from the bank, had been kept by his wife in her pocketbook or stocking. He has failed to call her to

corroborate that statement. He also admits that the price at which he says he purchased the property was only 60 or 65 per centum of its value. The evidence of witnesses produced by the complainant is to the effect that \$1,058 was little, if any, in excess of one-third of the market value of the property. Section 67e, Bankr. Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], provides that all conveyances or transfers by a bankrupt of his property, made within four months prior to the filing of the petition against him, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of the bankrupt except as to purchasers in good faith and for a present fair consideration. In this case the complainant has shown by the bankrupt himself that not a dollar of the proceeds of the alleged sale was paid to his merchandise creditors. The necessary inference is that he intended to defraud those creditors. The testimony of the defendant, Doroshow, shows that he knew he was not purchasing the property for a present fair consideration. The pretended sale was made between the date when the bankrupt secured the postponement of a suit by one of his creditors against him and the day fixed for the trial of that suit. The bankrupt and Doroshow, immediately after the pretended sale, and in the night, secured a sign painter to erase from the store window the bankrupt's name and to substitute therefor Doroshow's name. Early the next morning, December 30, 1903 (the trial of the postponed case being fixed for December 31st), the bankrupt and Doroshow had the sign painter change the name on the bankrupt's wagon. The suspicious conduct of Doroshow is such as to call for a satisfactory explanation by him. He has not offered it. The evidence is of such a character that there can be no other inference from it than that the bankrupt and Doroshow deliberately schemed to defraud the bankrupt's creditors. Doroshow, therefore, is not in a position to secure protection, as he now asks, to the extent of the purchase money which he claims he paid.

The property is in the possession of the complainant. The defendant has a replevin suit against the complainant pending in the New Jersey Supreme Court. The prosecution of that suit has been stayed by a preliminary injunction issued in this suit. There will now be a final decree adjudging the alleged sale to be null and void, and directing that a permanent injunction be issued against the further prosecution of the replevin suit.

LOUIS DE JONGE & CO. v. BREUKER & KESSLER CO.

(Circuit Court, E. D. Pennsylvania. September 7, 1906.)

No. 1.

COPYRIGHTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against the alleged infringement of a copyright, the effect of which will be to interfere with defendant's business, will not be granted where complainant's right is doubtful on the showing made; but defendant may be required to give a bond for complainant's protection in case he is successful on a full hearing.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 78.]

In Equity. On motion to dissolve restraining order and motion for preliminary injunction.

Goepel & Goepel, for complainants.

Harding & Harding, for respondent.

J. B. McPHERSON, District Judge. The complainants' bill charges infringement of a copyrighted sketch in colors, called, "Holly, Mistletoe and Spruce." A restraining order was granted, and at the same time a motion for a preliminary injunction was made. This motion and the defendant's application to dissolve the restraining order were argued together, and all the affidavits submitted by both parties, including those that were filed by the complainants on August 25th, have been duly considered. Several defenses are set up to the complainants' case, of which the defense chiefly urged seems to be this: That, while the sketch in question may have been entitled to protection by a design patent—it being admitted by complainants that the sketch was to be reproduced upon some suitable material by lithography, and that the reproductions were to be used in covering or lining fancy and ornamental boxes, albums, articles for ladies' use, and other analogous purposes—it was not the subject of a copyright, and therefore is not protected by the formal instrument that was issued by the Librarian of Congress on September 23, 1905. Other defenses are also set up, but they need not now be enumerated.

For the present, it is enough to say that the affidavits and the arguments have convinced me that the decision of the questions raised must await a later stage of the controversy. The complainants' right is not clear enough, as the matter now stands, to justify the court in interfering with the defendant's business by summary process, which (in the case now under consideration) would almost necessarily imply that the complainants will be ultimately entitled to the relief asked by the bill. I think it no more than just, however, in view of the doubt that exists concerning the conflicting positions of the parties, to give the complainants a reasonable measure of protection, in case they should finally succeed. I shall therefore require the defendant to give a bond in \$3,000, conditioned to indemnify the complainants against the damage, costs, and expenses which they may suffer, or incur, by reason of the defendant's acts as charged in the bill, provided the complainants obtain a final decree in their favor.

I am the more unwilling to decide the principal questions that were argued, because the decision could not be made effective if it should be in favor of the defendant, since upon these motions the court could not of its own volition dismiss the bill. Hereafter in the progress of the cause—perhaps upon demurrer to the bill, if the parties should agree that the questions are thus sufficiently raised; perhaps upon bill and answer; or, in any event, upon final hearing—the court will be glad to dispose of the controversy as speedily and as completely as possible.

It is therefore ordered that, upon the filing by defendant of a bond in \$3,000, conditioned as above stated, with security to be approved by the clerk, an order shall be entered by that officer dissolving the restraining order and refusing a preliminary injunction.

DEVOY v. UNITED STATES.

(Circuit Court, S. D. New York. May 28, 1906.)

No. 3,723.

CUSTOMS DUTIES — CLASSIFICATION — BOX TOPS — SURFACE-COATED PAPER — LITHOGRAPHIC PRINTS.

Box tops made of surface-coated paper and having designs printed by the lithographic process are dutiable as "surface-coated papers * * * printed," under paragraph 398, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1671], rather than as lithographic prints under paragraph 400, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672].

On Application for Review of Decisions of the Board of United States General Appraisers.

One of the decisions below is reported as G. A. 5,814 (T. D. 25,676). The board affirmed the assessment of duty by the collector of customs at the port of New York, on merchandise consisting of paper made in regular sizes and shapes, with pictorial designs thereon, being intended to be used as tops or covers for candy boxes, handkerchief cases, sachet boxes, etc. The board held them to have been properly classified as lithographic prints, under paragraph 400, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], and overruled the importer's contention that they were dutiable under paragraph 398, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1671], relating to "surface-coated papers not specially provided for, * * * if printed." In the circuit court, further evidence was introduced in behalf of the importer, being to the effect that the goods in controversy, though bearing decorative designs embossed by the lithographic process, were not commercially known as "lithographic prints," and that they would be regarded commercially as surface-coated paper.

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

EULER & ROBESON v. UNITED STATES.

(Circuit Court, S. D. New York. May 28, 1906.)

No. 4,149.

CUSTOMS DUTIES — CLASSIFICATION — FLORAL WATERS — MEDICINAL PREPARATIONS.

Orange-flower water and rose water are not dutiable as medicinal preparations under paragraph 68, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631] but as unenumerated manufactured articles under section 6 of said act, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question related to goods imported at the port of New York, which consisted of the floral waters orange-flower water and rose water,

assessed with duty under the provision for medicinal preparations in paragraph 68, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631]. This assessment was affirmed by the Board of General Appraisers, on the authority of *Dodge v. U. S. (C. C.)* 130 Fed. 624. The importers contended that the assessment should have been under the provision for unenumerated unmanufactured articles in section 6 of said act, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]; and in the Circuit Court they introduced further evidence, from which it appeared without conflict that the floral waters in dispute had no medicinal uses whatever.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

VILLARI, MITCHELL & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 31, 1906.)

No. 3,767.

CUSTOMS DUTIES—DECAYED FRUIT—SEPARATION.

In ascertaining the quantity of decay in imported fruit, the importers did not avail themselves of the provisions of regulations prescribed by the Secretary of the Treasury under section 23, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930]. *Held*, that they were not obliged to do so, as that section relates to abandonment, and not to cases of allowance for nonimportation, as for fruit worthless on importation.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5865 (T. D. 25,843), which affirmed the assessment of duty by the collector of customs at the port of New York.

Walden & Webster (Howard T. Walden, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question consists of lemons in boxes. It was assessed for duty at one cent per pound under paragraph 266 of the Tariff Act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651], upon the basis of the quantities stated in each of the invoices, and reported by the appraiser as having been actually imported. The importers protested claiming that said merchandise "is worthless and no longer merchandise, and therefore is not an article imported from a foreign country mentioned in any of the schedules of said Tariff Act, and no duty can be legally assessed upon the same."

Upon the argument counsel for the government sought to sustain the action of the collector in the assessment of duty upon the ground that the importers had not availed themselves of the provision of the statute (section 23, Act of June 10, 1890, c. 407, 26 Stat. 140 [U. S.

Comp. St. 1901, p. 1930]) as promulgated in T. D. 21,831, relating to the abandonment of merchandise.

I am satisfied from an examination of Treasury Decision 21,831 that it applies specifically to abandonment cases, and I do not think the importer is under any obligation to avail himself of the statute bearing upon the question of abandonment, and therefore I do not think it affects this case one way or the other. I have examined the testimony with some care, and I think I shall be compelled to follow the decision in *Courtin, Golden & Co. v. U. S.* (C. C.) 143 Fed. 551 (T. D. 26,998). The method of ascertaining the quantity of decayed fruit is fairly well enough in common with the method applied in that case.

The decision of the Board of General Appraisers is reversed.

GREEN v. CHICAGO, B. & Q. RY. CO.

(Circuit Court, E. D. Pennsylvania. September 7, 1906.)

No. 62.

1. COURTS—JURISDICTION OF FEDERAL COURTS—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

A federal court does not acquire jurisdiction of a corporation of another state by service of process on an officer or agent of the corporation within the state where the court is held unless it appears from some part of the record or by the return that the corporation is doing business in such state.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 814-816.]

2. SAME—STATE STATUTE.

A railroad company, incorporated in Illinois, filed the statement required by Pa. Act April 22, 1874 (P. L. 108) to entitle it to do business in Pennsylvania and designating its agent in that state. Subsequently such company leased its lines to defendant, an Iowa corporation, which thereafter operated the same. The designated agent of the lessor in Pennsylvania testified that he thereafter performed the same services for the lessee that he had previously for the lessor. *Held* that, in the absence of proof of the terms of the lease, it did not appear that defendant was doing business in Pennsylvania under the registration of its lessor or was in any way bound or affected by it, and that a federal court in that state did not acquire jurisdiction of defendant by service of process on such designated agent of the lessor; it not appearing that defendant was in fact doing business in the state.

On Rule to Show Cause Why Service of Summons should Not be Vacated.

Frank P. Prichard and John G. Johnson, for plaintiff.

Francis Rawle, for defendant.

J. B. McPHERSON, District Judge. Without setting out in detail the undisputed facts upon which the plaintiff relies to establish the proposition that the defendant is doing business in the state of Pennsylvania, and was therefore properly served with the writ, I think it is enough to say that in my opinion these facts do not present a case

essentially different from the case that was considered in *Earle v. Chesapeake & Ohio R. R. Co.* (C. C.) 127 Fed. 235. It was there held that the company was not doing business in this state, and if that case was rightly decided, it seems to me that the present controversy also must be determined in favor of the defendant.

One difference between the two cases remains to be noticed briefly. On May 21, 1900, the Chicago, Burlington & Quincy Railroad (not Railway) Co. filed in the office of the Secretary of the Commonwealth the statement required by the Pennsylvania act of April 22, 1874 (P. L. 108.) That statute (section 1) forbids any foreign corporation to "do any business in this commonwealth, until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein."

Section 2 is as follows:

"It shall not be lawful for any such corporation to do any business in this commonwealth, until it shall have filed in the office of the Secretary of the Commonwealth a statement, under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the Secretary of the Commonwealth, under the seal of the commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents in each and every of said offices."

In accordance with the requirements of this act, the railroad company filed the statement just referred to, declaring that offices had been established at Philadelphia and at Pittsburg, and that the agent at Philadelphia was Harry E. Heller. No such statement has ever been filed by the railway company defendant, but Mr. Heller testified that he performed the same duties for it as he had performed for its predecessor, the railroad company. Counsel have agreed that the two corporations are different entities, the railroad company having been chartered by the state of Illinois, and the railway company having been chartered by the state of Iowa; that the former leased its lines for a long term of years to the latter about October 1, 1901, and that the property has since been operated by the defendant. Similar facts did not appear in *Earle v. Railroad Co.*, but I do not think that they require the court to reach a different conclusion in the present case. For this there are two reasons, as it seems to me: First, the lease has not been offered in evidence, and I am therefore unable to say how completely the defendant has stepped into the shoes of its lessor. *Prima facie*, registration under the Pennsylvania statute by one corporation could neither bind nor protect another corporation, without sufficient proof—and perhaps not even then—that the two were substantially identical, or that the latter had assumed the obligations of the former in this respect. For all that appears, the defendant may be maintaining its office and agency in Philadelphia without any reference to the statement filed by the railroad company under the act of 1874, and in violation of the statutory provisions.

The second reason is to be found in the decisions of the Supreme Court of Pennsylvania that are referred to upon the brief of defendant's counsel. I regret to be unable to discuss them more fully, and

to be obliged to confine myself to announcing that I agree with the position that under these decisions the defendant is not "doing business" in Pennsylvania, and is not, therefore, constructively within the state, and amenable to process therein.

It follows that the writ of summons was not lawfully served, and that the service must be set aside.

The rule is accordingly made absolute.

A writ of error in this case has been taken to the Supreme Court.

GALLENKAMP v. RACHMAN.

(Circuit Court, E. D. Missouri. January 5, 1906.)

No. 5,133 (1,722).

CUSTOMS DUTIES—CLASSIFICATION—DECORATED GLASSWARE.

Glassware ornamented with metal filigree work *held* dutiable as "articles of glass, * * * ornamented, decorated," etc., under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], regardless of whether glass or metal is the component of chief value.

On Application for Review of a Decision of the Board of United States General Appraisers.

These proceedings were brought in the name of Charles F. Gallenkamp, surveyor of customs at the port of St. Louis, and relate to a decision (G. A. 5,922 [T. D. 26,034]) which reversed the surveyor's assessment of duty on merchandise imported by William Rachman.

H. L. Dyer, Asst. U. S. Atty., for surveyor.

Vital W. Garesche, for importer.

FINKELNBURG, District Judge. This is a petition to review a decision of the Board of United States General Appraisers in the above-entitled matter, and involves the question what duty is properly chargeable against certain wares imported by defendant? The articles in question were invoiced by the importer as "metal decorated with glass." This was manifestly a misdescription. A glance at the sample exhibited to the court shows at once that it is the reverse, namely, a glass vase decorated with metal, and this is admitted by the Board of General Appraisers in the following language: "The articles in question as shown by the exhibit in the case are glass vases ornamented with metal filigree work."

But the question still remains whether these wares are dutiable at the rate of 60 per cent. under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], as claimed by the surveyor of customs at St. Louis, or at the rate of 45 per cent. ad valorem under Schedule C, par. 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], as claimed by the Board of General Appraisers at New York.

Paragraph 100 provides as follows:

"Par. 100. Glass bottles, decanters, or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted,
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printed in any manner or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all the foregoing, filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem."

Paragraph 193 is as follows:

"Par. 193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem."

It is my opinion, from the facts presented by the record, and from an inspection of the exhibit, that the article in controversy is essentially a vessel composed wholly of glass; that it is complete for use as a glass vessel, an article which would serve its entire purpose without any metal attachment, and that the metal work surrounding its lower part is intended, not for use, but for ornament, and that as such it falls under the first clause of paragraph 100, *supra*. Paragraph 193 in its terms applies only to articles or wares not otherwise specifically provided for, and hence does not apply to articles or wares which are covered by paragraph 100. If the article in question comes under the first clause of paragraph 100, as I think it does, then, in my opinion, the question whether the glass or metal decoration is of greater value becomes immaterial.

In view of the foregoing, the judgment of this court will be in favor of the petitioner, and the decision of the Board of United States General Appraisers is hereby overruled. And it is hereby adjudged that the articles and wares in controversy are dutiable at the rate of 60 per cent. ad valorem.

UNITED STATES v. ONE BLACK HORSE et al.

(District Court, D. New Jersey. February 26, 1906.)

CUSTOMS DUTIES—FORFEITURE—SMUGGLING—SEIZURE OF PROPERTY OF INNOCENT OWNER.

Under sections 3061-3063, Rev. St. [U. S. Comp. St. 1901, pp. 2006, 2007], a team used in the transportation of smuggled merchandise is forfeitable, regardless of the fact that its owner and its driver did not have knowledge of the purposes for which it was being used. Such knowledge is unnecessary, except in the case of common carriers.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 297.]

On Information for Forfeiture.

John B. Vreeland, U. S. Atty.
Robert Carey, for claimant.

CROSS, District Judge. The attorney of the United States for this district has filed an information against certain property, to wit, one black horse, one wagon, and one set of single harness, seized by the Treasury Department as forfeited to the United States for having been used for the conveyance and transportation of cer-

tain Sumatra leaf tobacco, brought into the United States without having paid the duty to which it was subject. The claimant, the Hudson Steam Laundry Company, denies that the property has been forfeited as set out and claimed in the information.

The case was tried before the court without a jury. From the testimony I find that 54½ pounds of Sumatra leaf tobacco were landed from one of the steamships of the North German Lloyd Steamship Company, at Hoboken, within this district, on the 17th day of March, 1904, and that the horse, wagon, and harness above referred to were on that day engaged in conveying said tobacco away from said steamship company; that said tobacco had not been declared, and the duty thereon imposed by law had not been paid; and that the same had been brought into the United States contrary to law. There was no evidence to show that the claimant or the driver of the horse and wagon had knowledge of the use to which they were being put; but that is immaterial. The forfeiture is claimed under sections 3061-3063, Rev. St. [U. S. Comp. St. 1901, pp. 2006, 2007]. Under these sections it is unnecessary to show that the claimant of the property used for the transportation of smuggled merchandise had knowledge of the purposes for which the property was being used. This is conspicuously apparent from the fact that section 3063 provides that in case of common carriers it is necessary to show such knowledge. It follows, therefore, upon the principle of "*expressio unius, exclusio alterius*," that it is only in the case of common carriers that such knowledge must be made to appear. *U. S. v. One Black Horse et al.* (D. C.) 129 Fed. 167; *U. S. v. Two Bay Mules* (D. C.) 36 Fed. 84; *Dobbins Distillery v. U. S.*, 96 U. S. 395, 24 L. Ed. 637.

The property seized is declared forfeited.

MILLER v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court, D. Massachusetts. October 11, 1906.)

No. 236.

COURTS—FEDERAL JURISDICTION—DISTRICT OF SUIT.

Under the provision of section 1, of the federal judiciary act (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant," an alien, although resident in a state, can maintain a suit against a citizen of the United States only in the district of defendant's residence, the latter clause of the provision relating only to suits between citizens of different states of the Union.

On Demurrer for Want of Jurisdiction.

Gargan, Keating & Brackett, for complainant.

Woodward Hudson and George P. Furber, for defendant.

LOWELL, Circuit Judge. This was an action of tort brought by "a subject of his majesty, King Oscar II of Sweden, residing at said Boston." The defendant is a New York corporation. Jurisdiction is based upon diversity of citizenship. The defendant has demurred to the jurisdiction of this court. The statute of 1888 provides that:

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508].

The plaintiff argues that, as he is an alien resident in Massachusetts, he is entitled to bring his suit in this court, as this is the court of the district of his residence. His contention fails for two reasons, either of which is sufficient:

(1) In *Re Hohorst*, 150 U. S. 653, 660, 14 Sup. Ct. 221, 224, 37 L. Ed. 1211, the Supreme Court said that the last clause of the statute above quoted "relates only to suits between citizens of different states of the Union, and is therefore manifestly inapplicable to a suit brought by a citizen of one of these states against an alien." No reason has been suggested for applying the clause in question to the case of an alien plaintiff rather than to that of an alien defendant.

(2) Even a plaintiff citizen of the United States can bring suit in the Circuit Court in Massachusetts against a citizen of New York only if the former be a citizen of Massachusetts. In *Shaw v. Quincy Mining Company*, 145 U. S. 444, 449, 12 Sup. Ct. 935, 937, 36 L. Ed. 768, the Supreme Court said that the statute above quoted "requires any suit, the jurisdiction of which is founded only on its being between the citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident." This is in conformity with the fourteenth article of amendment to the Constitution, which provides that:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

"The word 'inhabitant' in (the statute in question) was apparently used not in any larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of anything less than a state, when the intention was to cover not only a district which included a whole state, but also two districts in one state." 145 U. S. 447, 12 Sup. Ct. 936, 36 L. Ed. 768. While the matters above referred to were not directly in issue in the cases above cited, yet they were premises upon which the reasoning of the Supreme Court was based.

If some inhabitancy or residence of the plaintiff in Massachusetts, which does not amount to citizenship, will not enable a citizen of New Hampshire to sue a citizen of New York in the Circuit Court of Massachusetts, an alien cannot sue the same defendant under like circumstances. The statute was not intended to give to aliens greater rights than those of citizens. That the words "inhabitant" and "resi-

dent" are used elsewhere as distinguished from "citizen" is not material!

Demurrer to the jurisdiction sustained. Action dismissed, without costs.

McALLISTER v. UNITED STATES.

(Circuit Court, S. D. New York. March 3, 1896.)

No. 2,231.

1. CUSTOMS DUTIES—CLASSIFICATION—LILY OF THE VALLEY ROOTS—"PLANTS."

In construing the provision in Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule G, par. 234½, 28 Stat. 525, for "lily of the valley * * * plants used for forcing," held that lily of the valley roots, sprouted, which are imported for forcing, are dutiable thereunder, being included within the term "plants," in a popular sense, though not technically.

2. SAME—NOSCITUR A SOCIIS.

Lily of the valley roots are not covered by Tariff Act Aug. 28, 1894, c. 349, § 2, Free List, par. 558, 28 Stat. 542, relating to "moss, seaweeds, and vegetable substances," not being vegetable substances in the class of moss and seaweeds.

On Application for Review of Decisions of the Board of United States General Appraisers.

The General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on importations by F. E. McAllister. One of the Board's decisions is reported as G. A. 3,141 (T. D. 16,312).

Comstock & Brown (Everit Brown, of counsel), for importer.
Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in controversy are bunches of roots, lily of the valley having several sprouts or crowns thereon. The importer testifies that they are thus imported for forcing, and that he has never known of their being imported with foliage. The collector classified them for duty under Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule G, par. 234½, 28 Stat. 525. The provisions of said paragraph are "orchids, lilies of the valley, azaleas, palms, and other plants used for forcing under glass for cut flowers, * * * ten per centum ad valorem." The importer protested, claiming that the articles were free under paragraph 558 (section 2, Free List, 28 Stat. 542), as "moss, seaweeds, and vegetable substances," or under paragraph 611 (28 Stat. 544), as "roots not specially provided for." The Board of General Appraisers overruled the protest and sustained the action of the collector, and the importer appeals.

These articles are not vegetable substances in the class of moss and seaweeds under said paragraph 558. It seems clear that, while they are not botanically and technically plants, yet they are plants in the broadest sense, with the operation resultant from planting already started. They would be popularly considered as plants and are imported to be planted. I think it is manifest that Congress, in view of these circumstances, and in view of the fact that they are imported

in this way only, intended to use the word in its broadest sense, and to assess them denominatively for duty under paragraph 234½ as lily of the valley plants used for forcing under glass for cut flowers, etc.

The decision of the Board of General Appraisers, affirming the classification of the collector, is therefore affirmed.

JULIUS LOEWENTHAL & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 30, 1906.)

No. 3,742.

CUSTOMS DUTIES—CLASSIFICATION—CROCHETED GOODS—LACE—TRIMMINGS.

So-called "crochet yokes," made by knitting or crocheting, and used in the yoke of women's vests, are not trimmings or lace within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of New York, who classified the articles in controversy as "cotton trimmings," under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]. The board described the goods as consisting of "so-called crochet yokes, the same being in fact knitted or crocheted cotton lace articles about fourteen inches in length and one inch in width, said to be used by being sewn on the neck or yoke of women's vests"; and the board ruled that, "inasmuch as they are 'lace articles,' they are dutiable under paragraph 339, whether they be used as trimmings or as ornaments." In this court further evidence was introduced on behalf of the importers, consisting of the testimony of a dealer in lace goods, who testified that he would not regard the articles in question as coming within the category of laces or imitation laces.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

HAZEL, District Judge. The articles in question, consisting of crochet yokes, are ornaments, and not trimmings. The evidence taken in this court sustains the contention of the importer. The case of Garrison, Wright & Co. v. U. S. (C. C.) 121 Fed. 149, would seem decisive of the propositions argued at the hearing. It follows that the merchandise is dutiable at 45 per cent. under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 322, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], and not as trimmings as returned by the appraiser, nor as laces as found by the board.

So ordered.

HECK v. MISSOURI PAC. RY. CO.

(Circuit Court, D. Colorado. October 1, 1906.)

No. 4,776.

1. RELEASE—PLEADING IN AVOIDANCE OF DEFENSE.

A reply in avoidance of a release set up in the answer must confess the execution of such release, and that directly and not hypothetically, and a reply alleging that "if" the release was given it was obtained by fraud, etc., is bad.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, §§ 90-92.]

2. SAME—AVOIDANCE—RETURN OF CONSIDERATION AS CONDITION PRECEDENT.

As a condition precedent to the right to avoid a release pleaded as a defense, and admittedly based on a consideration paid, the plaintiff must return or offer to return such consideration.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, §§ 38, 45.]

3. SAME—NEGLIGENT FAILURE TO READ.

A plaintiff, who, on receipt of a sum of money from defendant, signed a written release of a cause of action for a personal injury, without reading the same, is chargeable with negligence which precludes the avoidance of such release on the ground that its contents were misrepresented by defendant's agent without a showing in excuse of the failure to read the same or to have it read before signing.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, § 32.]

4. SAME—VALIDITY—FALSE REPRESENTATIONS.

The fact that a plaintiff was induced to sign a release by false or fraudulent representation as to its contents or purport will not render it void or avoid its effect as a defense in an action at law, where it was signed knowingly and intentionally, and upon a consideration paid, although it may afford ground for cancellation in equity.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Release, § 32.]

At Law. On motion to strike out reply.

Skelton & Morrow, for plaintiff.

Thos. H. Devine and Henry A. Dubbs, for defendant.

LEWIS, District Judge. Trespass on the case. The answer pleads accord and satisfaction, the payment of \$130 by defendant to plaintiff, and, in consideration thereof, a written release by plaintiff of the damages in question. The replication attempts the plea of confession and avoidance, alleging that if the release was obtained from the plaintiff, it was by artifice, fraud, deceit, and by false and fraudulent representations made to plaintiff by defendant and its agents.

1. The plea is bad. It does not give color. 1 Chitty on Pleadings (16 Am. Ed.) bot. pp. 677, 678, 679:

"A plea of this description is either in justification or excuse of the matters alleged in the declaration, as, imprisonment under a magistrate's warrant, or son assault demesne in trespass; or it is in discharge of the cause of action by subsequent matter, as accord and satisfaction, or a release. It is observable that each of these pleas admits the mere facts stated in the declaration, as that the defendant committed the trespass charged; that the contract was made or the debt was incurred, etc. But the matter which they allege by way of defense defeats or avoids the legal effect of those facts and disproves, if true, the plaintiff's right of action. As a part of this rule, that a plea must either

traverse or deny, or confess and avoid, it was held that a plea of discharge under an insolvent act from liability to perform the promises laid in the declaration must expressly confess such promises to have been made, and this not hypothetically; and that, therefore, a plea of discharge from the alleged premises, 'if any such were made,' was demurrable. So, very recently a plea of the statute of limitations, alleging that the cause of action, 'if any such there be,' did not accrue, etc., was bad on special demurrer. * * * An important rule of pleading is deducible from the principle that a plea in bar must traverse, or confess and avoid, the matter to which it is applied, namely, that a plea in confession and avoidance must give color. * * * It is plain that a plea which shows new matter in avoidance or discharge of the plaintiff's allegations is double and argumentative, if it do not admit the apparent truth of those allegations as matter of fact. There can be no occasion to adduce grounds for defeating the operation of disputed facts. The plea in avoidance must, therefore, give color to the plaintiff; that is, must give him credit for having an apparent or prima facie right of action, independently of the matter disclosed in the plea to destroy it."

The plea is also bad as being hypothetical. Bliss on Code Pleading (2d Ed.) § 317, gives the following as hypothetical pleas, and therefore bad:

"If there has been an escape, that there has also been a return; or if the plaintiffs are the owners and holders of a promissory note named, etc., the said note was obtained by fraud, etc."

See, also, 4 Enc. Pl. & Pr. 671, for the requisite elements of a plea of this kind.

2. In this plea the plaintiff admits that she received from the defendant \$130 on the execution of the settlement and release. She, however, denies that the release pleaded embodies the contract she made. The defendant in its answer says it does. The plaintiff does not allege that she returned to the defendant, or tendered to it before instituting this suit, the money she received, nor did she make deposit in court of that sum for the use of defendant at the time she instituted this action. The release, based on a valuable consideration as pleaded in the answer, makes prima facie a good defense to the cause of action set up in the declaration. The defendant's plea of accord and satisfaction, if not traversed, is a complete bar; and if met with the plea of confession and avoidance, the burden is on the defendant to establish the matters in avoidance. So that, as to the artifice, fraud, deceit, and fraudulent representations, the presumption is against plaintiff. The plaintiff must overcome the contract of settlement. It stands till then. The written contract raises a presumption against her. The burden is on her to overcome it. The parties, under the present legal aspect of the case, made a settlement of the damages claimed, and plaintiff has been paid the amount agreed on therefor. She retains the money paid her, and at the same time asks to be relieved from the contract of settlement, and now seeks judgment for the same damages that have been adjusted; which, so far as the case now stands, are by agreement fully covered and represented by the \$130 in her hands. Prima facie, therefore, she asks to litigate with the defendant for the money which defendant has already paid her and which she now holds. It is true she asks for more, but in contemplation of law while the release contract stands, she has been fully compensated.

At present that contract stands against her as a conclusion, notwithstanding her allegations of fraud. She may have taken from the defendant a sum grossly inadequate for the damages suffered, but there is no presumption to that effect at this time; and we cannot presume a fact to be true, which she must prove, and which is a prerequisite to her right to litigate as to the amount of damages.

The objection of the plea is that now, at the very threshold of the case, it appears that she seeks the compensation already made to her and still retained by her. This she cannot do. For this reason also the plea is bad.

In *Barker v. Northern Pac. Ry. Co.* (C. C.) 65 Fed. 460, it was said:

"But there is another insurmountable obstacle in the complainant's way upon this feature of this case: and that is although she desires to set aside the contract of release, she still retains the consideration, and has never offered to return it. Where a party attempts to rescind a contract, the rescission must be complete. He cannot affirm it in part and reject it in part. Common honesty would require him seeking to escape the burdens of the contract, to return the benefits which he has received. This is not only a rule of common honesty and fairness, but has been recognized by the courts from time immemorial. There are some few exceptions where railroads have been involved, but they simply illustrate that courts sometimes give way to sentiment, and allow compassion and sympathy to rule instead of tranquil judgment. These offers of restitution should come promptly, and not reluctantly or tardily. To withhold a restitution is to exhibit a want of confidence in the integrity and justness of his case, who complains of a contract, and seeks to set it aside because of fraud."

In *Hill v. Northern Pac. Ry. Co.*, 113 Fed. 914, at page 917, 51 C. A. 544, at page 547, it is said: "Good faith and fair dealing would require the plaintiff, as a condition precedent to the presentation and maintenance of such an issue, to return or offer to return the money received in consideration of the instrument."

In *Vandervelden v. Chicago & N. W. Ry. Co.* (C. C.) 61 Fed. 54, 59, we find the following:

"If the contract is of such a nature that by means thereof one party thereto is induced to pay a given sum of money to the other, which he would not have paid except for the inducement of the contract, and after the payment of the money the party receiving the money seeks to rescind the contract, it is clear that, in justice and equity, he should be required to repay the money as a condition of rescission."

In *Johnson v. Granite Co.* (C. C.) 53 Fed. 569, at page 572, Judge Putnam said:

"And so I prefer to rest the case upon the fact that the amount received by the plaintiff was not repaid, or tendered back, before suit was commenced. That the law of this state requires this is positively settled in *Brown v. Ins. Co.*, 117 Mass. 479, and *Mullen v. R. R. Co.*, 127 Mass. 86, 34 Am. Rep. 349, and was evidently the theory of the court in *Larrabee v. Sewald*, 66 Me. 376, cited by the plaintiff. In *Snow v. Alley*, 144 Mass. 540, 11 N. E. 764, 59 Am. Rep. 119, it is said that where the consideration given is a mere promissory note, it need not be tendered back until the trial, because it has itself no intrinsic value; but nothing in this case contravenes the earlier decisions referred to."

It is not deemed necessary to review the authorities relied on and cited in the cases above mentioned. An able discussion of the ques-

tion under consideration may be found in the dissenting opinion of Judge Burgess in *Girard v. Car Wheel Co. (Mo.)* 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. Rep. 556, concurred in by Gantt and Sherwood. The conclusion there reached, after an exhaustive review of the authorities, was stated as follows:

"It will thus be seen that the authorities are almost unanimous in holding that where money or other valuable thing is paid on the settlement to obtain a release of any right of action, before the person to whom it is paid, and who has the right of action, can recover it, he must return or offer to return whatever he has received, if of any value; and this he must do although the settlement or release was obtained by fraud. And it is also manifest from the decided weight of authority that the offer to return whatever of value has been received as a consideration for the settlement or release, must be made before or at the time the suit is brought, and the contract or agreement, in so far as it lies in the power of the party desiring to do so, rescinded."

These views were subsequently adopted by that court in *Och v. M. K. & T. Ry. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442. It was there said:

"And if the release in this case is to be canceled, the parties should be put in statu quo [citing cases]. The rule undoubtedly is that where a party seeks to rescind a contract on the grounds of fraud or imposition, he must tender a return of what he has received under it, before he can maintain an action at law; and in an action in equity he must at least tender a return by his bill of complaint."

This same question was raised in *Union Pac. Ry. Co. v. Harris*, 63 Fed. 800, 12 C. C. A. 598, and *St. Louis Ry. Co. v. Phillips*, 66 Fed. 35, 13 C. C. A. 315. But Judge Caldwell, who spoke for the court, declined to pass upon it because it had not been raised on the trial. We know of no reason why this principle should not have recognition in suits at law, as well as in equity.

3. There is another objection to this plea in the replication. The artifice, fraud, and deceit, and false and fraudulent representations on which the plaintiff relies to avoid the release, are fully set forth in the following language:

"After the accident mentioned in said amended complaint plaintiff continued her journey to Victor, Colo., where she was confined to her bed, and where she continued to suffer great and excruciating pain and agony until long after the time hereinafter mentioned. That while she was so confined to her bed, and while so suffering, as aforesaid, from said injuries, some person claiming to be an agent of the defendant, but whose name is to plaintiff unknown, called on plaintiff at Victor, Colo., at about the date mentioned in said answer, to wit, May 27, 1904, and stated to her that he had been informed that she had been injured in the wreck mentioned in the amended complaint. That the defendant company desired to aid and assist in every way possible all those who received any injury at said time. That he was instructed by the defendant company to procure such medical attendance as she might desire. That for the purpose of determining the extent of her injuries he would at once call in a physician. That he thereupon called in a doctor who, at his request, made an examination of the plaintiff for the alleged purpose of determining the extent of her injuries, and how long she would be confined to her bed on account of said injuries, in order that said alleged agent might be able to determine what her expenses would be during said time. That said doctor told plaintiff and said agent of the defendant that it was his opinion that plaintiff would recover from said injuries in from four to six weeks from said date. That thereupon said agent estimated that her expenses for board, nursing, and medical attendance during said six weeks

would amount to about \$130, and he thereupon offered to pay said plaintiff said sum of \$130 for the purpose of covering her expenses during said six weeks, and he then and there told plaintiff that if she did not recover in said estimated time of six weeks to inform him thereof, and he would see that the defendant continued to pay her expenses until she fully recovered. That said sum was paid to her to cover her expenses during said six weeks, and not as compensation for the injuries she sustained, or for any other damages sustained by her on account of her said injuries, nor was there anything said by said agent, or by anybody else, that would indicate that said agent intended said sum to compensate her for the injuries she received, or for any damages sustained by her, except the payment of her expenses for said six weeks in which it was estimated she would recover; nor was said sum received by plaintiff as compensation for said injuries, or for any damages sustained by her on account of said injuries, but was received for the sole purpose of paying her expenses during said estimated six weeks in which she expected to recover. That when said agent paid plaintiff said sum of \$130 he presented her a paper for her signature which he had so rolled and folded as to conceal the contents thereof from plaintiff, and when plaintiff inquired what said paper contained, and whether she could read the same, said agent explained that she was suffering too much to go to the trouble of sitting up to read said paper, that it was only a receipt for the money he had paid her, that he would not have her sign it at all, but it was necessary for him to turn it in to the company to show where the money went. That plaintiff was at said time unfamiliar with business methods, and had no suspicion that said agent was seeking to take an unfair advantage of her as he had assured her that he was endeavoring to do everything for her benefit, and she believed he was only looking after her welfare and comfort. That she was at said time suffering so much pain and agony, and her nerves were so shocked and affected by said injuries that she was incapable of exercising any independent judgment as to the proper course to pursue with reference to said matter, and having been entirely disarmed of any suspicion whatever of unfair dealing, and relying implicitly and absolutely on the statements of said agent as to what said paper contained, and believing that said paper so presented to her was nothing but a receipt for said \$130 paid to her by said agent, and that it contained nothing inconsistent with the statements made by said agent, she signed the same, without having read or known its contents. That said paper signed at said time is the only one which she ever signed which could contain the contract mentioned and described in said answer of the defendant, and if said paper so signed by her at said time contained or embodied the contract mentioned in the answer, it was obtained by the artifice, fraud, deceit, and fraudulent representations of the agent of the defendant who induced her to sign the same as aforesaid, and it is void and of no effect."

It will be observed that the only allegation made for the purpose of showing a trick, artifice, fraud and false representations touching the immediate execution of the release, is as follows:

"He [defendant's agent] presented her a paper for her signature which he had so rolled and folded as to conceal the contents thereof from the plaintiff, and when plaintiff inquired what said paper contained, and whether she could read the same, said agent explained that she was suffering too much to go to the trouble of sitting up to read said paper, that it was only a receipt for the money he had paid her."

It is nowhere alleged that the plaintiff was unable to read the release. No reason is assigned why she did not ask some one present to read it. This was negligence on her part.

"A party who blindly executes an instrument without examination has only his own folly and neglect to complain of." *Dingle v. Trask*, 7 Colo. App. 16-21, 42 Pac. 186.

"A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. * * * If one can read his contract his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practised by the opposite party. If he cannot read it, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so; and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." *Chicago, St. P. M. & O. Ry. Co. v. Belliwith*, 83 Fed. 437-439, 440, 28 C. C. A. 358, 361.

"A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection if the purchaser does not avail himself of those means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another." *Slaughter v. Gerson*, 13 Wall. (U. S.) 379-383, 20 L. Ed. 627.

"The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity, nor will industrious activity in other directions, to the neglect of such means, be of any avail." *Andrus v. Smelting Co.*, 130 U. S. 643, 647, 9 Sup. Ct. 645, 646, 32 L. Ed. 1054.

"It is further insisted that, by proper diligence, appellees could have ascertained the truth or falsity of the representations, before entering upon the contract. When the means of knowledge are at hand, and equally available to both parties, and the subject about which the representations were made is open to their inspection, if the party to whom the representations are made does not avail himself of those means and opportunities, he will not be heard to say that he has been deceived by the misrepresentations. If, having eyes, he will not see matters directly before them, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another." *Sellers v. Clelland*, 2 Colo. 532-544.

"If the purchaser has full opportunity of examining the goods, and can easily and readily ascertain their quality and value by inspection, and he neglects to do so, then any injury which he may sustain by such negligence is the result of his own folly, and he can have no relief at law." *Reynolds v. Palmer* (C. C.) 21 Fed. 433-434.

"Again, relief will not be given against a mistake, where the party complaining had within his reach the means, or at hand the opportunity, of ascertaining the true state of facts and neglected to take advantage of them." *Barker v. Northern Pac. Ry. Co.* (C. C.) 65 Fed. 460-463. See, also, *Chicago & A. Ry. Co. v. Green* (C. C.) 114 Fed. 676-680.

All other allegations as to fraud, artifice, and deceit are extraneous the immediate execution of the release. Can they be considered as a proper plea here?

In *George et al. v. Tate*, 102 U. S. 564, 26 L. Ed. 232, we find the following:

"Proof of fraudulent representations by Myers and Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected. It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. *Hartshorn v. Day*, 19 How. (U. S.) 211, 15 L. Ed. 605; *Osterhaut v. Shoemaker*, 3 Hill. (N. Y.) 513; *Belden v. Davis*, 2 Hall (N. Y.) 466; *Franchot v. Leach*, 5 Cow. (N. Y.) 506. The remedy is by a direct proceeding to avoid the instrument."

Judge Hanford in *Hill v. Northern Pac. Ry. Co.* (C. C.) 104 Fed. 754-756, puts it thus:

"I consider that the Supreme Court of the United States has given a just rule applicable in the decision of this question. The rule makes a distinction between cases where the execution of a written instrument has been obtained by trick or fraud, to which the assent of the party executing it was not given intentionally, and cases where instruments have been executed intentionally and understandingly, but where the mind of the party has been affected and assent secured by means of false representations and deceit, and holds that in cases where the execution of an instrument has been obtained by fraud or trick, without the assent of the party executing it, the instrument is entirely void, and should be disregarded in an action at law in which a plea of non est factum has been interposed, but in cases of the other class, written instruments intentionally executed are only voidable at the option of their makers, and effect must be given to them as valid instruments until they are annulled by a judicial decree in a direct proceeding for the purpose. *Hartshorn v. Day*, 19 How. (U. S.) 211, 15 L. Ed. 605; *George v. Tate*, 102 U. S. 564-571, 26 L. Ed. 232. The decision in the case of *Railway Co. v. Harris*, 158 U. S. 326-333, 15 Sup. Ct. 843, 39 L. Ed. 1003, is in harmony with the previous decisions of the Supreme Court, and my attention has not been called to any cases in which the Supreme Court has departed from the above rule. With all due respect for the decision of the Circuit Court of Appeals for the Sixth Circuit, in the case of *Wagner v. Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121, this court must be bound by the law as it has been declared by the highest court in this country."

Kosztelnik v. Iron Co. (C. C.) 91 Fed. 606, 607: "Under the pleadings as they now stand, upon proof of the release on the trial, the plaintiff will be permitted to show any fraud touching the execution of the instrument, but will not be entitled to show that he was induced to make the contract of release by fraudulent representations, which would constitute an equitable, and not a legal, defense. *Shampeau v. Lumber Co.* (C. C.) 42 Fed. 760; *George v. Tate*, 102 U. S. 564-570, 26 L. Ed. 232. If the plaintiff seeks to avoid the release by reason of false representations, whereby he was induced to make the

contract, he must pursue his remedy by a suit in equity." A demurrer to the replication in this case was sustained, and the ruling affirmed by the Court of Appeals for the Ninth Circuit. 113 Fed. 914, 51 C. C. A. 544. See, also, *Johnson v. Granite Co.*, 53 Fed. 569.

The plaintiff did not sign the release under such circumstances, according to the replication, as to render the same void. "A void contract may be disregarded by either party, a voidable contract cannot be. It will scarcely be contended that defendant company could have maintained an action against the plaintiff for the money paid on the contract of settlement under these circumstances. No executed contract where a valuable consideration has passed, made between the parties competent to contract, not immoral or prohibited by statute, nor against public policy, is void between the parties thereto however fraudulently it may have been obtained." *Och v. Railway Co.*, *supra*.

The release agreement is, therefore, not void; that is, incapable of confirmation or ratification. For, under the facts pleaded in the reply, the plaintiff is held in this forum to have intended to execute the instrument which she signed. These facts, aside from the trick, artifice, and deceit pleaded, are not such as can here be made available to her. They might be considered in equity for purposes of cancellation. A device, trick, or artifice employed in the execution of a contract will render it void, but a void contract needs no decree of annulment. It is this latter kind of a contract, which is not a contract in fact, though one in form, that can be dealt with in a law action primarily. The facts touching the execution of such a contract are available at law to the injured party under the plea of non est factum; and this is the conclusion in *George v. Tate*, *supra*, and in *Johnson v. Granite Co.*, *supra*. This principle is directly announced in *Shampeau v. Lumber Co.* (C. C.) 42 Fed. 760. See, also, *Hill v. Railway Co.*, 113 Fed. 914-917, 51 C. C. A. 544. The same conclusion is reached in *Och's Case*, *supra*, and in the dissenting opinion in the *Girard Case*, *supra*, in both of which a very lucid and able review of the authorities may be found. See, also, *Levi v. Mathews* (C. C. A.) 145 Fed. 152-154.

Thus the line between the two jurisdictions is well marked, and the practise in one does not encroach upon that of the other. I therefore conclude (a) that the only trick, artifice or deceit going to the immediate execution of the release, as pleaded, cannot be availed of by the plaintiff, for to do so would relieve her from her own negligence at the time; (b) that all other allegations of fraud and fraudulent representations are of facts not in nor connected with the execution of the instrument, and from which she cannot obtain relief in this forum; (c) that as to such facts her only remedy is in equity.

For the foregoing reasons, the motion of the defendant to strike the plea is sustained.

It is so ordered.

LARSEN v. 150 BALES OF SISAL GRASS.

(District Court, S. D. Alabama. July 31, 1906.)

No. 1,110.

SHIPPING—TIME CHARTER—RESERVATION OF LIEN ON CARGOES AND SUB-FREIGHTS.

The effect of a provision of a time charter giving the owner of the vessel a lien on all cargoes and subfreights for the charter hire, as against a shipper other than the charterer, is merely to subrogate the vessel owner to the rights of the charterer, and where the shipper has paid the freight to the charterer in good faith, he is protected in such payment, and no lien on the cargo can be asserted by the vessel owner more than by the charterer.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 199.]

In Admiralty. Libel for freight.

The following are the facts agreed upon: The claimant, Avelino Montes S. en C., was, at the time of the filing of the libel in this cause and at the time of the shipment of the goods, the owner of the 150 bales of sisal grass, which were arrested under the process in this cause; these bales being a part of a cargo of sisal grass shipped from Progreso, Mexico, upon the steamship *Atlas*, whereof the libelant was and is master, which shipment was made on the 15th day of December, 1905, for carriage of the said goods to Mobile, Ala. The said steamship was a Norwegian steamship under the Norwegian flag and was at that time chartered and operated by the *Compania Yucateca*. The steamship *Atlas* was being operated as a general merchandise ship, and before the trip upon which the sisal grass in question was shipped, the *Compania Yucateca* made a trip with said vessel between Progreso and Mobile, transporting therein, for reward, as a general merchandise ship, the goods of various persons between said points. M. Martin C. was the agent at Progreso of the said *Compania Yucateca*, and, as such agent, was authorized to and did solicit cargoes for said vessel, and agreed upon the rates of freight to be charged to the several shippers, and the terms upon which they were to be paid, either in advance or upon delivery; and when agreed to be paid in advance, he collected the freight and issued to the shippers instruments in the form attached as exhibits to the answer in this case, and that on the former trip the freight so shipped was delivered according to the terms of such instruments. The said Martin C. solicited freight for said vessel from intervenor, and agreed to transport for him on said vessel 1,999 bales at 11 cents per hundred pounds, from Progreso to Mobile; the freight to be paid in advance, and the same being a reasonable freight for the service to be rendered. Intervenor delivered to said vessel for transportation under such agreement 1,999 bales of sisal grass, and paid to the said Martin C. the freight in advance, which aggregated the amount of \$777.12, and the said Martin C. executed and delivered to him two instruments, styled "bills of lading" in the answer, and attached thereto. The said Avelino Montes C. had no knowledge of the charter of said vessel by the *Compania Yucateca*, nor did he know under what title or right it was being operated by that company, nor whether freight hire of the said vessel had been paid by the charterers to the owners or not. For the said shipment the said Avelino Montes en C. did not ask for or require of the master any bill of lading or present any to him therefor, and the master of the ship was not by any person required or requested to sign any bills of lading for said cargo, and did not in fact sign bills of lading therefor; but under instructions from charterer proceeded to Mobile with said cargo in the said vessel with orders to deliver the same to Alberto Mendes. When the vessel was ordered to proceed to Mobile, and when she hove up anchor so to do, there was handed to the master, by said agent of the said charterers, the ship's papers, and other papers including the health certificate, clearance papers, invoices, and two papers in the forms of bills of lading. The charter of the

vessel was for the term of three months; the charter hire to be paid monthly in advance. The hire commenced to run on the 16th day of November, 1905, and was paid by the charterers for the first month; but the hire for the second month, due and payable on the 16th day of December, 1905, was not and hath not been paid by the charterers. The master of said vessel, claiming to have a lien under the terms of the charter party, for the security of the owners, upon the cargo and freight for the hire, demanded payment of the same, and endeavored to effect some arrangement for the security of the same or some part of the same, but without success, and thereupon filed the said libel against a part of the said cargo. The stipulation in the charter party annexed to libel in regard to lien on freight for charter hire reads as follows: "That the owners shall have a lien on all cargoes and all subfreights for any amounts due under this charter and the charterers shall have a lien upon the ship for all moneys paid in advance and not earned."

Pillans, Hanaw & Pillans, for libelant.

Gregory L. & H. T. Smith, for intervener.

TOULMIN, District Judge (after stating the facts). In the case of the *American Steel-Barge Co. v. Cargo of Coal* (D. C.) 107 Fed. 964, there was a libel by the owner of a steamer chartered by a transportation company, by a charter, the material parts of which were substantially like those in this case. The facts of that case were that the steamer took on a cargo of coal at Newport News, belonging to the claimant, consigned to the claimant's agent in Boston. The bill of lading was in the usual form, signed by the master. The freight payable was stated to be "as agreed." There was an agreement between the charterer and the claimant as to the rate of freight. The amount as fixed by the contract was, in the aggregate, \$2,348.46. The steamer left Newport News on December 30, 1898. On that day the claimant paid to the charterer in New York, at the charterer's request, \$1,500 on account of the freight to be earned by the steamer, and took from the charterer a receipt therefor. The charterer then was, and had been for some time, indebted to the claimant for coal to an amount largely exceeding the freight on the cargo in question. Upon the arrival of the steamer in Boston the libelant libeled the coal, and sought to hold it for the total amount of freight due thereon, at the rate agreed on. It asserted a lien upon the coal for freight, as the owner of a vessel which has earned freight in the carrying of a cargo; and relied especially upon the clause in the charter party giving "a lien upon all cargoes and all subfreight for charter money due under this charter."

The court said:

"The lien on subfreight given by the charter does not help the libelant, which here seeks to enforce, not a lien on freight, but a lien for freight. That a knowledge of the existence of the charter party does not bind the property of shippers other than the charterers for the rent due under the charter party has been decided [*Paul v. Birch*, 2 Atk. 621; *The Volunteer*, 1 Summ. 551, 573, Fed. Cas. No. 16,991; *The Albert Dumois* (D. C.) 54 Fed. 529]; and this even where the bill of lading refers expressly to the charter. * * * A lien upon a cargo for its freight is created by the maritime law in favor of the person in possession of the ship. A lien upon the cargo for the charter rent is created by the charter in favor of the general owner of the vessel. That the libelant, as not in possession of the vessel, cannot avail itself of the first lien has been already stated. * * *

The court concluded by saying that:

"The shipper dealt with the charterer as charterer, or rather with the charterer as it was entitled to deal with one who had control of the vessel, whether owner or charterer."

In short, the court held that the provision in the charter giving a lien upon all cargoes and all subfreight for charter money due under the charter could not be construed to give the owner a lien upon cargo owned by third persons, and shipped under contract with the charterer for charter money, nor has he any lien on such cargo under either the charter or the maritime law to compel the shipper to pay freight to him; such lien being created by the maritime law in favor of the person in possession of the ship.

The case was appealed to the Court of Appeals for the First Circuit. That court held that it was competent for a time charterer, by a provision in the charter, whether it is or is not a demise of a vessel, to pledge the freight to be earned by her during the term to secure the payment of the charter hire; that such a provision gives the owner an equitable lien in admiralty, as of the date of the charter, on any freight subsequently stipulated to be paid, and subrogates him to the lien of the charterer for the freight, and to the remedies of the charterer to enforce its payment. *American Steel Barge Co. v. Chesapeake & O. Coal Co.*, 115 Fed. 669, 53 C. C. A. 301. It also held that a cargo owner who, on the issuance to it of a bill of lading, paid to the charterer a portion of the freight, in good faith, is protected in such payment as against a lien on subfreight reserved by the shipowner in the charter, of which the shipper had no knowledge or notice. In the course of the opinion, the Court of Appeals said:

"At the proper time, and under the proper circumstances, a libellant holding a lien on subfreight becomes subrogated to all the remedies of the charterer, which * * * includes a proceeding against the cargo in the event the lien for freight has not been lost; but, also like the charterer, he could not properly institute this proceeding until there had been default in payment of the freight, unless under very peculiar circumstances, which do not arise here."

The court also said:

"We have also shown that the owner of the cargo was entitled to look to the charterer as the party with whom he was dealing with reference to the cargo and the freight thereon." 115 Fed. 669, 53 C. C. A. 301.

So in this case the libellant, holding a lien on the subfreights, would be subrogated to any remedy possessed by the charterer, which would include a proceeding against the cargo of sisal grass in question in the event the lien has not been lost or satisfied by the payment of the freight on it. Here there has been no default in the payment of the freight. The freight having been paid to the charterer, he could not properly institute this proceeding, and hence there is no remedy to which the libellant could be subrogated, and, like the charterer, he could not properly institute this proceeding. The Court of Appeals, in the case cited, recognized as valid and binding the payment to the charterer of the \$1,500 on account of the freight, which was paid in advance to the charterer by the shipper, but reversed and remanded the case to the court below, with directions to enter a decree in favor of the libellant for the amount of the freight agreed on and earned,

less the sum paid on account of the same to the charterer, and an amount advanced to the master to provide for certain charges against the ship. The difference between the amount of freight claimed by the libellant and the sum paid by the claimant of the cargo on account of freight and the charges referred to was \$1,701.64, which amount the claimant undertook to set off against the demand and lien for the freight. This the court held could not be done. The set-off was based on an indebtedness of the charterer to the claimant which the court held could not be maintained on certain equitable grounds announced by it, and said: "Under the circumstances, the equity of the libellant must prevail against a general set-off, and the decree of the District Court must be reversed to that extent." *Raymond v. Tyson*, 17 How. 53, 15 L. Ed. 47; *Drinkwater v. The Brig Spartan*, 1 Ware, 149, Fed. Cas. No. 4,085.

On the authorities cited, and which seem to me to be in accordance with reason and equity, the libel is dismissed.

In re *BOLLING*.

(District Court, E. D. Virginia. September 11, 1906.)

BANKRUPTCY—STOCK BROKER—TITLE TO STOCKS PURCHASED FOR CUSTOMER.

A stockbroker who purchases and carries stocks on account of a customer on margins furnished by such customer, holds the same as pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee, to the exclusion of the bankrupt's creditors.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 207.]

In Bankruptcy. On exceptions to report of referee.

W. J. Leake and L. R. Page, for trustee in bankruptcy.
George A. Hanson, for petitioner Dickinson.

WADDILL, District Judge. In involuntary bankruptcy proceedings regularly inaugurated, Wyndham Bolling, a stockbroker doing business in the city of Richmond, Va., was duly adjudicated a bankrupt. His assets consisted mainly of the value of surplus margins in certain stocks held by him. Included in said assets were 500 shares of the stock known as "Steel Common," and on which there was a margin in hand, as ascertained by the sale thereof, of \$2,175.74. Upon the bankruptcy of said Bolling, Emmet Dickinson, a customer, at once interposed his claim to said stock, and subsequently filed his formal petition asserting ownership thereof, by insisting that the same was purchased for and carried on his account, and that in carrying the same he had lost thousands of dollars; and praying that any sums arising from the sale of said particular stock should be decreed to him as his property; he being the owner thereof.

The question raised by the petition of said Dickinson involves his status respecting the steel stock in question; that is to say, whether, as between himself and his broker, the ordinary relation of debtor and creditor existed, or he occupied the more favorable position of a

pledgor of said stock. The questions arising on the petition were referred to the referee, who duly took evidence thereon, and reported adversely to the claim of the petitioner. The case is now before the court upon a review of the finding and decision of the referee. After a most careful consideration of the entire subject, and of the able and elaborate arguments of counsel, the conclusion reached by the court is that the referee erred in his ruling, both upon the question of law and fact; and that, therefore, the exceptions to his finding should be sustained. The evidence, in the view taken by the court, indisputably establishes the fact that the steel stock in question was purchased by the bankrupt, Bolling, on account of the petitioner Dickinson; and that the same was carried by him for Dickinson; that the latter furnished the money with which to buy and carry the same; and that, under such circumstances, Dickinson, who furnished the money, should be entitled to any surplus margin on this stock, instead of the general creditors of Bolling. There would seem to be no good reason in principle why this should not be the case, and that so inequitable a result should be worked out by the court as would follow if it decreed the money arising from the surplus margin to the general creditors of Bolling, who paid nothing on account of the stock, instead of to Dickinson, who paid for and carried the same. The court is largely influenced in reaching this conclusion by a careful consideration of the case of *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102, 110, 117, a decision of the Supreme Court of Errors of the state of Connecticut, which contains an exhaustive review of the subject of the ownership of and right to surplus margins due on stock carried by a broker for his customer, upon the failure of the former.

In discussing the effect of the view contrary to the one here taken, Prentice, J., speaking for the court, said (26 Atl. 879, 21 L. R. A. 111):

"So long as the interpretation of the contract preserves as its distinctive feature the principal proposition that the customer purchases merely the right to have delivery to him in the future, at his option, of stocks or securities at the price of the day of the agreement, and its corollary that the customer derives no right, title, or interest in the stocks or securities until final performance, the difficulties in the way of harmonizing the situation are bound to exist. The fundamental difficulty grows out of the necessary attempt in some way to transform the customer, who enjoys all the incidents, and assumes all the risks of ownership, into a person who in fact has no right, title, or interest, and to create out of the broker, who enjoys none of the incidents of ownership, and assumes not a particle of its responsibility, a person clothed with a full title and an absolute ownership."

And subsequently in the same case (26 Atl. 881, 21 L. R. A. 113), in discussing the status of the customer, and demonstrating that he occupies the position of pledgor of the stock purchased, as distinguished from an ordinary debtor, the same learned judge, referring to the leading New York case, and the authorities generally bearing on the subject, says:

"The leading case upon this subject in New York is *Markham v. Jaudon*, 41 N. Y. 235. The opinion of the court in that case delivered by Chief Justice Hunt, contains an analysis of the obligations of the parties to a margin-purchasing contract which is so exhaustive, and so in consonance with our views, in so far as it relates to the questions involved in this case, that we

quote it in full, together with some further pertinent observations of the court, as follows: 'The broker undertakes and agrees (1) at once to buy for the customer the stock indicated; (2) to advance all the money required for the purchases beyond the ten per cent. furnished by the customer; (3) to carry or hold such stocks for the benefit of the customer so long as the margin of 10 per cent. is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker; (4) at all times to have in his name and under his control ready for delivery, the shares purchased, or an equal amount of other shares of the same stock; (5) to deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or (6) to sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes (1) to pay a margin of 10 per cent. on the current market value of the shares; (2) to keep good such margin according to the fluctuations of the market; (3) to take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker. The position of the broker is twofold. Upon the order of the customer he purchases shares of stocks desired by him. This is a clear act of agency. To complete the purchase he advances from his own funds for the benefit of the purchaser, 90 per cent. of the purchase money. Quite as clearly he does not in this act as an agent, but assumes a new position. He also holds or carries the stock for the benefit of the purchaser until a sale is made by the order of the purchaser, or upon his own action. In thus holding or carrying he stands also upon a different ground from that of a broker or agent, whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of a broker as such. In so doing he enters upon a new duty, obtains other rights, and is subject to additional responsibilities.' The conclusion of the court is that this new relation is that of pledgor and pledgee. This doctrine has been adopted and approved by a long line of New York cases, among which are the following: *Stenton v. Jerome*, 54 N. Y. 480; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Grunan v. Smith*, 81 N. Y. 25; *Capron v. Thompson*, 86 N. Y. 418; *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790; *Willard v. White*, 56 Hun, 581, 10 N. Y. Supp. 170. The Supreme Court of Illinois has held in accordance with the rule in New York. *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842. The text-writers have adopted this view. *Dos Passos*, *Stockbrokers*, 112; *Cook*, *Stock & Stockholders*, § 457; *Jones*, *Pledges*, 495; 18 Am. & Eng. Ency. Law, 707; *Colebrooke*, *Collateral Securities*, § 306; *Overton*, *Liens*, 205."

To the entire opinion of Judge Prentice, the court refers as containing a clear, able, and comprehensive exposition of the law on the subject, and one which from its reasoning and results the court feels clearly should be followed in the present case.

Counsel for the trustee earnestly insist that the settled rule of decisions under the existing bankruptcy act, respecting the status of stockbrokers and their customers, is that they occupy the relation of ordinary debtor and creditor, as distinguished from that of pledgor and pledgee; and, in support of their contention, refer to the following decisions: *In re Swift*, 105 Fed. 493, 5 Am. Bankr. Rep. 335, affirmed 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 375; *In re Topliff*, 114 Fed. 323, 8 Am. Bankr. Rep. 141; *In re Gaylord*, 113 Fed. 131, 7 Am. Bankr. Rep. 577. A careful review of these cases, will not, in the judgment of the court, sustain them in their view. The case of *In re Swift*, which in its essential features was unlike the one under consideration, was from the District Court of the state of Massachusetts, and as well in the lower court as in the Circuit Court of Appeals, turned largely, if not entirely, upon the

state law of Massachusetts regarding the class of creditors under consideration, namely, that the relation of debtor and creditor existed, which doctrine should control in the federal court in cases in that state. The *Topliff Case*, also a decision from Massachusetts, turned upon the question of whether a creditor of the class in question, should be allowed to prove his debt against the bankrupt's estate, without surrendering certain preferential payments received by him within four months of the bankruptcy; and the conclusion reached under the then proved facts and circumstances, whatever might be the character of the claim, was that the doctrine respecting preferential payments did not apply to it. The *Gaylord Case* was a decision of the District Court of the Eastern District of Missouri, also involving the question of preferential payments, as in the Massachusetts case last cited. The customer of the stockbroker was seeking to prove a debt against the bankrupt's estate, and the question was whether, before so doing, certain payments received by him within four months prior to the bankruptcy should be surrendered; and the court held that, before making such proof, this should be done. But these decisions, or certainly the questions necessary to be decided in each of them, in no manner precludes the question presented by this record. The petitioner, Dickinson, is not seeking to prove a debt against the bankrupt's estate. He claims that a particular stock carried by another broker on account of the bankrupt, the latter having executed his orders with New York through a broker having a direct wire, was stock bought for him, on his account, and for which he had paid; that it was his stock, and that the surplus margin belonged to him, and not to the bankrupt's estate, nor subject to the demands of the general creditors.

No case like the one under consideration has been cited by counsel, and the court believes that none can be found, where so inequitable a doctrine would be sanctioned as would result in a denial of the petitioner's claim, after proof of the fact that the stock was bought and carried on his account, and paid for with his money. While it is true the referee found against the petitioner, being of opinion that he had not supplied evidence sufficient to establish his claim to the fund in question, according to the ordinary method of tracing trust funds, still the court feels constrained to differ from this finding, taking into account the peculiar relation sought to be maintained. The transaction in this case was but an ordinary stockbroker's agency in the purchase and carrying of stock upon margin. Neither the petitioner nor the bankrupt ever actually handled the particular stock bought; but petitioner gave his orders to purchase stock on margin to the bankrupt, in the ordinary course of such speculative transactions, and the evidence he furnishes establishes as conclusively, as it is ever possible to trace this class of dealing, the fact of the purchase made on his account, and of the payments made by him to carry the stock. The broker received only a commission on the transaction; and to deny to this petitioner the right of recovery under the circumstances of this case, would clearly be to hold that a purchaser of stock on margins could under no circumstances recover

back what had been unexpended of the amount advanced by him, on the stock, in the event of the failure of the middleman, the broker.

The exceptions to the referee's report will be sustained, and a decree entered in favor of the petitioner, Dickinson, for the amount admitted by the parties to be \$2,175.74, with costs.

In re FOSS.

(District Court, D. Maine. October 4, 1906.)

No. 131.

1. BANKRUPTCY—PETITION TO REVIEW ORDER OF REFEREE—TIME FOR FILING.

The filing of a petition for the review of an order of a referee 30 days after such order was made, *held* to have been within a reasonable time and effective, in the absence of any rule of court on the subject, and it appearing that no prejudice resulted from the delay.

2. HUSBAND AND WIFE—PROPERTY CONVEYED TO WIFE—RESULTING TRUST TO HUSBAND.

Where a husband when free from debt paid the consideration for real estate which was conveyed to his wife, the presumption is that a voluntary settlement upon her was intended, and the burden rests upon one seeking to establish a resulting trust in him to overcome such presumption by sufficient evidence.

3. BANKRUPTCY—FRAUD—EVIDENCE TO ESTABLISH.

The independent and unconnected facts that a bankrupt, when free from debt, paid the consideration for property which was conveyed to his wife, and that he soon thereafter engaged in a hazardous or illegal business, do not establish an intent to defraud creditors, which will affect any rights of the wife in the bankruptcy proceedings.

4. SAME—PROVABLE DEBTS—LOAN BY WIFE.

The wife of a bankrupt held entitled to the allowance of a claim for money lent to her husband, which she procured by mortgaging her own real estate.

In Bankruptcy. On certificate from referee.

Wm. R. Pattengall, for Mary E. Foss.

C. B. Donworth, for Trustee.

HALE, District Judge. Eugene C. Donworth, Esq., one of the referees of the court, certifies that, in the course of the proceedings in this cause before him, the following question arose pertinent to these proceedings, to wit: A question as to the legality of the claim of Mary E. Foss against said estate for money loaned said bankrupt and raised by mortgages of claimant's real estate, the referee having disallowed said claim. The referee further reports: That he made an order disallowing said claim on January 24, 1906; that on February 24, 1906, a petition for review was filed with the referee, said referee having had no notice prior thereto of an intention by claimant to ask for a review. That on the same day, to wit, February 24, 1906, the attorney for the creditors filed a written objection to the allowance of the filing of the petition on the ground that such petition was not filed within a reasonable time; and on February 28, 1906, the attorney for

the claimant was notified that such objection was filed. On June 18, 1906, the referee ruled that the above petition for review was not seasonably filed, and thereupon made an order to that effect, and notified the attorney for the claimant of such decision.

The matter now comes before the court upon the two questions:

First. Was the petition for a review by the District Court of the action of the referee filed within a reasonable time?

Section 39, cl. 5, of the bankruptcy act of July 1, 1898, c. 541, § 39, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436], makes it the duty of referees "to make up records embodying the evidence, or the substance thereof, as agreed upon by all parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges."

General Order in Bankruptcy No. 27 (89 Fed. xi, 32 C. C. A. xxvii), provides:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

The question now submitted involves a question of law, as well as of fact. There is no time limit fixed for the filing of a petition with the referee for a review of his proceedings. It must, therefore, be filed within a reasonable time. Such reasonable time is usually fixed by standing rule; but this court has no standing rule, and, so far as I can find, never has had one touching this point. Where a standing rule has been adopted by any court it has been for a much less time than was taken by the petitioner in filing his petition. The matter of fixing a reasonable time for anything involves some difficulty. The court of Maine has said: "It is difficult to fix a legal latitude and longitude for this fugacious rule." In the case at bar, it is not claimed that any rights have been forfeited or affected by the delay in filing the petition for a review of the proceedings. The referee did not act upon the petition until nearly four months after its reception.

In this case I rule that the petition for review was filed within a reasonable time, under all the circumstances; although, if I were making a standing order, I should probably make a limit of 10 days for receiving such petitions for review of a referee's finding. See *Collier on Bankruptcy*, 311, and cases cited: *Loveland*, 119, and cases cited.

Second: Was the claim of Mary E. Foss properly disallowed by the referee?

The claim is for cash advanced to W. H. Foss, the bankrupt, by Mary E. Foss, his wife, on mortgage of her real estate. The total amount for which the claim is now made is \$5,400. The testimony tends to show that a certain part of the real estate, which was mortgaged by the claimant to obtain the money advanced to her husband, was earned by her in keeping a boarding house, and that another portion of the consideration for the purchase of the real estate was de-

rived from a gift of the bankrupt to his wife prior to the time when the bankrupt became indebted to any of his present creditors.

The referee has found "that the cash loaned, if any, was not raised upon real estate which the claimant owned in her own right, and which had been purchased with cash or property belonging to her free from all legal or equitable interest of bankrupt therein; but that said bankrupt was the equitable owner of said property." In thus finding that the bankrupt was the equitable owner of the real estate mortgaged by the claimant to obtain the money advanced by her, the referee must have found that there was a resulting trust in the property to the bankrupt.

I have examined the testimony with great care upon this point, and I must come to the conclusion that all the testimony taken together falls far short of proving such resulting trust to the husband. So far as we have to do with the consideration which proceeded from the bankrupt when he was free from debt, I must find that the deed to his wife constituted a voluntary settlement upon her, which cannot now be disturbed in bankruptcy.

The doctrine of the federal courts relating to resulting trusts is not essentially different from that of the courts of Maine or Massachusetts. Where, upon the purchase of property, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration. The burden is on the party who alleges the trust. If the person to whom the conveyance is made be one for whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded *prima facie* as an advancement, and the burden will rest upon the one who seeks to set aside the trust for the benefit of the payee of the consideration to overcome this presumption in favor of a legal title by sufficient evidence. *Jackson v. Jackson*, 91 U. S. 122, 23 L. Ed. 258; *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; *Stevens v. Stevens*, 70 Me. 92; *Long v. McKay*, 84 Me. 199, 24 Atl. 815; *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311; *Story's Equity Jurisprudence*, § 1202.

It is undoubtedly true that the presumption in favor of a wife or child may be rebutted by sufficient evidence, as was shown in *Gray v. Jordan*, 87 Me. 140, 32 Atl. 793; but, taking the whole record before me, there is not sufficient evidence to overcome the presumption in favor of the wife. In my opinion, there is no resulting trust established in the case, nor is there any sort of trust resulting by implication of law.

It is claimed, further, that a fraud was attempted to be perpetrated by the bankrupt in this case, in that, although he put the property in the name of his wife when he was free from debt, still it was when he was about to enter into a hazardous pursuit, namely, into the keeping of a liquor store.

A fraud upon the bankrupt law is not affirmatively shown by proving two independent facts, namely, that the bankrupt conveyed certain real estate to his wife, and that he soon after began to keep a

liquor saloon. These facts must be supplemented by some affirmative testimony showing an attempt to commit fraud under the bankrupt act. In the Hugill Case (D. C.) 100 Fed. 616, there was sufficient affirmative evidence to prove a fraudulent motive and purpose, and the court properly held that the holders of the tainted instrument should not be allowed to participate in the result of the fraud. But, in the case at bar, no such fraud is proven by affirmative testimony, and I cannot find such fraud from the mere allegation of it, or from evidence which does not go to the extent of sustaining the allegation.

I find that all the testimony in the record, taken together, proves that the real estate was the property of Mrs. Foss. Whatever consideration for the purchase of the real estate proceeded from the husband was paid while he was free from debt; and the transactions between the husband and wife clearly import a promise by him to repay her any sums of money which she advanced in his behalf. I must, therefore, come to the conclusion that the referee was incorrect in holding that the bankrupt was the equitable owner of the property.

I, therefore, overrule the decision of the referee in disallowing the claim of Mary E. Foss in full, and I find that the claim of Mary E. Foss should be allowed.

The order of the referee in disallowing said claim is hereby set aside, and he is directed to allow the claim to the amount of \$5,400.

THE I. W. NICHOLAS.

(District Court, W. D. New York. October 3, 1906.)

1. SALVAGE—NATURE OF SERVICE—AIDING STRANDED VESSEL.

In the early part of November the steel steamer *I. W. Nicholas* stranded in a fog on a rocky reef in the northern part of Lake Michigan, and the steamer *Amazonas* came to her relief in response to signals of distress. Backing near at some risk, owing to rocks on the bottom, a hawser was run from one vessel to the other, and by their united efforts the *Nicholas* was moved a considerable distance, when she again grounded astern. After further efforts, lasting in all four hours, the work was discontinued at the instance of the master of the *Nicholas*, who sent his mate by the *Amazonas* for a wrecking tug. Some time later a storm came on and the *Nicholas* was released by the effect of the waves without injury. She was in a better position for such release by reason of the efforts of the *Amazonas*, and was originally in considerable peril; the weather being threatening. *Held*, that the service performed by the *Amazonas* was one of salvage, and not merely of towage, although not one of a high order of merit, and that she was entitled to reimbursement for injury and damage to her equipment, and to an additional award of \$800; her value with her cargo being \$149,000 and that of the *Nicholas* \$127,400.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage § 17.

Salvage awards in federal courts, see note to *The Lanington*, 30 C. A. 280.]

2. SAME—RIGHT TO COMPENSATION—SUCCESS OF EFFORTS.

It is not essential to the right to salvage that the services rendered should have been entirely successful, although the fact that they were not may be considered on the question of the amount of compensation.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, § 30.]

In Admiralty. Suit for salvage.

Clinton & Clinton and George Clinton, for libellant.

Goulder, Holding & Masten and Harvey D. Goulder, for respondent.

HAZEL, District Judge. Early in the morning of November 4, 1903, the steel vessel I. W. Nicholas, owing to foggy weather, stranded on the south side of Simmons' Reef, in the northern part of Lake Michigan, about a quarter of a mile from the gas buoy and not far distant from the usual pathway. She went aground forward and to about midships. The libellant, owner of the steamship Amazonas, claims salvage for services rendered by that vessel to the Nicholas. The salvor was bound from Chicago to Buffalo with a cargo of corn and oats, and when near Simmons' Reef heard signals of distress. She immediately left her course and approached within one-half mile of the stranded vessel. After vainly attempting to free the Nicholas from the dangerous position, her skipper had determined to engage a wrecking tug to lighten her and then pull her off. With that object in view he hailed the passing vessel and directed his mate to proceed on board her to Mackinaw, about 40 miles distant, and there telegraph to Cheboygan for a wrecking tug and appliances. The master of the Amazonas suggested to the mate when he came aboard that, if desired, he would pull off the stranded steamer, and later, the master of the Nicholas consenting, the Amazonas dropped her anchor to keep her in position, turned around, and cautiously went toward the reef, stern first. The soundings between the two steamers indicated from 20 to 24 feet of water, but nevertheless danger existed to the salving steamer from submerged boulders and rocks, which made it necessary to proceed with caution. About 800 feet of the steel hawser of the Nicholas was made fast through the stern chock of the Amazonas. The latter vessel worked ahead, while the former reversed strong on her engines, and by their joint efforts the Nicholas reversed quite a considerable distance, when suddenly she also grounded astern. The cable was thereupon shifted to her starboard bow, and the attempts to release her continued. The testimony as to whether the Nicholas after shifting the cable moved owing to the exertions of the Amazonas is contradictory. However, after laboring and pulling during about four hours, her skipper, fearing an injury to her bottom on account of boulders and dragging, let go the hawser, signaled the Amazonas to cease pulling, and again directed the mate to board the Amazonas and proceed to Mackinaw for a wreckage outfit. In the afternoon a squall broke, which had threatened during the forenoon while the work to release the steamer was in progress. The gale blew from the west, and steadily increased in velocity. The combers struck the steamer on her port side, fortunately releasing her from her imperiled position without injury. She raised in the sea and floated without assistance other than from her own engine and machinery. The evidence is very conflicting regarding the distances that the Nicholas reversed while the Amazonas was working her engine ahead, and also regarding her exact position on the reef. Some of the witnesses estimated the distance that she

reversed at about 800 to 1,000 feet. Capt. Nelson, however, testified that she was pulled astern only 100 to 150 feet, and that her bow was then headed in a northeasterly direction. He also testified that she was aground approximately on the edge of the reef. Libelant contends that the Nicholas backed further on the reef in her efforts to extricate herself; that a blowing southwest wind and the current shifted her still further upon the rocky reef.

Respondent admits that towage services were performed, and expressed a willingness in the answer to pay a reasonable compensation therefor, but denies that the attempts to release the vessel were attendant by dangers or risks to the Amazonas or her crew. And it is insisted that the services rendered were unsuccessful and wholly without benefit to the distressed steamer. The latter proposition is undoubtedly entitled to consideration on the question of the amount of compensation for the services rendered, but the rule of law does not imply that a vessel hastening to succor another should completely succeed in the undertaking before being entitled to salvage compensation. Upon the elicited facts I am of opinion that a salvage service was performed, although the danger to the Amazonas evidently was not great. Her exertions to relieve the vessel during the progress of the work may have been futile. Yet who can say that they would not have been crowned with complete success had she been permitted to perform the service which Capt. Nelson in the exercise of perhaps a proper precaution elected to discontinue. That the stranded steamer was in a position of danger is unquestioned. Indeed, she was exposed to a threatened storm, and her position was one to justify at least apprehension, even though danger was not actual or imminent.

Libelant contends that the services rendered without doubt resulted in the vessel securing an advantageous position on the reef; that the squall might have put her in a worse position; in fact, might have resulted in stoving a hole in her bottom. The evidence is sufficiently persuasive that by the efforts of the Amazonas the bow of the Nicholas came round to starboard and swung clear of the gas buoy on the edge of the reef, putting her in a more favorable position. She was enabled thereby to get the force of the wind and of the increasing waves. That her position would have the effect of contributing largely to her subsequent release by the wind and waves probably was not anticipated; but any such suggestion is not material. Nor is it important to determine whether the vessel was on the edge of the reef or a quarter of a mile distant therefrom. It is well established that the degree of danger is not an important factor in applying the principle underlying the salvage compensation. *The Plymouth Rock* (D. C.) 9 Fed. 413. As all the elements upon which to base a salvage service are here present, even though the risks of the salvor or the danger to the disabled vessel were not great, I am convinced that the service ought not to be deemed a mere towage service. The rule announced in *The Edam* (D. C.) 13 Fed. 140, and followed in *The Algitha* (D. C.) 17 Fed. 551, would seem to apply. It is there stated:

"It appears a duty owing by the courts of admiralty to the public to give a reward sufficiently liberal to induce the master of any steamer to overcome all unwillingness to assume additional labor, to put aside his desire to make

a direct and quick passage, even to disregard the express instructions of his owners, in favor of the request of another steamer disabled at sea to be towed to a place of safety."

It is more difficult to fix the proper amount of salvage compensation to be paid than to determine the character of the liability. In fixing such amount, however, I have chiefly taken into consideration the willingness of the Amazonas to be of assistance, together with what was actually accomplished and the rule above quoted, that salvage compensation should generally be awarded to encourage the vigilant performance of services of this character. The values of the vessels and cargoes, together with their draft, are as follows: The Nicholas has a burden of 2,500 tons, draws 18 feet 5 inches of water forward and 17 feet aft. Her conceded value was \$120,000, and her cargo \$7,400. The draft of the Amazonas was about 18½ feet and she was valued at \$85,000, and her cargo at \$64,000. There is nothing in the circumstances of the service rendered to justify a large or liberal compensation, or, indeed, the compensation of \$5,000 demanded in the libel. Some risk perhaps was taken by the Amazonas in backing on the reef and toward the distressed steamer, but to properly lessen this risk it should not be forgotten that soundings were properly and skillfully taken, and that there was sufficient depth of water in the immediate locality to insure a reasonably safe undertaking. Neither the sea nor the wind were troublesome. An allowance based on high merit would not be warranted, although, as already stated, the action of the master of the Amazonas is deserving of commendation and reward despite his failure to successfully release the distressed steamer. In view of the circumstances, I think \$1,220 will be a fair and proper compensation. Out of this sum the claimant, the Davidson Steamship Company, should first be reimbursed for the reasonable expense incurred for a new hawser and small ropes, amounting to \$420. These are shown by the evidence to have been injured in the services rendered. The balance of the award will be apportioned as follows: Five hundred dollars to the libelant, Davidson Steamship Company; \$100 to the master; \$200 to the crew, to be apportioned according to their wages.

Let a decree in favor of the libelant, with costs, be entered accordingly.

In re JACOBS & VERSTANDIG.

(District Court, D. Oregon. October 12, 1906.)

No. 28.

1. BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.

A fraudulent concealment of property by a bankrupt from his trustee to justify the refusal of his discharge, under Bankr. Act July 1, 1898, c. 541, §§ 14b (1) and 29b (1), 30 Stat. 550, 554 [U. S. Comp. St. 1901, pp. 3427, 3433], cannot be predicated of acts committed prior to the passage of the bankruptcy act, or even prior to the adjudication; but, if a concealment of goods or money then initiated with intent to defraud creditors is continued after the bankruptcy, it is a concealment from the trustee within the statute.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 735.]

2. SAME.

Where the stock of goods of a firm of retail merchants, a few months prior to their bankruptcy, together with the goods afterward bought, exceeded in value the goods and accounts as inventoried by the trustee by more than \$15,000, while the amount paid to creditors during the same time was less than \$1,500, and the remaining value is wholly unaccounted for, it is a fair inference that the bankrupts converted the goods into money and fraudulently and knowingly concealed and continued to conceal the same, and the facts justify a refusal of their discharge under Bankr. Act July 1, 1898, c. 541, § 14b (1), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427].

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 735.]

In Bankruptcy. On application for discharge.

Ed. Mendenhall and A. R. Mendenhall, for bankrupts.

Bauer & Greene, for objecting creditors.

WOLVERTON, District Judge. Heretofore, on August 6, 1904, the referee in bankruptcy made findings, and a recommendation based thereon, that the bankrupts were entitled to their discharge. Certain creditors, deeming the findings unsupported by the evidence, have moved the court to set them aside and to deny the recommendation. The specifications in opposition to the discharge are numerous; but, in the view I take of the matter, it will be necessary to consider only the sixth of the first charge, which is, in effect, that the bankrupts did, knowingly and fraudulently, while bankrupts, conceal from the trustee property belonging to their estate, to wit, a sum of money, being the proceeds received by them from the sales of goods, wares, and merchandise, and from the collection of accounts, claims, and demands, in their business at Toledo, between about June 1, 1898, and January, 1899. In reality this specification, being general in its scope, going to the conduct of the principal business, comprises, in substance and effect, the five preceding, and questions the bona fides of the bankrupts in accounting for all sums received by them in the management of their business intervening the dates designated.

The firm embarked in business at Toledo, Wash., with a branch house at Portland, Or., in the summer of 1895, on a capital of \$4,000; Jacobs contributing \$2,500, cash and merchandise, and Verstandig the remaining \$1,500, mostly in cash. According to Jacobs, the firm did

well up to the spring of 1898—did a fairly profitable business—but commenced to lose money about the beginning of March. Verstandig says they lost money from January 1, 1898; but, from an inventory which he testifies was made of the stock on that date, it appears that they had accumulated \$12,000 in merchandise, and in notes and accounts considered good \$500, with liabilities on stock purchases of \$4,500, and thus that they had doubled their capital. It is explained that their losses were entirely upon produce purchased, such as oats, hay, potatoes, and the like, from their customers; but of their dealings in this line they kept no books of account whatever, and were wholly unable to specify any particular losses they had sustained, except that Verstandig testifies that they lost about \$5 per ton on 40 or 50 tons of hay shipped to San Francisco, and \$409 on a lot of potatoes they were unable to get to market at the proper time. They seem to have conducted four stores in Toledo. In March or April, 1898, they opened another store at Castle Rock, supplying it with goods from Toledo, with D. S. Joelsohn, Jacobs' son-in-law, in charge. They conducted it in that manner for about two months, when they sold to Mrs. Joelsohn, Jacobs' daughter. It is shown that Mrs. Joelsohn purchased with money furnished by her mother, the consideration being \$800, and that the proceeds were divided between Jacobs and Verstandig; each getting one-half, or \$400. No account was kept of the amount of goods taken from the store at Toledo to supply the one at Castle Rock, nor does there seem to have been any inventory taken of the stock when sold. Subsequently, Mrs. Joelsohn and the Toledo stores exchanged goods in limited quantities for mutual accommodation. Some time in September, 1898, the firm opened a store at Olequa, Wash., near the hop-yards. Verstandig testifies early in his examination that the firm took some \$4,000 or \$5,000 worth of goods out there, that they realized about \$500 from sales, and that the balance of the stock was carried back to Toledo. Upon a subsequent examination he stated that the amount of goods sent out was from \$1,000 to \$1,500 in value. There was no account, however, kept of this project, as it respects the amount of goods shipped, sold, or returned. The clerks in charge sold for cash account, receiving for purchases money or hop checks, the equivalent of cash. In the latter part of September, the firm opened still another store at Seattle, Wash. This they supplied with goods from their stock at Toledo, and others purchased from jobbers and intercepted at Winlock and carried on to Seattle. This enterprise was conducted until early in December, when the stock remaining undisposed of was reshipped to Toledo. Jacobs was himself in charge at Seattle, and testifies that the only money he accounted for to the firm arising from the business was \$400, which he paid to Verstandig. He says further that the venture was not profitable, the sales being light and the expenses heavy. He was unable, however, to state what the expenses were, except to say they ran from \$300 to \$600. Verstandig testifies again, as to this, that the amount of goods shipped to Seattle was from \$3,000 to \$4,000 in value; but in his later examination he declares that, according to his estimate, it was from \$1,000 to \$1,500. There is some attempt to determine the value of the goods shipped and reshipped

from the waybills and shipping receipts of the transportation companies, but the data do not furnish sufficient basis for reliable deduction as to that. Besides these several ventures, the firm had a store for a time at Portland, but there is no book account whatever of the business transacted there. This gives a general idea of where, and somewhat how, the business was conducted. It is unnecessary to allude to matters more specifically.

On August 1, 1898, Verstandig gave to L. C. Wachsmuth & Co., of Chicago, for the purpose of obtaining credit, a statement of the firm's resources and liabilities, in substance, as follows:

Merchandise on hand, cash value January 1, 1898.....	\$12,000 00
Amount of book accounts and notes considered good.....	500 00
Total	\$12,500 00
Owing for merchandise, open account.....	\$ 1,100 00
Other money	300 00
Total	\$ 1,400 00
Annual sales	\$20,000 00

In connection with this statement, the firm writes:

"That outside of stock in merchandise we have about \$1,500 worth of produce on hand, but we could not give you exact statement of stock on hand only from inventory taken Jan'y. 1st, 1898."

This statement is one of three made all in a comparatively short period of time, and all for the purpose of sustaining and procuring credit. The first was on July 20, 1898, and shows:

Stock	\$11,000 00
Cash on hand.....	500 00
Good accounts.....	500 00
Stock at Portland.....	2,000 00
Total	\$14,000 00
Indebtedness	\$ 2,300 00

The third, being of date August 20th, shows:

Stock	\$12,000 00
Notes and accounts.....	1,700 00
Total	\$13,700 00
Indebtedness	\$ 1,725 00

These statements, as compared one with another, are consistent, and indicate that the business was conducted regularly. A careful estimate of subsequent purchases by the firm, of wholesalers and jobbers, which is based upon data contained in a book kept by Verstandig personally, shows that they procured additional goods prior to their failure of the value of \$12,086.27. I may say the failure dates from about December 13, 1898, when their main store at Toledo was attached. Within the same period of time the book shows amounts paid out aggregating \$1,392.90 only; so that by adding stock on hand August 1st, namely \$12,000, to the subsequent purchases, \$12,086.27, we have an aggregate of \$24,086.27; and deducting amount disbursed, to wit, \$1,392.90, leaves \$22,693.37 of stock alone to be accounted for, omitting all reference to other property, which is of no significance in the

investigation. Now, the inventory of the trustee, taken at cost mark, shows merchandise \$7,353.59. To this add accounts as per the firm's own schedule, \$1,041.44, and we have \$8,395.03, which deduct from the above, and we find a discrepancy of \$14,298.34. This is a very large sum, and wholly unaccounted for. Verstandig in his testimony discredits in a manner the inventory of January 1, 1898, by saying it was taken by his clerk, and the several statements made by himself to their wholesale dealers, asserting that they were made from estimates only, and for the purpose of obtaining credit, leaving the inference that they were swelled so as to enlarge the apparent resources of the firm. But, if we allow only \$1,000, the original capital, for stock on hand at the time of the statement of August 1st, there will still remain a discrepancy of \$6,298.34—a deficit occurring within less than 4½ months, and altogether unexplained. The alleged losses on produce do not explain it, for these occurred in the spring, prior to the time of the statement of August 1st; and then the \$1,500 worth of produce mentioned in the letter of that date is not taken into account at all. There might have been other disbursements of cash—probably were—but no account is recorded of them. The firm had a system of giving duebills to persons from whom they purchased produce, paying these by store account or by cash, as convenience permitted, thus taking up the paper without making any record thereof. But these accounts could not have been large. Indeed, upon persistent inquiry, Verstandig was unable to give the names of any considerable number of persons who ever held such paper. Another item worthy of mention is that Verstandig testifies that he paid the \$100, received from Jacobs as the proceeds of the Seattle venture, to Collins, whom he says he owed for borrowed money. But this does not appear upon the records. The account with Collins, with whom there appears to have been one kept, does not show anything of the transaction. This is about the only explanation going to reduce the amount of the discrepancy. The firm ventures an explanation that they increased their stock in anticipation of a large business in the hopyards, and, finding they were disappointed in this, sought to reduce it by selling in Seattle, and thus to enable them to meet the demands of their creditors. But it appears that they supplied goods to the Seattle store, not only from Toledo, but directly from the wholesale dealers, thus refuting the sincerity of the explanation. And, again, it appears that the proceeds of the sale of the store at Castle Rock were divided between the parties, without any idea of paying them to the creditors of the firm, where they should have gone in the ordinary course of business. In connection with these facts, it should be further remarked that the testimony of both members of the firm was very unsatisfactory. The memory of each was bad, and they could give no definite statement touching the current transactions, or of conditions at any particular time, and left the affairs, not altogether without purpose, as I am convinced, in an uncertain and indefinite shape, so that the true condition should not be known.

Are the members of the firm entitled to a discharge upon such a record? The rule undoubtedly is that the discharge cannot be with-

held on account of any concealment of property or funds by the bankrupts prior to the time the bankruptcy act became operative, which was July 1, 1898; otherwise, the law would be retroactive. In *re Webb* (D. C.) 98 Fed. 404; In *re Moore*, Fed. Cas. No. 9,751. The data, however, forming the basis for present consideration are of conditions obtaining and arising subsequent to the enactment. What matters prior to that date have been alluded to in the statement, relative to the proofs, were for the purpose of showing the manner in which the business of the firm was conducted. It is necessary to show that the concealment was of property to which the trustee is entitled, and it must have been made knowingly and fraudulently by the bankrupts while such; that is, after they were adjudicated bankrupts. Subdivision 1, § 14b, read in connection with section 29b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550, 554 [U. S. Comp. St. 1901, pp. 3427, 3433]); In *re Quackenbush* (D. C.) 102 Fed. 282. The word "concealed" employed in this connection is sufficiently elastic in its signification to comprise a "continuing concealment." Thus, if a bankrupt has disposed of property belonging to him, prior to the adjudication, and has the proceeds thereof in his possession or within his authority to use and appropriate subsequently, there is a continuing concealment, for which he is amenable to the law, although the fact of concealment by intent and purpose took place while he was not a bankrupt. In *re Quackenbush*, *supra*; In *re Hussman*, 12 Fed. Cas. No. 6,951; In *re Ablowich et al.* (D. C.) 99 Fed. 81; In *re Welch*, 100 (D. C.) Fed. 65; In *re Mendelsohn* (D. C.) 102 Fed. 119; In *re Hoffmann* (D. C.) 102 Fed. 979; In *re Bemis* (D. C.) 104 Fed. 672.

Now, considering the entire testimony, a resumé of which, or of such as is material to the present controversy, is contained in the foregoing statement, it is impossible to draw any inference other than that the bankrupts concealed a large amount of the assets of the firm. Presumably such assets were in the form of money, as no other property is to be found in their possession. Having the money prior to the adjudication, they must have had it since, and have it now in legal contemplation. The wide discrepancy between the assets they had on hand August 1, 1898, added to those they procured subsequently, and those they had on hand according to the inventory of the trustee, proves this; and, while it is possible that they yet have merchandise of their stock while in business, yet the most reasonable inference from the manner of conducting their business in the latter days of their career in that line is that they have money to a considerable amount, the proceeds of such merchandise. They were doing their best to reduce their stock to cash, but have failed utterly to account for the proceeds. As was said by Brown, District Judge, in *Re Mendelsohn*, *supra*:

"In order to secure any effective administration of the law in bankruptcy, it is indispensable to hold bankrupts to the performance of the duties imposed upon them by the act, and to deny them a discharge where the only reasonable inference from the testimony and exhibits made is a concealment of assets and intentional nonproduction of books, which might otherwise account for their disappearance."

In the case at bar the bankrupts have produced what books they had, but they were grossly derelict in failing to keep intelligible books

of account of their ordinary business, so as to show the state of their assets. I am sure that any intelligent jury of citizens would not fail to find a concealment of money by the bankrupts, while such, under the evidence and conditions here present. Several of the cases above cited are similar to this one. And in addition thereto, as very apt, I cite further the case *In re O'Gara* (D. C.) 97 Fed. 932, decided by my predecessor.

The discharge will therefore be denied.

UNITED STATES v. KNABE et al.

(Circuit Court, M. D. Alabama. October 13, 1906.)

COMPROMISE AND SETTLEMENT—CONSTRUCTION—PERSONS DISCHARGED.

An act of Congress which ratified and directed the carrying into effect of a compromise and settlement made between the Secretary of the Treasury and persons interested in a number of judgments and pending suits in which the United States was plaintiff and the bondsmen of certain public officers were defendants, and directed the satisfaction of all judgments and the dismissal of all suits, *held* to discharge from liability sureties upon a bond given by the defendant in one of such suits who was deceased to pay a judgment for rents obtained therein, although such sureties were not parties to the settlement, on the ground that the judgment was one of those embraced in the settlement and directed to be discharged.

At Law.

This was an action brought by the United States, on the 30th day of April, 1898, against the defendants as sureties upon the bond executed by Eugene Beebe to the United States, in 1891, to account for the rents and profits of certain real estate. The case was submitted for decision on the merits as to J. P. Knabe, on the 23d day of June, 1906, upon an agreed state of facts, jury trial having been waived; and also upon motion to revive the suit against the executrix of T. J. Scott.

It appears from the agreed facts and the act of Congress, hereafter referred to, that Eugene Beebe and Ferrie Henshaw, both of whom died before this suit was brought, were sureties upon the official bond of Widmer, an internal revenue collector, and that Beebe was also surety upon the official bonds of Dustan and Davis, postmasters. The United States at different times recovered judgments against Beebe and Henshaw for the amount of the several defaults of their principals, and at execution sales purchased and took conveyances of several parcels of property, owned or claimed by Beebe and Henshaw, their heirs or grantees, and upon the title thus acquired afterwards recovered judgments for possession and rents. Among the judgments thus recovered, were two, taken on the 9th day of December, 1890, against Beebe for possession of two parcels of property in this city, known as the "Race Track Property," and "109 Dexter Avenue." The judgment in the latter case was for possession, together with \$500 damages for detention. Beebe carried the first case to the Supreme Court on writ of error, and moved for a new trial in the case involving the Dexter avenue property. The Circuit Court continued the motion to await the result of the case in the Supreme Court, as both involved substantially the same questions of law and title, and required Beebe to execute bond conditioned to pay the United States the judgment for the rents which had already accrued, and for future rents, pending final action upon his motion for a new trial, if it were decided adversely to him. Beebe executed the bond in suit with Knabe and Scott as sureties. The Supreme Court having decided adversely to Beebe, the Circuit Court overruled the motion for a new trial, and the United States thereupon brought suit upon the bond, alleging as breaches that Beebe had not paid the judgment rendered,

nor the rents thereafter accruing. Beebe had remained in possession, and paid neither the judgment nor the rents, as the bond bound him to do.

The defendants pleaded in discharge and release a compromise and settlement made with the government, the terms of which are set forth in the act of Congress, approved January 30, 1903 (32 Stat. 786, c. 339), "to divest out of the United States all its right, title and interest of, in, and to certain real estate situate at and near the city of Montgomery, state of Alabama, and to vest the same in the Southern Cotton Oil Company, Bessie R. Maultsby, James S. Pinckard, trustee, M. V. B. Chase, and Edwin Ferris." It was stipulated, if the court should find that the act operated a discharge and release of defendants, judgment should be rendered in their favor, and, if not, judgment should go in favor of the United States for the full amount claimed in the complaint. The act, after reciting that numerous suits had been brought against Beebe and Henshaw as sureties upon the official bonds of Widmer, Dustan, and Davis, the recovery of judgments thereon, the sales of various parcels of property owned or claimed by Beebe and Henshaw, their purchase by the United States, and conveyances to it, further recites: "Whereas various suits at law and in equity and in ejectment were subsequently brought against Beebe and Henshaw, their heirs, executors, administrators, or grantees, to enforce the title of the United States to the real estate so purchased, and to secure possession thereof, and for an accounting for the rentals thereof, many of which suits are still pending, and whereas, said Beebe and Henshaw are now deceased, and a proposition has been made by the parties in interest hereinafter mentioned, to pay to the United States the sum of twenty-five thousand dollars in compromise and settlement of said claims, and to end the litigation resulting therefrom, upon condition that the United States would release, relinquish and convey unto the proponents all the right, title and interest in said real estate owned, acquired, or claimed by the United States, and said sum of twenty-five thousand dollars has been deposited with the Secretary of the Treasury, as required by law, to abide action upon said proposition, and whereas the Secretary of the Treasury has approved said proposition of compromise and settlement for the amount tendered as aforesaid, but is without authority to carry the same into effect by a conveyance to said parties of the interest of the United States in said real estate: Therefore, be it enacted," etc.

The act then by apt words divests the title of the United States out of them, and vests the title to the several parcels of property, among them the parcel of property for the rents of which the bond in suit was given, in the several parties named in the act. The sixth section directs the solicitor of the treasury to execute and deliver "to said several parties herein named, such deeds, writings, or assurances as will release, relinquish and convey unto them respectively, all the right, title and interest which the United States may own or claim of, in, and to, the respective properties herein mentioned, and take such further action as may be proper to carry said proposition of settlement into effect." The seventh section provides, "that the solicitor of the treasury be, and he is hereby, authorized and directed to have all suits now pending in the Circuit Court of the United States for the Middle District of Alabama, or elsewhere, between the United States and the parties herein named, or involving said property described, either at law or in equity, dismissed, settled, and ended, and to have satisfaction entered upon the records of said courts, of all judgments rendered in favor of the United States against said parties, or any of them, or involving said property, and to take such further action as may be proper to carry said proposition of settlement into effect."

Erastus J. Parsons, U. S. Atty.

J. P. Knabe, pro se.

George F. Moore, for defendants.

JONES, District Judge (after stating the facts). As Knabe and Scott are not shown to be "parties in interest" who contributed the money paid to the government, and are not mentioned by name in the

act of Congress, and the enacting clauses do not vest any title in them, or release anything to them, the government insists that the settlement and compromise cannot operate to discharge the defendants from liability upon the bond in suit. Its insistence assumes that the intent and subject-matters of the "compromise and settlement" are to be gathered solely from the provisions vesting the title in the parties named in the act, and the nature of the commands Congress put upon the solicitor of the treasury to carry the settlement into effect with the parties in whom title was vested, and that, when thus considered, the act shows that the defendants were not intended to be included in the benefits of the compromise. Neither assumption is well founded.

The Secretary of the Treasury had authority, under section 3469 of the Revised Statutes [U. S. Comp. St. 1901, p. 2317], to compromise the liability upon the bond of the internal revenue collector; but that section gave the secretary no authority to settle the liability of the sureties on account of the defalcation of the postmasters. Under section 409 of the Revised Statutes [U. S. Comp. St. 1901, p. 229], the Postmaster General had authority to compromise the liability on the bonds of the postmasters. The presumption being that public officers, in the absence of showing to the contrary, rightly discharge their duties, the court is bound to presume, when the act says the money has been "deposited as required by law, to abide action upon said proposition," and, then, that the Secretary of the Treasury "has approved said proposition of compromise and settlement for the amount tendered, but is without authority to carry the same into effect by a conveyance to the parties in interest," that the preliminary steps required by sections 409 and 3469 had been taken, which authorized the executive department to release and discharge all liability upon the "claims," and to "end the litigation resulting therefrom," although that department was not vested, under the existing law, with power to perform the conditions as to revesting the title to the real estate. However that may be, Congress ratified the compromise as made, upon the conditions accepted by the Secretary of the Treasury, and itself revested the title. The moment the act was passed, the government having received the money on the conditions stated, all the "claims" of the United States, and the rights acquired by them in the suits to enforce them, were ipso facto, unconditionally, released and discharged. The act stripped the government of all right to claim or hold anything against any one, on account of the suits, or the transactions from which they resulted, except the sum of money it accepted, and further put upon it the duty of restoring to those from whom it had recovered them all the rights acquired in the litigation. The state of affairs described by the act, and the provisions it made to meet the situation, demonstrate that the purpose of the lawmakers was simply to enable the Secretary of the Treasury "to carry the proposition of settlement into effect," and that the act is wholly without purpose to alter, modify, or change a single term of the compromise as "approved" by him. Congress designed, and did nothing more than to make good, the Secretary's acceptance of the proposition. If the effect of the compromise of the "claims" be only to relieve the several persons in whom the act vests the titles to the several parcels of real estate,

Beebe's and Henshaw's other property, if any, would still be bound, and could be pursued in the hands of their heirs, and that, too, in the teeth of the contract made by the act and the acceptance of the money, whereby the government settled and compromised its claims, and ended "the litigation resulting therefrom."

The terms of the "proposition of settlement" leave no room to doubt what the "claims" of the United States were, which were to be settled and compromised, and as to which the "litigation resulting therefrom" was to be "ended." These claims, to use the language of the statute, were the asserted right "to enforce the title of the United States to the real estate so purchased and to secure possession thereof, and an accounting for the rentals thereof, many of which suits are still pending." There can be no doubt that the suit on the bond was a part of the compromised "litigation resulting" from the attempt to enforce these claims of the United States against Beebe and Henshaw. It was an effort to get "an accounting for the rentals" of a portion of the property which the government had acquired. The bond was given to secure a judgment for the "rentals" which the government recovered against Beebe, growing out of the "litigation resulting" from its efforts to collect the amount of the defalcations of Widmer, Dustan, and Davis, and it was exacted in a suit "involving" one of the parcels of property mentioned in the act. This suit was one of the suits, "many of which are still pending," at the time of the passage of the act, and formed part of the litigation which the government agreed to have "dismissed, settled and ended." If Beebe had lived and been sued upon this bond, the government certainly could not contend after the acceptance of the offer of compromise and settlement upon the conditions on which it was made, and the payment of \$25,000 thereunder, that Beebe was still liable to account for the rentals which this bond was given to secure. If judgment went against the sureties, Beebe's estate would be liable over to them, and thus compelled to pay a liability from which the government has discharged him. Any defense which is available to this principal is available to the sureties. The United States cannot release the principal from liability and still charge the sureties upon the bond given to secure that discharged liability. It is therefore immaterial whether these sureties were "parties in interest" who made the payment to the government, or whether they are named in the act among the persons to whom the government relinquishes its right and title.

Apart from these considerations, the seventh section of the act shows very clearly that it did not intend to confine the effect of the settlement to the individuals to whom the government released its title to the real estate, or to exclude all other persons who had become involved in the litigation from the operation and effect of the release of Beebe and Henshaw. Explicit directions as to what should be done to make the settlement effective as to the persons named in the act, concerning "the respective properties herein mentioned," are given in the sixth section. If Congress had intended to dismiss suits only between the parties named in the enacting clauses of the act, the seventh section would have been unnecessary. The seventh section distinguishes between suits pending between the United States and the "parties herein

named," and suits "involving the property" described, and directs the solicitor of the treasury to have both classes of suits "dismissed, settled and ended." It was careful to make the same distinction as to satisfaction of judgments of record. It directs not only the satisfaction of judgments in favor of the United States against the "parties herein named," but goes further and directs satisfaction of judgments, though not against the "parties herein named," if rendered in a suit "involving said property." It also commands the solicitor of the treasury to take such further action as may be proper "to carry said proposition of settlement into effect." One of the judgments remaining unsatisfied at the time of the passage of the act was a judgment the United States recovered against Beebe for the Dexter avenue property, and \$500 damages for rent. That judgment was rendered against one of the parties to the suits "named herein," and that suit was one "involving the property herein described." Undoubtedly, Congress intended that satisfaction should be entered of that judgment "in order to carry said proposition of settlement into effect." The bond in suit was given to secure the fruits of that judgment. The failure to pay this judgment is assigned as one of the breaches of the bond now in suit. It would be a singularly narrow and unjust construction of the terms of the compromise and settlement to hold that, although it required the solicitor of the treasury to enter satisfaction of that judgment, and to end and dismiss pending suits to enforce the claims of the government against Beebe, yet that, nevertheless, the United States could maintain suit against Beebe's bondsmen, and compel them to pay the judgment for rents.

The law favors compromises and settlement of disputed property and pecuniary rights, as well where the government is a party as where the litigation is solely between private individuals. When propositions of compromise of such disputes are made to the government and accepted by it, the courts will apply the same rules for ascertaining their meaning as govern in construing like contracts between man and man. An act conveying, as part of the terms of compromise and settlement, upon a valuable consideration, property the United States acquired in litigation with parties, falls neither within the letter nor the reason of the rule which requires grants of franchises or special privileges to be construed most strongly in favor of the grantor and most strictly against the grantee. The court is of opinion that the compromise and settlement made with the Secretary of the Treasury, which Congress ratified and directed to be carried into effect, satisfied, discharged, and released all claims of the United States "to enforce the title of the United States to the real estate so purchased, or to secure the possession thereof, or an accounting for the rentals thereof," and ended the "litigation resulting therefrom," and therefore operated a full discharge and release to these defendants from all liability upon the bond in suit. This conclusion renders it unnecessary to consider the defenses set up by Scott's executrix against the revivor of the suit.

Judgment will therefore be rendered for the defendants.

EASTERN OREGON LAND CO. v. BROSNAN et al.

(Circuit Court, D. Oregon. October 8, 1906.)

No. 2,922.

1. PUBLIC LANDS—REMEDY OF CLAIMANT AGAINST VOID PATENT—ACTION AT LAW.

Where public lands, patented under the general land laws, had previously been reserved or otherwise appropriated by act of Congress, the patent is void, and the land may be recovered by the true owner by an action at law, where he has such title as will support an action in ejectment.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 328.]

2. SAME—GRANT FOR CONSTRUCTION OF ROAD—LANDS EXCEPTED.

Where a grant of public lands to a state to aid in the construction of a military road excepted therefrom all lands theretofore "reserved to the United States or otherwise appropriated by act of Congress or other competent authority," land within the limits of the grant, as subsequently fixed by the filing and approval of the map of definite location of the road, which was at that time merely occupied by a settler, who had made no filing thereon under the land laws, was not within the exception and passed under the grant; but, where the settler was in occupancy under a pre-emption or homestead claim duly filed, the land was "appropriated" and within the exception, and did not pass, although the entry may have been subsequently canceled; and a complaint in an action by one claiming under the grant to recover land subsequently entered by and patented to the defendant under the land laws, in order to state a cause of action and overcome the presumption in favor of the patent, must show affirmatively that at the time the grant became fixed in place the land in question was not within the exception.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 222.]

At Law. On demurrer to complaint.

This is an action to recover the possession of real property described as the N. W. $\frac{1}{4}$ of section 23, township 17 S., range 44 E. of the Willamette meridian, in Malheur county, Or. The plaintiff derives title through an act of Congress approved February 25, 1867 (14 Stat. 409, c. 77), whereby there were granted to the state of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Canyon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Ft. Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections on each side of said road; it being provided that all lands theretofore "reserved to the United States, or otherwise appropriated by act of Congress or other competent authority," were reserved from the operation of the act, except so far as it should be necessary to locate the route of the road through the same, in which event the right of way to the width of 100 feet was granted. By section 2 it was further provided that the lands thus granted might be disposed of by the Legislative Assembly of the state, for the purposes specified in the act, and no other. By section 4 the state was empowered to locate and use, in the construction of the road, an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, within a limit of 10 miles, equal to the amount reserved from the operation of the act, to be selected in odd-numbered sections; and by section 5 it was enacted that the land granted should be disposed of only when the Governor of the state should certify to the Secretary of the Interior that 10 consecutive miles of the road had been completed, and then to an amount not exceeding 30 sections, and so on until the road should have been fully completed. In pursuance of this act the Legislative Assembly of the state of Oregon, by an act approved

October 20, 1868 (Laws 1868, p. 5), granted to The Dalles Military Road Company, an incorporated concern organized with a view to constructing said road, "all lands, right of way, rights, privileges and immunities" granted or pledged to the state by Congress for the purpose of aiding said company in constructing the road designated and specified in such act of Congress, "upon the conditions and limitations therein prescribed"; and by section 3 the road company was authorized to locate the additional lands granted, subject to the approval of the Governor. After setting out the substance of these acts, the complaint further alleges that prior to June 23, 1869, the road company duly surveyed and definitely located the line of said wagon road between the points designated by the act of Congress and the Legislative Assembly of the state, and fully constructed and completed the road, and filed in the office of the Governor of the state a map thereof, showing the particular and definite location of the same throughout its entire length, and that on the date mentioned the Governor certified that the map or plat had been duly filed in his office by the road company, and that it showed, in connection with the public surveys as far as they were completed, the line of the route as actually surveyed and upon which the company's road was constructed in accordance with the requirements of the acts in question, and, further, that he had made careful examination of the road since its completion, and that the same was constructed in all respects as prescribed, and that he accepted the same. The complaint further alleges that the road company forthwith filed in the office of the Secretary of the Interior of the United States a map or plat of said military road, showing the definite location thereof with reference to the public surveys as far as then made, accompanied by said certification of the Governor, and that the same was duly accepted by the Interior Department; that on January 15, 1872, the Commissioner of the General Land Office, by an order of the Secretary of the Interior, withdrew from sale and settlement the lands involved by the grant; that subsequent to the survey, and prior to the entry upon said lands of the defendant, the Surveyor General caused said lands so granted by Congress to be surveyed, and that by such survey the real property in question was shown to be situated within the three sections in width of the located line of said road as shown by the map aforesaid; that, through mesne conveyances from the road company, the plaintiff has succeeded to all its right, title, and interest in the premises in question, and is now the owner in fee simple and lawfully entitled to the possession of the same. It is then further alleged, in effect, as amended by stipulation, that long after the title to said land had vested in the plaintiff, as aforesaid, and notwithstanding said grant, the defendant Thomas J. Brosnan represented to the register and receiver of the United States land office at Burns, Or., that said lands, at the date of the taking effect of the grant to plaintiff's predecessor in interest as alleged, were occupied by a bona fide pre-emption settler under the pre-emption laws of the United States, other than himself, and that, by reason of such occupancy and settlement, said lands were excepted from the operation of said grant, and the title thereto remained in the United States; that by reason of said representation of defendant the register and receiver permitted him to file upon and enter said tract of land at the land office, and that thereafter the Department of the Interior, basing its action upon such representation, but without authority of law, caused a patent to issue to the defendant Thomas J. Brosnan, and that by reason thereof said defendant claims to be the owner of said premises; and that defendant has no claim of title or right thereto, other than that based upon said entry and patent. Plaintiff prays for possession of the land, and for the value of the rental and damages. To this complaint a demurrer is interposed, upon the grounds that it does not state facts sufficient to constitute a cause of action and that the court is without jurisdiction to entertain the cause.

Huntington & Wilson, for plaintiff.

Will R. King, W. H. Brooke and F. L. Young, for defendants.

WOLVERTON, District Judge (after stating the facts). In support of the demurrer it is first insisted that plaintiff should have pro-

ceeded in equity, because it has been disclosed by the complaint that the said defendant has a patent title from the government, and that, to avoid such patent, it is necessary to impeach and thus to overthrow or set it aside. Answering this position, plaintiff asserts that the Department of the Interior was without power or authority to issue such patent under the conditions impending, and that, being thus conditioned, the patent is void, and plaintiff's right of possession can as well, if not more appropriately, be tried by an action at law.

The pivotal question about which the entire controversy hinges is whether the premises in dispute were reserved from the operation of the grant to the state for use in the construction of the designated military wagon road. If they were not, the defendant's patent is void. If they were reserved, however, in consideration of the conditions attending the grant, there can be but one result, namely, that they passed to the defendant Brosnan under his patent, which would therefore evidence the better title. The principle involved is concluded by the language of Mr. Justice Brewer, in *Burfenning v. Chicago, St. Paul, etc., Ry.*, 163 U. S. 321, 323, 16 Sup. Ct. 1018, 1019, 41 L. Ed. 175. After considering the authority of the Land Department to determine preclusively questions of fact pertaining to the acquirement of title from the government, he says:

"But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof"—citing several cases from the federal Supreme Court.

That was an action of ejectment, where patent had issued upon application for an additional homestead, notwithstanding the premises involved were excluded from pre-emption and homestead; and, as indicated, it was held the action was properly brought.

So, in the case of *Morton v. Nebraska*, 21 Wall. 660, 674, 22 L. Ed. 639, where a patent had issued under the pre-emption act, which declared that "no lands on which are situated any known salines or mines shall be liable to entry," notwithstanding the lands concerned were saline, it was held that the patent was absolutely void; the court saying:

"It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

See, also, *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410, 39 L. Ed. 528, where, the land having been previously withdrawn from sale, pre-emption, or homestead entry by the Interior Department, ejectment proved an effective remedy.

If, therefore, the premises here in issue were carried to the state by the grant from Congress under consideration, and not reserved by its language, then it is clear, upon both principle and authority, that the action will lie. If not, plaintiff can have no standing in any event. It is always true that in ejectment the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631, 28 L. Ed. 993; *Northern Pac. Ry. Co. v. McCormick*, 94 Fed. 932, 36 C. A. 560. The language of the exception is as follows:

"That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby reserved from the operation of this act."

The Congress has heretofore appropriated the public lands of a defined character to entry and purchase by private parties. This it has done in part through the instrumentality of the pre-emption and homestead laws, whereby qualified settlers are enabled to make selections, and, by compliance with prescribed prerequisites and conditions, to obtain the ultimate title, and thus in the end the land becomes wholly appropriated to the use and benefit of the individual. In the process of availing himself of the appropriation, the settler is required to observe certain directions of the law before the land will be considered as set apart to him for the especial purpose of his acquirement of the title thereto. When he has observed those directions, he is vested with a right paramount, which enables him to go forward and complete his purchase, even as against the government itself; that is to say, there comes a time in the prescribed process of the acquirement of title by the settler when the government cannot deprive him of his right or privilege by a donation or grant of the land to another, or even for public purposes, without condemnation and just compensation. In development of what I mean should be understood by the foregoing observations, it is said in *Hastings, etc., Railroad Co. v. Whitney*, 132 U. S. 357, 361, 10 Sup. Ct. 112, 114, 33 L. Ed. 363:

"The almost uniform practice of the department has been to regard land upon which an entry of record valid upon its face has been made as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale, or grant until the original entry be canceled or declared forfeited, in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

Following further comment, the court continues (page 364 of 132 U. S., page 115 of 10 Sup. Ct. [33 L. Ed. 363]):

"So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

And as against a subsequent grant it has been held, by clear and unmistakable enunciation, that mere occupancy of the public domain, without more, does not create such a right or claim in or to the lands occupied as will ipso facto exclude it therefrom. In *Lansdale v. Daniels*, 100 U. S. 113, 116, 25 L. Ed. 587, the court says:

"Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose."

So in *Whitney v. Taylor*, 158 U. S. 85, 94, 15 Sup. Ct. 796, 800, 39 L. Ed. 906, the court says:

"But it is also true that settlement alone, without a declaratory statement, creates no pre-emption right."

And, after quoting as above from *Lansdale v. Daniels*, the court continues:

"And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the pre-emption claim."

So, also, in a later case (*Northern Pacific R. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 479) it was held that no mere occupancy of a tract of public land in and of itself excepted the same from the operation of a railroad grant. To the same purpose see, also, *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527. And, finally, in *Tarpey v. Madsen*, 178 U. S. 215, 226, 20 Sup. Ct. 849, 853, 44 L. Ed. 1042, Mr. Justice Brewer, speaking of the result of the cases, says:

"If it be said that this rule ignores the privileges given to temporary occupants of land to make entry within a short time, it must be said that it also denies the personal right of the railroad company to fix definitely its line of road. For when the company has by resolution of its directors established such line, and that has been marked on the ground by posts and stakes, it has done all required by the letter of the statute. If it be said that the railroad company may, notwithstanding its personal action thereafter, vote to locate its road on a different line, so, on the other hand, may it be said that the individual occupant of a tract may abandon his thought of entry; and by making each of the parties' rights, to wit, those of the railroad company and the individual, turn on a matter of record, the court simply gave definiteness and certainty to the congressional grant."

Thus does the government, through Congress, appropriate the public domain to the use of private parties, and thus are indicated the particular conditions that save the appropriation from a general grant for other purposes. So I take it that a pre-emption that has proceeded to the filing of the declaration by the settler of his intention to claim the same as such with, and the acceptance thereof by, the proper functionaries of the Land Department, is an appropriation by act of Congress within the purview of the reservation of the grant under discussion.

It may be predicated of the grant that it became effective to vest title not earlier than the date of filing the map of definite and final location of the road with the Interior Department, which appears from the complaint to have been done forthwith after the approval of the same and acceptance of the road as completed, in accordance with the acts of Congress and the Legislative Assembly of the state of Oregon, by the Governor of the state. The certificate of such approval bears date June 23, 1869. Previous to such filing, the grant could appropriately have been denominated a "float"; but it could not be said

to have attached to any particular odd-numbered sections until definite location of the road, so that it was henceforth insusceptible of change or relocation without further authority from Congress. Manifestly it required a survey of the lands to determine their character and to complete the segregation from the public domain. But this did not prevent the grant attaching to such lands as fell within its terms and conditions. It became effective as a grant in presenti only by relation back to the date of the enactment. Ever since the case of *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201, it has been settled that, under the usual grants to railroad companies by acts of Congress, the line of location becomes definitely fixed and unalterable by the fact of filing the map of definite location, approved by the proper authorities, with the Secretary of the Interior. See, also, *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; *Sioux City, etc., Land Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. 362, 36 L. Ed. 64; *Tarpey v. Madsen*, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. Ed. 1042.

The case alluded to involved a grant to the state of Kansas, in manner similar to the one under consideration, but with the further provision:

"That as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

But it stands to reason that there can be no passing of the title while the definite limitations of the grant remain uncertain; and they must necessarily remain so while the line of location of the road is not definitely and finally fixed and established. However, the entryman of a homestead or pre-emption, who has filed his declaratory statement prior to or at the time of the filing of the map of final and definite location, acquires a right as it respects the lands involved that will cause them to revert to the public domain to the exclusion of the grant should the entry subsequently fail, so that they will become again subject to private entry.

In the case of *Kansas Pacific Ry. Co. v. Dunmeyer*, supra, the homesteader made a valid entry in respect of the land in dispute July 25, 1866. The map of definite location of the line of the railroad company was filed with the Commissioner of the General Land Office at Washington September 21, 1866, and it was held that the entry brought within the exception the land to which a homestead claim had attached at the time of the taking effect of the grant, and that, although the homestead entry was subsequently canceled, the land continued within the exception, and reverted to the government, to the exclusion of the grant. So, also, in *Hastings, etc., R. R. Co. v. Whitney*, supra, the applicant made entry of a soldier's homestead May 8, 1865, which stood upon the records of the Land Department until September 30, 1872, when it was canceled by the proper officers of the general government. The map of definite location of the railroad company's line was filed March 7, 1867, and it was held that

the homestead was excepted from the grant, and this, although there was much irregularity accompanying the entry. It was deemed sufficient that the entry remained subsisting of record, having the sanction of the officers whose duty it was under the law to pass upon it. In this case it was also determined that, upon cancellation of the entry, the land did not inure to the benefit of the railroad company, but became again a part of the public domain, subject to private appropriation.

Again, in *Whitney v. Taylor*, *supra*, settlement was had in May, 1854, on public land that had not then been offered for public sale. The public survey was filed prior to May, 1857, when the settler duly declared his intention to claim it as a pre-emption right under Act March 3, 1853, c. 145, 10 Stat. 244; his statement of declaration being filed in the proper government record. He occupied until 1859, when he left for England, never returning. The railroad company filed its map of definite location March 26, 1864, and the pre-emption entry was canceled in 1885. It was held that the land came within the exception of the grant, and that when the pre-emption entry was canceled it reverted to the government, and was henceforth subject to homestead. A like principle was declared in *Northern Pacific R. Co. v. Sanders*, 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139, wherein were involved mining claims. See, also, *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231.

Now, the complaint as amended alleges, in substance, that Thomas J. Brosnan represented to the register and receiver that said lands were, at the date of said grant and the definite location of said road, occupied by a bona fide pre-emption settler, under the pre-emption laws of the United States, other than himself. If this were all, and taking the fact to be as represented by Brosnan, the claim would not fall within the reservation of the grant, because of the failure of the settler to file his declaratory statement. He would have been a mere settler—nothing more—whose acquired rights could not avail him as against the grant. But the complaint is silent as to whether the settler filed his declaratory statement or not. That he did not prior to the vesting of the title under the grant, if such were the case, should be made to appear. Otherwise, the land was reserved, and the Interior Department will be presumed to have proceeded with authority in issuing the patent. What was set forth in the case of *Northern Pacific R. Co. v. Colburn*, *supra*, was that the settler never made any entry in the local land office, and that the decision of the Secretary of the Interior was based simply on the fact of occupation and cultivation; and the court said:

"While the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant is a decision on a matter of law, which does not conclude the parties and which is open to review in the courts."

But the plaintiff here does not bring itself within the compass of that case, because of the omission indicated from the complaint, and the demurrer should, therefore, be sustained. In this consideration, I have not overlooked the contention of defendants' counsel that oc-

cupation by a qualified and bona fide settler constitutes a claim, thus bringing the land occupied within the exception of the grant, within the doctrine of the case of *Northern Pac. Ry. Co. v. McCormick*, supra, more recently concurred in by the Supreme Court in *Nelson v. Northern Pacific Ry. Co.*, 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406. Those cases, however, are without application here. The enactment there considered is:

"That there be, and hereby is, granted," etc., odd-numbered sections within prescribed limits, "and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed."

The holding of these cases is that continuous occupancy, with a view in good faith to acquire title as soon as surveyed, constituted a claim upon the land within the meaning of the act, and, as that claim existed when the railroad company definitely located its line of road, the land was by the express words of the act excluded from the grant. The act here under consideration contains no such words or language. Whether or not the settlement upon and occupancy of unsurveyed land gave the settler such a right under the law as that he was entitled to make his filing of intention to pre-empt after the filing of the map of definite location of the road, and within three months after the approval of the township plat as surveyed, and thereby bring the land within the reservation, is a question I have not considered or determined, as it is not presented by the record; the simple question here being, as indicated, whether mere settlement and occupancy of a qualified and bona fide settler, without more, constitutes such a claim of right to the land as brings it within the reservation of the grant. I hold that it does not. But, notwithstanding, the demurrer to the complaint should be sustained, for the reason it is not shown that the Interior Department was without power to issue the patent to the defendant because no declaration of intention was seasonably filed by the settler. Unless such patent is thus or otherwise impeached, it must stand as the better title; the present allegations, as indicated, being insufficient for the purpose.

In re WATERLOO ORGAN CO.

(District Court, W. D. New York. August 16, 1906.)

No. 1,073.

1. MORTGAGES—FORECLOSURE—PROCEEDS OF SALE—DUTIES OF TRUSTEE—INTEREST ON FUNDS.

A bankrupt corporation had issued bonds secured by a mortgage which, after the bankruptcy, was conceded to be valid as to two-fifths of the property, but was contested by the trustee as to the remainder. The court ordered a sale of the property and the immediate distribution of two-fifths of the proceeds among the bondholders proving their claims, and that the remaining three-fifths should be retained by a bank, which was trustee under the mortgage, at 3 per cent. interest, until the right thereto should be determined. The bank bought the property for the

bondholders and resold the same, and, owing to unexpected litigation over the validity of certain of the bonds, the entire proceeds of the property remained in its possession for some years. *Held*, that while it was its duty under the order of the court to keep the two-fifths available for distribution at any time, it was also its duty, as trustee, for the bondholders to exercise such reasonable care over the fund as would result in a fair increment, and that, having retained such fund in its own possession, it would be charged interest thereon at the same rate it was required to pay on the remaining three-fifths.

2. SAME—COMPENSATION OF TRUSTEE.

Where a corporation mortgage provided that the trustee should receive "just compensation," such compensation should be computed on a quantum meruit with reference to the particular circumstances of the case and the nature of the services rendered. Where the property was sold in bankruptcy proceedings against the mortgagor, was bought in and resold by the trustee for the benefit of the bondholders, and the trustee also defended a suit brought by the bankruptcy trustee for the recovery of a large part of the property as to which he claimed the mortgage to be invalid, an allowance to the trustee of 2 per cent. on the proceeds of the property not in dispute, disbursed by it, was reasonable and proper, and it was also entitled to be reimbursed for its expenditures in defending the suit from the same fund.

3. SAME—DISTRIBUTION OF FUND—EXPENSES INCURRED BY TRUSTEE IN BANKRUPTCY.

A trustee in bankruptcy of a corporation is not entitled to be reimbursed from the proceeds of mortgaged property for expenses and attorney's fees paid out by him in litigating the right of certain of the bondholders to share in the fund, which expense was principally incurred for the benefit of the general creditors.

In Bankruptcy. On review of order of referee.

See 128 Fed. 517.

The following is the statement and opinion of Charles A. Hawley, Referee:

Statement.

The bankrupt had made and issued corporate bonds secured by mortgages which purported to cover after-acquired property. Two-fifths of the property was conceded to be subject to the lien of the mortgages; as to the three-fifths of the property which was after acquired, the lien of the mortgages was disputed. An order for the sale of the property was made, which, among other things, provided "that immediately after said sale the said two-fifths of the entire proceeds thereof shall be distributed by this court in pro rata payments to the holders of the bonds of the said bankrupt which are secured by the said mortgages and which shall be established before this court as valid obligations of said bankrupt." The order then provided for the retention of the other three-fifths of the proceeds by the First National Bank of Waterloo, trustee for the bondholders under said mortgages, upon interest at 3 per cent. for full months pending the controversy as to the title thereto. As to said three-fifths, the trustee in bankruptcy brought suit against the bank (trustee under the mortgages) in the Supreme Court of the state of New York, succeeded at the trial and at the Appellate Division, and the case is now pending on appeal to the Court of Appeals.

After the sale opportunity was given to the bondholders to establish their bonds before me. The bondholders filed proofs of their bonds as secured debts in the ordinary form, the security being said mortgages, and all of the bonds, of which proofs were so filed, were proved and allowed, except 2 of \$500 each, presented by Francis Bacon, and 21 of \$500 each, presented by the First National Bank of Waterloo. The 2 bonds presented by Mr. Bacon and the 21 by the Bank were objected to by the trustee in bankruptcy and hearings were had thereon. On November 7, 1903, the referee filed de-

cisions allowing the claims of Mr. Bacon and the bank upon said disputed bonds. Petitions for review were filed and allowed, and the decisions were affirmed by the District Court. Thereupon, the cases were taken by the trustee in bankruptcy to the Circuit Court of Appeals where the order of the District Court as to the 21 bonds held by the bank was affirmed, and that as to the 2 bonds held by Francis Bacon was reversed. In re Waterloo Organ Co., 13 Am. Bankr. Rep. 477, 134 Fed. 345, 67 C. C. A. 327; Id., 13 Am. Bankr. Rep. 466, 134 Fed. 341, 67 C. C. A. 255. The decision of the Circuit Court of Appeals as to Bacon's 2 bonds was made the decision of the District Court by a final decree after appeal, dated April 20, and filed with me April 23, 1906. The decision of the Circuit Court of Appeals in the case of the 21 bonds held by the bank was made the judgment of the District Court by an order made June 9, 1906, and filed with me June 12, 1906. Thereupon, the trustee in bankruptcy filed his petition, reciting the proceedings, and asking, among other things, that the owners of said bonds should show cause why a decree should not be made, fixing and determining their respective pro rata shares of the said two-fifths of the proceeds of the sale of said property. Thereupon, an order to show cause was granted. The First National Bank filed an answer to such petition, and also filed a petition for an adjustment of its compensation for services and reimbursement of its expenses, as trustee in said mortgages; and the trustee in bankruptcy also filed a claim for services and disbursements. A hearing was had thereon, and the matter is now before me for decision.

Opinion.

Five questions are presented for determination:

1. Counsel for the bank as trustee contends that the trustee in bankruptcy has no standing to prosecute the present litigation.

That contention, I think, must be overruled. The bonds which are here involved were proved against the bankrupt's estate as secured debts; the security being the mortgaged property out of the sale of which the fund arose. It is quite evident, then, that the larger the fund realized here for the bondholders the smaller will be their claim over against the general estate of the bankrupt for the balance remaining unpaid upon their bonds; and so the trustee is interested. But the question is not important, for Messrs. O'Brien & Short appear for a bondholder, and raise the same questions raised by the trustee in bankruptcy. The trustee in bankruptcy also claims that as matter of fact he represents at least 6 of the 13 bondholders.

2. Whether the bank, as trustee for the bondholders, shall be charged with interest upon the two-fifths of the proceeds, and, if so, at what rate.

By the order of sale it was apparently in contemplation that the bank, as trustee for the bondholders, would become the purchaser of the property, and the order evidently contemplated a retention of three-fifths of the proceeds awaiting the determination of the controversy in respect thereto, and the immediate distribution of the two fifths; the controversy over the bonds held by Mr. Bacon, and those held by the bank not being at that time indicated. The bank, as trustee, did buy the property for the sum of \$25,800. Thereupon the proof of the bonds was taken up, and the controversy developed. The bank held the property from the date of the sale, which sale was confirmed December 2, 1902, until about June, 1903, when it sold the property to the Vough Piano Company, a corporation then recently formed, for the same price it bid upon the sale; the piano company to take the property as it then stood, and assume any liability which the bank had incurred in the meantime. I do not understand it to be claimed that up to the time of the sale to the Vough Piano Company that the bank, as trustee, is liable for interest. It appears that on the sale to the Vough Piano Company the bank, as trustee, deeded the entire property, received nothing in payment therefor, and no written obligation of any kind to secure the payment.

About three months after the sale, the Vough Piano Company made a \$40,000 mortgage upon the property which it purchased of the bank, and upon about \$25,000 worth of other property, and deposited the whole, \$40,000, in bonds secured by said mortgage with the First National Bank of Waterloo;

and the inference is perhaps permitted from the testimony that they were held at first as security for the purchase price, and, later, as security for the purchase price and as collateral for what the piano company might owe the bank, with which the piano company has an active account. At the time of these transactions, the Vough Piano Company was composed of William C. Vough, Chauncey L. Becker, and John Becker. Charles D. Becker was its secretary, Charles D. Becker and John Becker were stockholders, and Charles D. Becker, a director in the First National Bank of Waterloo, and Herbert R. Becker (now deceased) was the cashier of the bank. While upon the purchase of the property the Vough Piano Company made no bond, or note, or any written promise to pay the purchase price, the understanding was that it was to be paid whenever the bank called for it. The bank did not call for it until on or about January 20, 1906. Thereupon, the money was paid and deposited in the Exchange National Bank of Seneca Falls; remained there about two months and earned \$51 interest; and was then deposited in some bank or savings institution in Rochester at 4 per cent. interest, where it now remains. Under these circumstances, the trustee in bankruptcy and counsel for bondholders claim that during the period intermediate the sale to the Vough Piano Company and the collection and deposit of the money upon interest, the trustee should be charged with legal interest, and one of the counsel contends that this should be computed with quarterly rests. To this contention, counsel for the bank as trustee, replies, that the bank was not the kind of a trustee whose duty it is to make investments; that it was not expected to make investments, but to make immediate payment, and that it was its duty to keep the funds under its immediate control, so that whenever the litigation terminated it would be ready "immediately" to distribute the fund in compliance with the order under which it obtained it. That there was no means by which it could tell when the litigation would be terminated, and that an effort was made to carry the litigation over the 21 bonds held by the bank to the Supreme Court of the United States, which refused to entertain it. I think that the truth lies between these two extremes. The bank, as trustee under the mortgage, was not of that class of trustees whose duty it was to make investments for the purpose of earning income to pay over for the support of the beneficiaries of the trust. Indeed, if it had made permanent investments, such, for example, as executors and trustees for infants are authorized to make, and so have tied up the fund, it would have been guilty of a breach of duty.

Nevertheless, while it was not its duty, as trustee, to seek a permanent investment of the fund at a large rate of interest, it was its duty, as I think it is the duty of every trustee, to exercise such provident care over the fund as would, within the line of its duty, result most largely to the benefit of the bondholders. This is not a case where the trustee has mingled the trust fund with his own, or has gained any advantage from the course of conduct which has been pursued. It is simply a case, I think, where there was a want of diligence and provident care on the part of the trustee. Nor can I escape the conclusion that if, at the time the District Court made its order of sale, the long litigation over the bonds had been presented to the court even in prospectu that the bank would have been directed to hold this fund during the pendency of the litigation at the same rate of interest as was prescribed for the three-fifths of the proceeds of the sale. It is therefore my opinion that justice demands that the trustee should be charged with interest upon the fund at the rate of 3 per cent. per annum for two years intermediate the sale of the property to the piano company and the deposit of the fund with the Exchange National Bank of Seneca Falls; and that to this interest should be added the interest it received from the Exchange National Bank and that which shall be received from the Rochester institution where it is now deposited.

My attention has been called by the briefs on behalf of the bondholders to several cases which it is strenuously insisted require that the bank should be charged with 6 per cent. interest. It does not seem to me that those cases support the contention based upon them; but that they tend rather to support a different conclusion, or are plainly distinguishable from the case at bar.

Thus, *Price v. Holman*, 135 N. Y. 124, 32 N. E. 124, was an executor's case where there was a delay in payment arising from the pendency of litigation over a disputed claim. There was a claim for interest upon interest; and it was held that it did not appear that the executor had used the money for his own purposes, or made any profit out of it, and that, in the absence of bad faith, the fact that he appealed from a judgment, and delayed the payment, did not render the executor chargeable. A trustee is not chargeable with interest solely because he deposits the trust funds with his own, or uses them in his business (which was not done here). There must be in addition a breach of trust, a neglect or refusal to invest in the time or the manner the trust agreement or the law points out. Citing with approval upon that question *Rapalje v. Hall*, 1 Sandf. Ch. 399. Indeed, *Price v. Holman* causes some hesitation in my mind as to whether the pendency of the litigation was not a sufficient answer to the claim that interest should be charged. If the bank, as trustee, had itself received the money, kept it without using it in its own possession ready to be paid, the principal underlying *Price v. Holman* would perhaps have called for a different conclusion from that which I have reached.

In *re Barnes*, 140 N. Y. 463, 35 N. E. 653, is substantially to the same effect. In that case an assignee for the benefit of creditors deposited funds to his individual account, but his account always had a credit in excess of the balance of the trust funds in his hands. The action was brought to set aside the assignment, which was pending for three years. Upon settlement the assignee was charged with 6 per cent. interest. It was held to be error; that the law neither authorizes nor permits the assignee to make any investments. It was his duty to convert the assets into money, keep the moneys, and distribute them at the time and in the manner required by law. And that while it might be, if he perceived the moneys must lie idle for a long time because of the suit pending, and there were solvent institutions known to him in the place where he might have deposited them, subject to withdrawal on demand, and with an allowance for interest, he should be charged with the interest which might thus be earned, he could not be charged beyond that. And the court said (page 473 of 140 N. Y., page 654 of 35 N. E.): "Upon the facts in this case there was no conversion by the trustee to his own private use, and it is not just that he should be charged with any greater amount than the possible loss to the fund by his omission to deposit where some rate of interest might have been allowed. Citing *In re Cornell*, 110 N. Y. 357, 18 N. E. 142; *Beard v. Beard*, 140 N. Y. 260, 35 N. E. 488; *In re Nesmith*, 140 N. Y. 609, 35 N. E. 942; and *In re Myers*, 131 N. Y. 409, 30 N. E. 135, are, neither of them, I think, in point upon the question here being considered.

3. The claim for compensation to the bank for its services, as trustee, and for its reimbursement on account of expenses in the litigation over the title to the bonds, and in the litigation in the state court over the title to the three-fifths of after-acquired property claimed to be subject to the lien of the mortgages.

(a) As to the services of the bank as trustee, counsel for the bank claims that a trustee under a corporate mortgage is entitled to the same commissions as are allowed by law to an executor or administrator.

I do not think so. Counsel contends, and I have agreed with his contention, that the bank, as trustee, is not of the class of trustees whose duty it is to make investments of funds. I think, also, that the bank is not of that class of trustees who are entitled to the commissions allowed executors. I have examined the various authorities to which he has called my attention. It is necessary only to refer to *Meacham v. Sternes*, 9 Paige (N. Y.) 398, which contains a practical summary of all the cases and a statement of the principle of law which governs here.

In the first place, it is to be observed that that case was one of an assignment in trust for the payment of debts, not the case of a trustee for bondholders under a corporate mortgage. The court held (page 403) that it may be considered a settled rule that in all cases of trust of this description, and all other express trusts of a similar nature where nothing is said in the deed or

instrument creating the trust, on the subject of compensation to the trustee for his personal services in the execution of a trust, and where there is not an agreement on the subject for a different allowance, that the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation as an executor or administrator. This, upon the theory that the court will consider the statute allowance to executors as tacitly understood and agreed on by the parties to all trusts of a similar nature, where nothing appears to show a different agreement or understanding. But the court goes on to say that where the instrument creating the trust fixes a different compensation, that, of course, must prevail. Where such an instrument contains an express provision that the trustee shall receive a compensation for his services in addition by his expenses and disbursements, leaving the amount of the allowance to be settled upon the principle of quantum meruit, the amount of compensation must necessarily depend to a certain extent upon the peculiar circumstances of each case, and must be adjusted with reference to what is usually paid by the agreement of parties for similar services.

So, too, upon page 401, in the discussion of previous cases, the court said it was not aware "of any case in which the court had, by an express decision, applied the same rule of compensation to an ordinary trustee created by deed or will where no provision was made in the instrument creating the trust to compensate the trustee for his services. For in such instruments express provision is usually made for a fixed compensation to the trustee. Or, at least, to allow him to retain a reasonable sum for his care and trouble in the execution of the trust. So, too, upon page 402, discussing the case of *Denniston v. Bleeker & Others*, the chancellor says that he suggested in that case that the equity of the statute allowing a fixed compensation to executors and guardians for their services by way of commission might probably be extended to the case of other trustees performing similar services, so as to allow them the same compensation where the instrument creating the trust was silent on the subject. That case, however, was finally disposed of upon the ground that the trust deed evinced an intention on the part of the person creating the trust to allow the trustees to charge a reasonable compensation for their services.

But it is understood that the trust deed or mortgage in this case is not silent upon the subject of the compensation of the trustee. But that it provides, as such corporate mortgages usually do provide, that the trustee shall receive a "just compensation" for its services. It follows therefore, not only that the duties of this trustee are not similar to those of an executor, administrator, or a guardian, but that the case falls precisely within the class where, according to *Meacham v. Starnes*, "just compensation" excludes the idea that commissions are necessarily to be computed at the statutory rate, but are to be determined upon a quantum meruit, and may be less, or equal to, or even more than the statutory rate, depending upon the circumstances of the case. I know of no instance where a trustee under a corporate mortgage has been permitted to recover percentage computed under the statute applicable to executors and administrators; and think that it is, at least, a matter of common knowledge that their compensation is ordinarily much less than that.

It appears from the testimony here that the ordinary charge is from $\frac{1}{4}$ to $\frac{1}{2}$ or 1 per cent.; but that testimony seems to be limited to the ordinary payment of bonds and coupons which are duly paid at maturity, and, in the due course of business, without default or litigation. It appears that when the bank, as trustee, bought the mortgaged property it put a manager in charge of it, and that an allowance was made for his services in the judgment rendered in the state court in the litigation over the title to the three fifths of the property. The testimony, however, permits, and, I think, requires, the inference that the bank, as trustee, has had to exercise some care and attention in the litigations in which it has been involved, both here and in the state court, and it would seem is equitably entitled to some compensation therefor. It is a matter of regret that the testimony is quite indefinite upon this subject, but from my knowledge of the course of the litigations, the testimony and the briefs, which have been submitted to me upon this hearing in regard to the litigation over the bonds, I am persuaded that I shall do no injustice if I

allow the bank $\frac{1}{2}$ of 1 per cent. for the payment of coupons amounting to \$8,134.42. The bank is yet to withdraw from its present place of deposit the two-fifths now under consideration, to pay therefrom such expenses as shall be hereinafter allowed, to distribute the net balance among the bondholders, secure their formal receipts therefor, and deliver the same to the trustee in bankruptcy. I think it will be no more than just and equitable, if for the services it has heretofore rendered, and for those hereafter to be rendered, that it shall be entitled to 2 per cent. upon the total amount of the funds, including interest which it will have on hand to divide for the payment of expenses and payment to the bondholders, when the order to be made herein shall be complied with.

(b) As to the reimbursement of the bank, as trustee, for its expenses in the litigation over the bonds and the litigation in the state court as to the title to three-fifths of the mortgaged property.

The bank has filed with me a bill for its expenses for its attorney's services and disbursements amounting to \$906.05. The items of this bill and the reasonableness of the charges are conceded. \$270.65 of the bill are for expenses for the trustee in the District Court, and no objection is made to their allowance. But it is claimed by the trustee in bankruptcy that the balance of the bill, \$635.40, being for attorney's services and expenses in the action in the state court, are not chargeable against the fund now here to be distributed. The argument made is that the bank, as trustee, should be turned over to the fruits of its litigation as to the three-fifths of the property for reimbursement for its expenses. This contention appears to be neither sound nor equitable. It is conceded that the litigation in the state court was not a frivolous, but a substantial, litigation. The trustee in bankruptcy sued the bank as trustee under the mortgage. The action was to determine the title to the after-acquired property, to which both the bank and the trustee in bankruptcy claimed title. Three-fifths of the property (which was nearly the entire estate in bankruptcy) was involved. I think it was the plain duty of the bank, as trustee, to defend that action; and that, if it had not defended it, it, perhaps, would have made itself liable to the bondholders for neglect of duty. Nor do I think that it was an improvident expenditure of time or money to appeal from the decision of the trial court. *Price v. Holman*, supra; *In re Barnes*, supra. I do not think that the cases cited from the bankruptcy courts where there have been general assignments for creditors vacated by proceedings in bankruptcy, and allowances to the assignees for services only permitted in so far as such services were beneficial to the bankrupt estate, are at all in point. An assignee accepts his assignment in defiance of the bankruptcy law, and knows that it is liable to be set aside by the intervention of bankruptcy proceedings. The bank was made a trustee long before there was any bankruptcy. It accepted the trust, and was bound by its obligations. It was sued, and defended itself, not unreasonably, but in good faith. It now turned over for its reimbursement, not for services, but for expenses and obligations actually incurred, to the three-fifths, and the decision of the court of last resort shall be against the bank, as trustee, then it will be remediless. These expenditures were incurred by it reasonably, and in good faith, for the benefit of the bondholders, and they ought to be paid by the bondholders, whether the result ultimately is for the advantage of the bondholders or not. *Steinway v. Steinway*, 112 App. Div. 19-22, 98 N. Y. Supp. 99.

My conclusion is that the bill should be allowed, and that the sum of \$906.05, the amount thereof, should be paid by the bank, as trustee, out of the proceeds of the two-fifths which are here for distribution.

4. The trustee in bankruptcy presents a bill for services and attorney's fees in the controversy over the 2 bonds claimed by Mr. Bacon, and the 21 bonds claimed by the First National Bank, amounting, in the aggregate, to \$1,362.75, of which \$500 in each case, amounting together to \$1,000, are for attorney's services of the trustee, and his counsel, Mr. Manning.

Counsel for the bank, as trustee, and for the bondholders, concedes that the disbursements have been made and the services rendered, but does not admit the reasonableness of the charges for the services (\$500 in each case), and contends that neither the services nor the disbursements are chargeable against

the fund here for distribution. I think his contention is correct. As has already been said, the claims of the bondholders have been proved as secured claims. The efforts of the trustee in the litigation over the bonds have necessarily been, as they ought to have been, not for the benefit of the bondholders alone, but for the benefit of the general creditors of the bankrupt estate, including the bondholders. And it would be, in my opinion, unjust and inequitable to charge these services and disbursements upon the fund here to be distributed. The charge to the extent of its reasonableness should be against the bankrupt's estate. That, I think, is the trust fund, which should bear this expense of its administration. *Woodruff v. N. Y. R. R.*, 129 N. Y. 27, 29 N. E. 251. Holding to this view, and without examining into or expressing any opinion as to the reasonableness of the charges for attorney's services, I must decline to make either the services or the disbursements a charge against this fund. I do not, by this decision, intend to preclude the trustee in bankruptcy from a future application for reimbursement for these services and expenses out of the fund arising from the three-fifths of the proceeds of the sale, in case he should ultimately be defeated in the litigation over the three-fifths, and the remaining estate of the bankrupt should be insufficient for his reimbursement. My view is, not that he should not in some way be protected for his reasonable expenses and disbursements, but that it ought not at the present time to be charged upon the fund now under consideration.

5. The trustee in bankruptcy, upon the hearing requested the referee to direct the cashier of the First National Bank to deliver to him \$10,500 of the notes which the bank produced, made, or indorsed by the Waterloo Organ Company, upon the theory that the bank is required to account to the trustee in bankruptcy for the par value of the 21 bonds held by it as collateral before any dividend is paid to it upon such bonds.

My decision as to the 21 bonds was that the bank was the lawful holder thereof, and entitled to prove the same, and that its claim be allowed. The District Court, upon review, affirmed that order. The order of the District Court affirming my order was as follows: "It is hereby ordered and adjudged that the decision and order made by the said referee in bankruptcy approving and allowing the said bonds be, and the same hereby is, in all respects, approved and affirmed. And the said bonds are, and each of them is, adjudged to be lawfully owned and held by the said First National Bank of Waterloo, N. Y., and that the claim made thereupon is duly approved and allowed in this proceeding." The Circuit Court of Appeals affirmed my order, and adjudged that the 21 bonds were valid and legal claims in the hands of the bank against the organ company; that the bank had a good and valid title thereto; that the bonds were duly and legally proved before me, and the same were duly and legally allowed by me, as properly proved claims, in favor of the bank, and against the trustee in bankruptcy of the organ company.

Thus it appears that my original order, and that of the District Court were affirmed without any modification whatever. But the trustee in bankruptcy claims that under the opinion delivered in the Circuit Court of Appeals (*In re Waterloo Organ Company*, 13 Am. Bankr. Rep. 477, 134 Fed. 345, 67 C. C. A. 327), the bonds are to be accounted for by the bank at par. Counsel for the bank claims that the opinion does not bear any such construction. The situation necessarily raises the question as to whether resort may be had to the opinion of the court which pronounces judgment, to modify or in any way qualify the judgment so pronounced. I do not think that it is proper or necessary at this time to decide this question. The bank still has rights, based in part upon the \$10,500 of notes which the trustee in bankruptcy desires to have surrendered, upon the three-fifths of the proceeds of sale; the title to which is now being litigated in the state courts. If the title to that three-fifths should ultimately be adjudged to be in the bank as trustee for the bondholders, then the bank would be entitled to another dividend upon the \$10,500 worth of notes, which I am asked now to require it to surrender for cancellation. I cannot, at this time, interfere with or impair that possible right. In my opinion, the request of the trustee in bankruptcy, even if it may at some time be a proper request, is prematurely made at this time. Without passing upon its merits, if any it has, and without

consideration of or expressing any opinion as to it, I decline to allow it upon the ground that it is prematurely made.

An order in accordance with this opinion may be entered.

Frederick L. Manning, for trustee.

Hammond & Hammond, for First Nat. Bank of Waterloo.

O'Brien & Short, for bondholders.

HAZEL, District Judge. The trustee in bankruptcy herein has filed a petition for review of an order made and entered by the referee in bankruptcy on the 4th day of August, 1906, which petition states that said order is erroneous, and sets forth nine objections to the same. The facts are fully stated in the written report of the referee.

1. As the First National Bank of Waterloo became liable to the bondholders from the time it sold the property to the Vough Piano Company, the contention of the trustee that the purchase price was used by the latter during a period of two years and seven months before payment of the same to the bank is not material to a determination of the questions presented, and does not constitute a sufficient reason for charging the bank with interest at the rate of 6 per cent. from the date of sale. Neither is it important that the bank sold the property on credit taking security therefor, nor that Mr. Becker, treasurer of the Vough Company, was also an officer of the bank. It may be fairly inferred that the money belonging to the different bondholders was on call at the bank, and therefore is to be regarded in the nature of a deposit. The bank, acting as trustee for the bondholders, certainly should not be punished for exercising a reasonable and apparently commendable discretion in the disposition of the mortgaged property. There being no agreement between the parties in relation to the rate of interest, what rate would be fair and equitable? In view of the circumstances, the amount for which the property was sold was not unreasonably withheld by the bank, nor was it invested or misappropriated. The referee was of opinion that the unusual conditions under which the money was realized and held by the bank required an accounting to the bondholders at the rate of 3 per cent. interest for a period of two years. His reasons for charging interest at a sum less than the legal rate are thought sound. It was the duty of the bank, as trustee, to exercise such reasonable care over the fund as would result only in a fair increment. The first objection presented to the order is overruled.

2. The claim that no allowance should have been made by the referee to the bank for services in paying interest on coupons is sustained. The evidence is open to the inference that compensation for services of this character is sometimes exacted, but they are not infrequently performed gratuitously. It is doubtful whether a charge for such services was contemplated by the parties. In any event, I think the remuneration is covered by the allowance of 2 per cent. mentioned in the next subdivision.

3 and 4. The trustee in bankruptcy contends that the bank performed no services as trustee for the bondholders under the mortgage; hence, it should not have received an allowance as such trustee. The

referee was of opinion that valuable services had been performed by the bank, and it should therefore be compensated. I concur in this view, and also, for the reasons stated in the opinion of the referee, in the allowance of \$906.05, for attorney's fees and disbursements incurred by the bank.

5. The amount for services of the attorney for the trustee in bankruptcy and certain bondholders is thought not to be chargeable against the fund in controversy. Such services and expenses were principally incurred for the benefit of the general creditors, and, therefore, should be paid out of the bankrupt estate.

6. The ground of objection that the bank is required to account for the par value of 21 bonds held as collateral to certain notes amounting to \$10,500, before any dividend is paid is not sustained. Stress is laid on the decision of the Circuit Court of Appeals in *Re Waterloo Organ Co.*, 13 Am. Bankr. Rep. 477, 134 Fed. 345, 67 C. C. A. 327, and it is argued by the trustee in bankruptcy that, according to the interpretation by such court of the contract transferring the bonds to the bank by the Waterloo Organ Company, their value was fixed at par; for which amount the bank is now bound to account to the company. This contention is not, in my judgment, warranted by the opinion of the court. As between the bank and the organ company, the bonds were issued at par, and could only be sold at par by the company; but the understanding of the parties, as indicated by the written agreement, did not contemplate a sale of the bonds by the bank. Under the agreement the 21 bonds were merely pledged as collateral, and there was no obligation upon the bank to buy them, nor did the agreement amount to a sale to the bank. Had the bank sold the bonds, a different question would be presented; but, not having disposed of them, it was not bound to account therefor at par value. The objection is overruled, and the demand for the return of the notes, as stated by the referee, is premature.

7 and 8. Counsel for trustee in bankruptcy contends that the allowance of \$1,075.83, as interest upon the collateral bonds from September 21, 1900, was erroneous and improper, for the reason that such bonds represented no actual indebtedness to the company. In the brief submitted by the trustee in bankruptcy, it is stated that the interest on the other bonds was allowed only from December 1, 1901, while on the collateral bonds the allowance was made from the former date, and that this apparent discrepancy was inadvertently overlooked by the referee. In reply, counsel for the bank states that the interest on the collateral bonds was allowed by the referee according to the proof of claim made by the bank. That Mr. Ditmars and other bondholders did not claim interest from September 21, 1900, is unimportant. It may be assumed that the other bondholders were not entitled to interest from any period other than that claimed by them. If their proofs of claim do not ask for all the interest to which they are entitled, the same may be amended in that respect by proper proceeding before the referee.

9. Finally, the trustee contends that the fees of the stenographer should be paid out of the fund in question. From the examination I

have given the record perhaps the expenses of the stenographer should be divided between the bank and bankrupt estate, but, as the referee has not specially considered this disbursement, and made no recommendation in relation thereto, the question is submitted to him for his decision on application of the trustee in bankruptcy.

The order may be modified as hereinbefore indicated.

LINTON et ux. v. SAFE DEPOSIT & TITLE GUARANTY CO. OF KITTANNING et al.

(Circuit Court, W. D. Pennsylvania. October 10, 1906.)

No. 31.

1. TRUSTS—VALIDITY—ACT PA. JUNE 8, 1881—FAILURE TO RECORD DECLARATION BY GRANTEE.

Act Pa. June 8, 1881 (P. L. 84), which provides that a deed absolute on its face shall not be reduced to a mortgage except by a defeasance in writing signed, sealed, and delivered at the time and recorded within 60 days, does not render void or ineffective an unrecorded declaration of trust executed by an absolute grantee to the grantor, by which it declared that it held the property in trust for certain purposes plainly expressed therein, merely because one of such purposes was to sell lots from the property and from the proceeds to repay itself certain advances; and the trustee cannot treat such instrument as a defeasance merely and assert its legal title to avoid the execution of the trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 33.]

2. JUDGMENT—MATTERS CONCLUDED—IDENTITY OF ISSUES.

Where the issues in two suits between the same parties are different, a determination in the first of matters in issue in the second, not necessary to the decision, is not conclusive on the parties in the second.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1263-1268.]

3. COURTS—FEDERAL COURT—INJUNCTION—STAYING PROCEEDINGS IN STATE COURT.

Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], which forbids the federal courts to grant injunctions staying proceedings in a state court, does not prevent the granting by a federal court of an injunction restraining a party from making a wrongful or inequitable use of an execution issued on a judgment of a state court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1418-1422.]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank of Providence*, 16 C. C. A. 90; *Central Trust Co. of New York v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

In Equity. On motion for preliminary injunction.

Thomas Watson, for the motion.

A. A. Patterson, opposed.

ARCHBALD, District Judge.* This is a bill to establish a trust and secure an accounting. The safe deposit company defendant holds lands which were conveyed to it by Mrs. Linton and her husband, on

*Specially assigned.

which it was to make and did make advances; repayment being provided for by the sale of lots, into which it was divided, and by the leasing for gas, and otherwise, all of which the company undertook to see to with their concurrence. The trust is evidenced by a writing, duly sealed and acknowledged by the company. The legal effect of it, however, is controverted, and it is out of this that the litigation grows.

As incident to the general purpose of the bill, an injunction is asked for at this time to stay execution on a judgment against Mrs. Linton, held by the defendant Colwell, which has been levied on the lands conveyed by her to the company. This judgment was originally secured by other parties, and has been the subject of considerable litigation. *Lewis v. Linton*, 204 Pa. 234, 53 Atl. 999, Id., 207 Pa. 320, 56 Atl. 874. It is superior in lien to the conveyance to the company, and on it whatever interest Mrs. Linton has will be wiped out, unless a sheriff's sale is prevented. Mr. Colwell is a director of the company, and it is charged that the judgment has been secured by him and execution issued, for the purpose of forestalling and cutting out the existing controversy. This is denied, and it is claimed that he purchased individually. But it is a fact that, upon the refusal of Mrs. Linton to give a general power of attorney to the safe deposit company to sell and dispose of these lands as the directors saw fit, and other differences, they threatened to get hold of this judgment and compel it, following which the judgment was purchased and marked to the use of Mr. Colwell; payment being made by the attorney of the company, after negotiations for it by the president. For the present at least, upon this showing, the company must be regarded as the real owner; or, if not that, I must conclude that Mr. Colwell is allowing himself to be used to defeat the trust, in the interest of the company, with which he is colluding. As a director and officer, he could hardly be expected to act contrary to its interests, if indeed he would be allowed to. And the complacency with which execution is suffered by the company, although directly assailing its title, and the resistance which is made to the efforts of Mrs. Linton to stop it, leave no doubt as to the relation between the parties and their common purpose.

The company, however, denies the trust, and claims to own the property absolutely. This position was not taken at the first, and the parties for a time worked together under it. One defense, indeed, is that the company have done all that in any event could be required. But the plaintiffs not being compliant, and new directors having come in, they seem to have thought better of the matter, and now propose to hold on, denying further accountability. How they are able to persuade themselves into this, in the face of the existing declaration, it is difficult to appreciate. It is said that the plaintiffs put the property into the hands of the company as security for advances, which made the transaction a mortgage, the accompanying declaration being in effect a defeasance, which in order to be available was required to be put on record, according to the state law, within 60 days (Act June 8, 1881 [P. L. 84]), but was not recorded for 16 months, which thus gave them the property. The plaintiffs contend that the delay in recording was at

the direct suggestion of the company, so as not to stand in the way of sales, and that it is a fraud to take advantage of the confidence. But this is denied, and is not material. Outside of and beyond it, by its solemn act and deed, under its corporate seal, the company has declared that the land was conveyed to it in trust for certain purposes. This it is bound in conscience to respect, and will not be permitted to repudiate, or get out of, on any sophistry. The act of 1881 seems to hold out a temptation, but only by a misconception. This act may be responsible for much, but there is nothing to countenance what is now attempted to be made out of it. It is an act to prevent fraud, and not to further it, and is not therefore to be made a means to that end. It simply provides that a deed absolute on its face shall not be reduced to a mortgage, by anything short of a defeasance in writing, signed, sealed, and delivered at the time, and recorded within 60 days. Within these limits it is binding, but beyond them it does not undertake to go. Applying it here, the declaration of trust, not having been put on record for 16 months, cannot be used to convert the plaintiffs' deed into a mortgage, if such an attempt should be made. But the defendants do not stop at that. Because it is ineffective for such a purpose, it is sought to be made of no effect at all. This is bad logic, and worse law. It by no means follows that, because it cannot be made to play the part of a defeasance, it has no further force. The plaintiffs in fact make no such claim for it. It is the defendants who assert this of it, setting it up in that character in order to knock it down again. In terms it is a declaration of trust, and as such it is to be reckoned with. By it the company declares that it holds the lands conveyed to it for certain definite purposes, which are expressed in plain terms, and must be carried out. In addition to the \$6,500 mortgage, which had been a lien upon the property, but which the company had satisfied, advances were to be made to Mrs. Linton to the extent of \$20,000 more, all of which were to be met by sales, to be made by the company, from time to time, at prices satisfactory to the plaintiffs. The proceeds were not, however, to be devoted to such repayment immediately, but, after taking care of interest and taxes, were to go to Mrs. Linton so long as the property unsold was sufficient security for the loans against it. And the plaintiffs also had the right to a reconveyance at any time, upon paying the advances made with interest and reasonable costs and charges. There is nothing difficult to comprehend in this, either in general scheme or details. Nor has anything been suggested why it should not be complied with and carried out to the end, the same as it was started to be. The trust is active, and if the duties have become irksome, by reason of disagreements or otherwise, it is possible that, upon application to the proper authority, the company will be permitted to lay down the trust and have another substituted, to whom the property can be turned over. But that is as far as it can expect to go. The trust remains and must be respected; nor can the company deal with the land, as it will, without regard to anything of the kind, simply because it holds the legal title.

It is said, however, that this is in conflict with the decision in *Safe Deposit Co. v. Linton*, 213 Pa. 105, 62 Atl. 566, a case between the

same parties, over the same matter, where the company's title was held to be absolute. There may be expressions of opinion in that case which lend some countenance to this idea, but they are to be interpreted, as always, in the light of the question litigated. The bill was for the partition of one of the tracts in controversy, an undivided two-thirds of which was conveyed to the company by Mrs. Linton, as part of this transaction; the other one-third being retained by her. The court sustained the bill, and ordered a division, based on the absolute character of the deed, which the declaration of trust was held ineffectual to qualify. With this no fault can be found. The deed undoubtedly conveyed a fee, without which the sales contemplated could not be made, and, the tract being held in common, partition was necessary to clear the way for this, by giving the company a several, instead of an undivided, interest. It is true that Mrs. Linton resisted the bill, and set up the trust, and the court, adopting the contention of the company, held that the deed and the declaration, taken together, constituted a pledge of the land for the money advanced, amounting to an attempt at a mortgage, made ineffectual by the act of 1881, because of the failure to properly record the defeasance. And it was also held that it was not a fraud on the part of the company to use their deed in this way. But it was not necessary to a decision to assign this or any other particular character to the transaction, it being sufficient that the court found nothing in the declaration of trust to stand in the way of a partition. This was the real issue and controls the judgment rendered, rather than the reasons which happen to be given for it. Of this we are admonished by *Jackson v. Thomson*, 215 Pa. 209, 64 Atl. 421, a case quite suggestive of the one in hand, in which an ejectment to enforce a trust *ex maleficio* was held not concluded by a prior bill, between the same parties and growing out of the same transaction, to have a deed absolute on its face declared collateral security for a mortgage, which was defeated by the act of 1881; the issue being different, notwithstanding the matters injected by the argument of counsel.

It is further said that the alleged collusion between the defendants, and the charge that Colwell is not the real owner of the judgment, was set up by Mrs. Linton in her application to the common pleas of Armstrong county, where the judgment is entered, to have it opened; and that it was disposed of, contrary to her contention, by the refusal of the court to grant the application. An appeal has been taken from that decision, whatever it was, and it is not therefore final. But, without regard to that, the answer made to the petition to open denied the charge, and, no evidence being given to sustain it, it fell, and with it all that was dependent upon it. And this, as I understand it, was all that was decided. The evidence which was lacking there, however, is now produced, with the result, that a different conclusion is reached upon the question which was so left open.

The right of the court to intervene by injunction, to stay execution in the state court, is also challenged; this being expressly prohibited, as it is claimed, by the federal law. Rev. St. § 720 [U. S. Comp. St. 1901, p. 581]. But it was decided otherwise in *Marshall v. Holmes*,

141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, and *Linton v. Mosgrove* (C. C.) 14 Fed. 543; the latter being a case in this court upon much the same facts, in which the same plaintiffs figured, which is conclusive upon us here.

The motion is granted, and an injunction is directed to issue as prayed for.

In re PLATTEVILLE FOUNDRY & MACHINE CO.

(District Court, W. D. Wisconsin. August 13, 1906.)

No. 92.

1. **BANKRUPTCY—TITLE OF TRUSTEE—LIENS.**

Under Bankr. Act, July 1, 1898, c. 541, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], providing that the trustee in bankruptcy shall be vested with the title of the bankrupt as of the date of the adjudication to all property which the bankrupt by any means could have transferred or which might have been levied on and sold by judicial process against him, liens on the bankrupt's property which were valid when bankruptcy intervened remain undisturbed.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 286-295.]

2. **SAME—SALE OF PROPERTY.**

An order by the bankruptcy court directing a sale of the bankrupt's property without mentioning liens will be construed as only authorizing a sale subject to existing liens.

3. **SAME—NOTICE.**

An order directing a sale of a bankrupt's property on which valid liens exist should be granted only on notice to lien creditors, and the record should affirmatively disclose that every creditor whose lien will be discharged by the sale has received such notice.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 361, 362.]

4. **SAME—WAIVER OF IRREGULARITY.**

Where property belonging to a bankrupt was sold free from liens, the act of a lien creditor in bringing trover against the trustee for the conversion of the property so sold constituted an affirmation of the sale.

5. **SAME—PETITION—SEQUESTRATION.**

The taking possession of the property of a bankrupt by the bankruptcy court does not operate as a caveat or sequestration of property owned by the bankrupt subject to valid liens, so as to make the holder of the lien a party to the proceedings.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 322.]

6. **SAME—POSSESSION—REPLEVIN.**

Where property belonging to a bankrupt subject to valid liens has been taken possession of by the bankruptcy court, the lien creditor cannot interfere therewith or maintain replevin against the receiver or trustee.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 238.]

7. **SAME—RIGHTS OF CREDITOR.**

Where personal property of a bankrupt was subject to a chattel mortgage, the mortgagee was entitled to petition the bankruptcy court for payment of the amount of the mortgage debt, in which case the court would have jurisdiction to determine the validity of the lien.

8. SAME—JURISDICTION—STATE AND FEDERAL COURTS—CONFLICT.

Where personal property belonging to a bankrupt and subject to a chattel mortgage was sold by the bankrupt's trustee, the mortgagee was entitled to maintain trover in a state court against the trustee to establish the validity of the mortgage; he never having appeared in the bankruptcy court, or in any way consented that the latter might take jurisdiction to determine his rights.

Richmond, Jackman & Swansen, for trustee.

Gilbert & Gilbert, for creditors.

A. W. Kopp and M. G. Jeffris, for chattel mortgagee.

SANBORN, District Judge. This is an order to show cause issued upon the petition of the trustee in bankruptcy, brought for the purpose of testing the right of the holder of a chattel mortgage upon property taken possession of and sold by the trustee to maintain an action of trover in the state court against the trustee to recover the amount of the mortgage debt. It is sought by the trustee to restrain him from prosecuting the suit begun in the state court. It appears from the petition and from the record that more than four months prior to the adjudication O. A. Eastman took from the bankrupt a chattel mortgage for \$7,000 on certain machinery and other property of the bankrupt. Shortly after the adjudication and on February 20, 1905, upon a petition made by the receiver appointed by this court, the referee made an order directing the receiver to sell the manufacturing plant of the bankrupt. This order was made without notice to the mortgagee, so far as the record discloses, except, however, that the petition upon which the order to show cause was granted states that at the time of the adjudication the attorney of the mortgagee was present, and after consultation in regard to an early sale of the property it was agreed that it was for the best interest of the creditors to proceed as rapidly as possible to sell the plant, and that if there were any valid liens against the property said liens would attach to the proceeds of the sale in the hands of the trustee. The order of sale does not direct that the property be sold free from incumbrances. It further appears from the petition that after the order of sale was made the attorney for the mortgagee informed the receiver that, although his rights as mortgagee might be sufficiently protected by having his claim as mortgagee attach to the proceeds of the sale, yet he would prefer to have the question of the validity of the mortgage decided before the sale of the property, but that neither the mortgagee nor his attorney made any formal objection to the sale. The sale took place March 12, 1905. At the sale the attorney for the receiver (who had been meanwhile appointed trustee), stated that the property would be sold free and clear of all incumbrances, and that if any person held a valid lien against the property the lien would attach to the proceeds of the sale in the hands of the trustee, and that no distribution of the fund among the creditors would be made until the mortgagee, Eastman, and any other lien claimant, had an order made to have the question of the validity of his claim decided by the court. The property was ostensibly sold by the trustee free and clear of liens, and brought the sum of \$12,000, and the sale was afterwards confirmed

by the court. On July 14, 1905, the mortgagee, Eastman, began suit in the state circuit court for Grant county, Wis., against the trustee and the purchaser at the sale, the Galena Iron Works Company, for the amount of the mortgage debt, with interest. The question is whether this court has power or jurisdiction to restrain the mortgagee from maintaining such suit in the state court, and also whether, if such jurisdiction exists, this is a proper case for its exercise.

It appears that at the time of the adjudication the bankrupt was in possession of the property which had been mortgaged, and the receiver, afterwards made trustee, took possession of the property, and that such possession was never disturbed. Section 70a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) provides that the trustee shall be vested with the title of the bankrupt, as of the date of the adjudication, to all property which he could by any means have transferred or which might have been levied upon and sold by judicial process against him. By this provision the trustee takes no better title than the bankrupt had. Liens which were at that time valid against the bankrupt remain undisturbed. In *re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, approved in *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. A trustee in bankruptcy is vested with no better right than the bankrupt. He does not take property sold to the bankrupt by conditional sale with a reservation of title in the vendor. The property is subject to all equities impressed upon it in the hands of the bankrupt. *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. A ruling of the United States Circuit Court of Appeals that a seizure by the bankruptcy court operates as an attachment and an injunction for the benefit of all the persons having interests in the property was reversed in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 353, 26 Sup. Ct. 481, 50 L. Ed. 782.

It seems to be further settled that while the bankruptcy court, as well as the referee, may sell property free and clear from liens, yet the power to do so is extraordinary, and that an order merely directing the sale of the property, without mentioning liens, will be taken as a sale subject to any existing liens; and it seems to be further settled that notice to the lien creditors of the application for sale must not only be given, but the record must disclose affirmatively that every creditor whose lien will be discharged by the sale has received due notice of the application. This would seem to follow, indeed, from the rules laid down by the Supreme Court of the United States to the effect that the trustee takes no title to the interest of the lien claimant. Clearly such interest could not be divested without the consent of the holder of the lien or notice given him. It does not clearly appear from the petition that the mortgagee ever did consent to a sale of the property free from his lien. The record is silent upon the question as to what authority the attorney for the mortgagee had to agree to a sale free and clear from liens. In *re Saxton Furnace Co.*, 14 Am. Bankr. Rep. 483, 136 Fed. 697; In *re Worland*, 1 Am. Bankr. Rep. 450, 92 Fed. 893; *Matter of New England Piano Co.*, 9 Am. Bankr. Rep.

767, 122 Fed. 937, 59 C. C. A. 461; In re Sanborn, 3 Am. Bankr. Rep. 54, 96 Fed. 551. But by bringing trover the mortgagee has affirmed the sale. In Wisconsin a chattel mortgage carries the legal title to the property, leaving the general equitable title in the mortgagor, who has the right to sell the property and create other or subsequent liens upon it. Illinois Trust & Savings Bank v. Alex. Stewart Lbr. Co., 119 Wis. 54, 94 N. W. 777.

The bankrupt was lawfully in possession of the mortgaged property, and the possession of the receiver and trustee was likewise lawful; but the lien of the mortgage was not affected in any way by the bankruptcy, as the cases in the Supreme Court clearly show. The mortgagee has in no manner appeared in the bankruptcy proceedings. While there are several decisions in the District and Circuit Courts to the effect that the taking possession of the property by the bankruptcy court operates as a caveat or sequestration of property and makes the holder of a lien a party to the proceeding, yet those cases must be deemed to have been disapproved by the Supreme Court in the rulings cited. While it is true that the possession of the bankruptcy court could not in any way be interfered with by the mortgagee, and also that he could not maintain replevin for the property against the receiver or trustee, yet so long as he does nothing to interfere in any way with the property or its proceeds in the custody of the court he would seem to be entirely within his rights. The mortgagee might come into this court and petition for the payment of the amount of the mortgage debt. In that case this court would have jurisdiction because of the consent of the defendant or petitioner. In re San Gabriel Sanatorium Co., 111 Fed. 892, 50 C. C. A. 56; In re Durham (D. C.) 114 Fed. 750; In re Antigio Screen Door Co., 123 Fed. 249, 59 C. C. A. 248.

By the action of trover, sought to be restrained under this order, the mortgagee in no way seeks to divest the possession of the court of the proceeds of the sale. The object of that suit is to test the validity of the mortgage and the right of the mortgagee to a judgment against the trustee. In that suit the trustee may plead that the property was sold by order of the court. The effect of the order, the sale announced to have been free and clear from liens, and the order of confirmation by the referee, as well as any conduct of the mortgagee or his attorney at the sale or at any other time which may be claimed to amount to a consent on the part of the mortgagee that the sale should be free and clear from any incumbrances, will be for the consideration of the state court; and if the mortgagee shall succeed in recovering the amount of the mortgage debt from the trustee the whole matter will still be within the power and control of this court, which has full jurisdiction to protect its officers and the funds in its control. In the following cases it was decided that trover or trespass against a trustee in bankruptcy would lie: In re Spitzer, 12 Am. Bankr. Rep. 346, 130 Fed. 879, 66 C. C. A. 35; In re Kanter & Cohen, 9 Am. Bankr. Rep. 372, 121 Fed. 984, 58 C. C. A. 260; In re Russell, 3 Am. Bankr. Rep. 658, 101 Fed. 248, 41 C. C. A. 323.

The mortgagee never having appeared in this court, or in any way

consented that this court might take jurisdiction to decide upon his rights to the proceeds of the property sold, or as to the validity of the chattel mortgage, I think that this court has no power to enjoin a suit in the state court. Even if such power existed, it would perhaps be better, in view of the fact that the action in trover is a plenary suit, triable by jury, while a petition in this court would not enable the mortgagee as a matter of right to demand a jury trial, to allow the action in trover to proceed. The practice is different in different districts in this respect. In some of the District Courts partition suits followed by a sale have been permitted by the bankruptcy courts to be prosecuted in the state courts. In other District Courts the tendency has been to compel all actions relating to the title to property of which the trustee takes possession to be litigated in the bankruptcy court. In a case like this it seems to me that, although it will be somewhat more expensive for the trustee to litigate the question in the state court, yet that it will, on the whole, be more conducive to the ends of justice not to interfere.

An order will be entered discharging the order to show cause and denying the petition of the trustee.

Ex parte BLACK et al.

(District Court, E. D. Wisconsin. July 27, 1906.)

1. CRIMINAL LAW—FEDERAL PRISONERS—REMOVAL—PROSECUTION—PROBABLE CAUSE.

On an application for the removal of a federal prisoner from the district where he is found to the district of the indictment, as authorized by Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], it is the duty of the removing judge to pass judicially on the validity of the indictment, and, if that is fatally defective, to deny the application for removal.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 500, 510.]

2. CONSPIRACY—INDICTMENT—OVERT ACT.

An overt act must be alleged in an indictment for conspiracy as an essential element of that offense.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 89.]

3. SAME.

Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], declares that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to the conspiracy shall be liable to a penalty, etc. *Held*, that where a conspiracy contemplated fraudulent entries on definite tracts of public land under the stone and timber act, and in order to accomplish the same the co-operation of 16 persons to act as entry-men was required, and one of the conspirators obtained such persons, an alleged overt act charged to consist of the payment of \$200 to defendant, who was one of the 16, in order to induce him to make a fraudulent entry and transfer of the lands to the conspirators, was an act which pertained to the conspiracy itself, and was therefore insufficient.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 38, 39.]

4. SAME.

Where the overt act alleged as a part of a conspiracy to defraud the United States took place after the conspiracy had been consummated, it was ineffective as an overt act to constitute such offense.

5. CRIMINAL LAW—CONSPIRACY—LIMITATIONS—COMMENCEMENT OF PERIOD.

Where an alleged conspiracy to defraud the United States out of public lands was formed in September, 1902, and the necessary affidavits to consummate the fraud were filed on the 7th and 8th of October, 1902, the filing of such affidavits constituted an overt act, which started limitations against a prosecution for conspiracy, which was barred on October 8, 1905, under Rev. St. § 1044 [U. S. Comp. St. 1901, p. 725], limiting prosecutions for federal offenses to three years after the offense shall have been committed.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 273, 275.]

Writ of habeas corpus accompanied by a writ of certiorari to the commissioner.

It appears: That the defendants were arrested upon a warrant issued upon the complaint of Edward J. Henning, Assistant United States Attorney for the Eastern district of Wisconsin, in which there was set out in substance the cause of action counted upon in a certain indictment against the defendants, who reside in Shawano in this district, which indictment was found in the district of Oregon on the 3d day of April, 1906, charging a conspiracy under section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676], to defraud the government of its title to certain of its public lands situate in Lakeview land district, of Oregon, which were subject to entry under the "Stone and Timber Act," so-called. That a bench warrant had been issued upon such indictment and, with a certified copy thereof, forwarded to the authorities of the Eastern district of Wisconsin. Thereupon the accused were arrested and brought before a commissioner for examination under section 1014, Rev. St. [U. S. Comp. St. 1901, p. 716], for the purpose of procuring an order for the removal of the accused to the district of Oregon. Upon such proceedings a certified copy of the indictment was introduced in evidence. In this indictment, and in the complaint of the District Attorney, the conspiracy was laid as follows: "And the grand jury aforesaid, upon their oath, do further find and present that from and on the 1st day of September, 1902, and thence down to and inclusive of the 20th day of June, 1903, within the district and state of Oregon and the jurisdiction of this court, the defendants [naming them] and others to this grand jury unknown, did knowingly, willfully, and unlawfully plot, combine, confederate, and agree together, with each other and between and amongst themselves, to defraud the United States of America of the possession and use of and title to large tracts of public lands which were then and there owned by and belonging to the United States, in the district and state of Oregon, and in the Lakeview land district thereof, and within the jurisdiction of this court, designated and described as follows: [Here follow twelve descriptions of lands.] That said lands were during said period in said Lakeview land district, subject to entry under that certain act of the Congress of the United States known and designated as the 'Stone and Timber Act' relating to and governing the entry of timber and stone claims under the laws of the United States. That said act is known and designated as Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545] and that the aforesaid plot, conspiracy, combination, confederation, and agreement so formed and continued by them [naming the defendants] and others to this grand jury unknown, was to be carried out, accomplished, and effectuated by promising and agreeing to pay, and by paying and causing to be paid, large sums of money to sundry and divers persons, who were thereby induced, caused, procured, and persuaded to make false, fraudulent, fictitious, feigned, untrue, and illegal entries of, to, for and upon the aforesaid lands of the said United States within said land district, and within the jurisdiction of this honorable court."

The overt act in the first count is set out in the following language: "And that to carry out and accomplish the object and design of the aforesaid plot, conspiracy, combination, confederation, and agreement, and in furtherance thereof, and to effectuate the objects thereof, they [said defendants] and others to this grand jury unknown, did, within the United States and the district and state of Oregon, and within the jurisdiction of this court, promise and agree, and did pay and cause to be paid to one John B. Million, the sum of \$200 on the 4th day of April, 1903, by Joseph Black above-named [he being one of the defendants] in the shape and form of a check in words and figures as follows: 'Ashland, Oregon, April 4, 1903. No. — Bank of Ashland. Pay to John B. Million or order (\$200.00) Two Hundred Dollars. Jos. Black.' And that said John B. Million indorsed said check and presented said check to said Bank of Ashland, within the state of Oregon, with his indorsement thereon, and there and then received the amount thereof, to wit, the sum of \$200 in gold coin of the United States, whereby, and by means whereof, said John B. Million was persuaded, caused, procured, and induced to make false, fraudulent, fictitious, feigned, untrue, and illegal application for, and to make false, fraudulent, fictitious, untrue, and illegal final proof and entry under the aforesaid timber and stone act of and for a portion of the above-described lands of the United States, to wit [one of the above descriptions] which said application, proof, and entry were there and then made by said Joseph B. Million, for the use, benefit, and behoof of the said [defendants] and for the use, benefit, and behoof of each of them; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

In three additional counts, the conspiracy as laid in the first count is adopted, and the overt acts charged are substantially the same, except as to the name and date. The date of payment in the second count is laid on the 23d day of May, 1903, in the third count on the 20th day of April, 1903, and in the fourth count on the 13th day of June, 1903. Upon the examination the commissioner received oral evidence of sundry residents of Shawano, tending to show that the accused had not been absent from their homes for any length of time during the period covered by the indictment, to anticipate any claim that they were fugitives from justice, and also the testimony of several witnesses, whose attendance had been secured by the government, tending to show that all the lands described in the first count of the indictment were entered in October, 1902, and that, as to all such descriptions, the final proofs were made on or before the 17th day of March, 1903; and that on the same day that the final proofs were completed, the necessary money payments made to the government, certificates issued, and thereupon the entrymen transferred their title to said land, presumably to the defendants, but they testified that they were not able to tell who was the grantee in such deeds. Parker, one of the defendants, who resides in Oregon, was also present, and gave evidence that on behalf of all the defendants he secured 16 persons to act as entrymen, who, in consideration of their services in bringing about the fraudulent entries, were to receive \$200 each, and that all their expenses were to be paid by defendants, and that after final certificates were secured at the land office, they were to transfer the title so secured. That defendant Parker selected the 16 entrymen and secured adherence to such terms, and that he transported such 16 entrymen in a body from place to place in conveyance furnished and paid for by the defendants, whenever any step was required to be taken in prosecution of the scheme. It further appeared that the several sums of money paid by the defendants as set forth in the indictment, to the parties for their services in furtherance of the conspiracy were paid "for making the final entry, final proofs, and conveying, and that such entry, final proofs, and conveyance, were made with the understanding that such sum of money agreed upon, was to be received for such entry, final proof and conveyance."

Parker's testimony corroborated the witnesses of the government as to dates when entry and final proofs were made. The defendants offered in

evidence before such commissioner a certified copy of certain entries in the tract book in the office of the General Land Office at Washington, which was duly authenticated, showing the status of all the lands described in the indictment, showing amongst other things the date of sale of each tract; the number of the receipt and certificates of purchase, the name of the purchaser, the amount paid, etc. This offer was excluded by the commissioner. The offer was renewed upon this hearing and was received. From this official record, it appears that each and every description of such land was entered in October, 1902, and final proofs were made therein in March, 1903, the latest certificate bearing date March 17, 1903. This index consisted of the following columns: "Description of Tract," "Contents," "Rate per Acre," "Purchase Money," "Name of Purchaser," "Date of Sale," "No. of Receipt," and "Certificate of Purchase." Under the head of "Date of Sale," the latest entry opposite any of these tracts was March 17, 1903. By stipulation of the parties the motion of the government to remove the prisoners to the district of Oregon, pursuant to section 1014, was presented and argued in connection with the habeas corpus proceedings.

Ryan, Ogden & Bottum, M. J. Wallrich and A. S. Larson, for petitioners.

H. K. Butterfield, U. S. Atty., and E. J. Henning, Asst. U. S. Atty.

QUARLES, District Judge. It is conceded by counsel on both sides, that in passing upon the motion to remove the prisoners, the District Judge is called upon to exercise a judicial function involving judicial discretion; but it is strenuously contended that as to any defects disclosed in this indictment, the trial court in Oregon has exclusive jurisdiction. In view of the grave consequences involved to the accused, I am persuaded that something more is expected of the District Judge in this case than a mere perfunctory sanction of the conclusions of the commissioner as to probable cause.

The law is well settled by Judge Scaman, in *Re Richter* (D. C.) 100 Fed. 295, as follows:

"The questions whether the inquiry before the commissioner extends beyond the introduction of the indictment and the identity of the defendant, and whether there is sufficient proof of identity, are not jurisdictional, for determination under the writ of habeas corpus, and, on the other hand, their solution is not required to determine whether a warrant of removal should issue. I have no doubt of the authority of the District Judge, on the latter application, to probe the grounds of the charge, and ascertain the existence of probable cause; and the duty is manifest to do so in his case before entering an order to send the defendant to distant Alaska for trial." *United States v. Fowkes*, 3 U. S. App. 247, 53 Fed. 13, 3 C. C. A. 394; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162; *In re Burkhardt* (D. C.) 33 Fed. 25.

"Undoubtedly the indictment is presumptive of probable cause, if an offense within the statute is clearly stated, and in that view, may be accepted in many cases as sufficient; but it is not conclusive, and, if so treated for all purposes of the examination, the just provisions in that behalf are of no practical value. In the application for removal, at least, if doubt is raised in any material aspect of the charge, the indictment must be supported by proof aliunde, and in the present case necessary ingredients to constitute the offense are so placed in doubt that no removal can be ordered without such proof."

In *re Buell*, 3 Dill. 116, 120, Fed. Cas. No. 2,102, the court says:

"The District Judge in making this order, proceeded upon the ground that he might properly look into the indictment, and if it was fatally defective in

essential averments to constitute an offense triable in the District of Columbia, he might refuse to issue the warrant for the prisoner's removal. It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the District Judge on such an application. I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the District Judge to such removal."

In *re Beverly Clark*, 2 Ben. 543, Fed. Cas. No. 2,797; In *re Wolf* (D. C.) 27 Fed. 606; In *re Corning* (D. C.) 51 Fed. 205.

In *Benson v. Henkel*, 198 U. S. 2, 25 Sup. Ct. 569, 49 L. Ed. 919, where, by a divided court, it was held that as a general rule technical objections to the indictment should not be entertained by the commissioner in proceedings for removal under section 1014, it is apparent that the majority opinion lays down no fast and hard rule, for on page 10 of 198 U. S., page 570 of 25 Sup. Ct. (49 L. Ed. 919), they recognize and enumerate many defects which would destroy the effect of the indictment as a ground for removal. *United States v. Greene* (D. C.) 100 Fed. 941; In *re Dana* (D. C.) 68 Fed. 893, 899; In *re Price* (C. C.) 83 Fed. 830, affirmed in 32 C. C. A. 162, 89 Fed. 84; In *re Greene* (C. C.) 52 Fed. 106.

In *Beavers v. Henkel*, 194 U. S. 87, 24 Sup. Ct. 605, 48 L. Ed. 882, the court hold that:

"So far as respects technical objections the sufficiency of the indictment is to be determined by the court in which it was found, and is not a matter of inquiry in removal proceedings."

From all the authorities the rule would seem to be that the indictment makes out a *prima facie* case as to probable cause; that technical objections to the indictment ought not to be entertained by the commissioner in proceedings under section 1014; that however the rule may be in habeas corpus proceedings when the judge is asked to make an order of removal, it is his province and duty to discharge the accused if the indictment is so radically defective that it would not support a conviction; as, for instance, where it clearly appeared that no crime against the United States is charged. It is interesting to note that the District Court of Oregon has also concurred in this view. In *re Wood* (D. C.) 95 Fed. 288-290.

The Supreme Court has been loth to impose rigid restrictions upon the judges called upon to act under section 1014. They have preferred to leave it to the sound discretion of the judge to distinguish between mere technical irregularities and fatal defects in the indictment. Section 5440, under which this indictment is found, reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

If this indictment fails to allege any overt act, it is as worthless as so much waste paper (*U. S. v. Watson* [D. C.] 17 Fed. 145; *U. S. v. Reichert* [C. C.] 32 Fed. 144; *Bannon v. U. S.*, 156 U. S. 465, 15 Sup. Ct. 467, 39 L. Ed. 494), and the accused are illegally restrained. It is a singular feature in this case that all the essential facts bearing upon the contested propositions of law are undisputed. The indictment must be read in the light of the facts. When so construed, this indictment breaks down. First, because the subject-matter of the alleged overt act appertains to the conspiracy; second, because the alleged overt act took place after the conspiracy had been consummated; third, because the action is absolutely barred by the statute of limitations. It must be borne in mind at the outset that Congress introduced a radical change in the law of conspiracy when it incorporated section 5440 into the statute. At the common law a conspiracy was ripe when the secret agreement had been reached by and among the conspirators. Under the statute, the unlawful agreement still constitutes the crime, as it did before.

In *United States v. Britton*, 108 U. S. 204, 2 Sup. Ct. 534, 27 L. Ed. 698, the court say:

"This offense does not consist of both the conspiracy and the acts done to effect the objects of the conspiracy, but of the conspiracy alone."

The policy of Congress was, not to introduce a new element into the crime, but to allow a period of grace, an opportunity for repentance, after the plot had been perfected, and before any decisive act had been done in furtherance of it. Therefore, the courts are required to differentiate sharply between the agreement per se and acts in furtherance of the agreement. Generally, a conspiracy, such as that charged here, must have its formative stage, its period of organization, its preparatory steps and preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such time, and until some act has been done to effect the purpose—some overt act—the parties may abandon the conspiracy and be held guiltless of the offense. *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545; *Hyde v. Shine*, 199 U. S. 76, 25 Sup. Ct. 760, 50 L. Ed. 90. It has been sometimes held that the date of the overt act ought to be set out, so that the court can see that it postdates the conspiracy, and that it is not a part of it. *United States v. Milner* (C. C.) 36 Fed. 890.

Let us apply these legal principles to the case at bar, keeping in mind the duty of distinguishing between the conspiracy and the open acts done in furtherance thereof. This conspiracy contemplated fraudulent entries of certain definite tracts of land under the stone and timber act. It appears by the evidence that the accused went to Oregon, where they associated with them one Parker, also named as defendant in the indictment. In order to accomplish their unlawful purpose they needed the active co-operation of 16 persons to act as entymen. It was agreed that Parker should secure these men to assist and co-operate in the scheme. Parker secures the 16 persons, explains the scheme to them. They assent to the same, and agree to do each his part of what is required by the law to make a complete

entry, including false affidavits, etc., and further agree to turn over the title to all such lands after acquiring the same. The defendants, through Parker, agree to pay each of these parties \$200, and to defray all their expenses. This compact was made in September or early in October, 1902. When the time was ripe, these 16 entrymen were assembled by Parker, and, at the expense of defendants, transported in a body to the place where the initial affidavits were to be filed, and on the 7th and 8th days of October, 1902, these 16 affidavits were made and filed, and thus the first open step was taken to carry out the purposes of the conspiracy. And so, step by step, these 16 entrymen, under the immediate guidance of Parker, carried out the plot in all its details, and after receiving final certificates, transferred and surrendered the fruits of the conspiracy.

Now the practical question is whether, under such circumstances, the pleader is at liberty to adopt as an overt act the bargaining with the entrymen and the payment to them of the agreed stipend. Enough has appeared to brand the entrymen as co-conspirators. They were not innocent tools in the hands of the defendants to do some ministerial act, but, under the personal guidance of Parker, the working out of the scheme in its entirety and in all its details was turned over to them. It is familiar that if a series of acts is to be performed with a view to produce a particular result, he who aids in the performance of any one of these acts in order to bring about the result, knowing what the object is, must have the intention to effectuate the end proposed, and if he operates with others knowing them to have the same design, there is in fact an agreement between him and them. His criminal intent is not to be distinguished from the intent of those who first formed the plan of the conspiracy. 2 Archibald's Crim. Pl. & Pr. 1054; *United States v. Cassidy* (D. C.) 67 Fed. 702; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487. It matters not how subordinate the service they render. *United States v. Stevens* (D. C.) 44 Fed. 132-140. It makes no difference in the application of this rule whether the co-conspirators are indicted or not. *United States v. Cassidy* (D. C.) 67 Fed. 703. Suppose they had been joined as defendants, as they might have been, and the indictment had outlined the entire conspiracy, the bargaining with the entrymen and the payment to secure their adherence would have been an essential part of the plot, really an enlargement of the conspiracy, and not partaking of the nature of an overt act. A payment of \$500 in advance to defendant was so treated in *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487. The agreement of the 16 entrymen to co-operate was an essential part of the combination underlying this crime. The bargaining with them was an integral part of the secret plot. Thus far everything rested in agreement, and was relevant to the conspiracy.

A simple illustration may make the position more evident. Suppose that Parker had not only bargained with the entrymen, but had actually paid them their stipend in advance, in consideration of their agreement, and at that point the scheme had been abandoned and no steps had ever been taken looking to the actual entry of any land,

would the crime have been complete? Could any one of the tentative acts relating to the secret plot have been adopted as an overt act? If so, section 5440 is a mere rhetorical flourish. The fact that the payment was delayed does not change the essential character of the act. It has not escaped my attention that the overt act in this indictment is framed in imitation of the indictment in *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. It is not averred in that case, and does not appear, that the defendant Allen, who induced and persuaded the entrymen, ever disclosed the fact that behind him was a combination to rob the government. The entrymen acting under individual persuasion may have been ignorant, and is presumed to have been innocent of the criminal conspiracy. In that event the persuasion on the part of Allen would have no connection with the conspiracy as such, but would be purely an executive act on his part, calculated to effect the common purpose, and, therefore, a competent overt act. The distinction is apparent to every lawyer between a mere outsider, who is hired by one member of the conspiracy to do an act, and the case of an accomplice, who, understanding the illicit scheme, proceeds to assist in its execution. The court in that case had in mind the very distinction that we are insisting upon, because they say on page 546 of 152 U. S., page 683 of 14 Sup. Ct. (38 L. Ed. 545): "The solicitation was not a part of the conspiracy, but subsequent to and in furtherance of it. No such conclusion would be warranted under the facts of this case. This indictment has industriously obscured the distinction between section 5440 and the common law. It has ignored all the overt acts incident to the fraudulent entry of these lands, and has seized upon an act which relates back to the conspiracy as and for the only overt act. The payment of the several entrymen must be distinguished from an open act in furtherance of the common purpose, because it is connected therewith only through the initial agreement; otherwise it has no relevance to the alleged crime. The stone and timber act under which these entries were made, itself prescribes the several steps which must be taken to effect the object of this conspiracy. For some reason, which may appear later on, all these have been ignored by the pleader, and an ingenious effort has been made to substitute an equivocal act which belongs to the formative stage of the conspiracy. To give effect to the statute, and to enforce the wise and gracious policy of Congress, which recognizes an interval known as the locus penitentiæ, between the conspiracy and the overt act, we are constrained to hold that the indictment is in this regard radically defective."

Second. The undisputed evidence shows that before the 3d day of April, 1903, the date of the earliest alleged overt act, the conspiracy laid in the indictment had been consummated. There is a strange confusion in the averments of the indictment as to dates and the sequence of events, whereby, upon the face of the indictment, it would appear that by the payment of \$200 to John B. Million, one of the entrymen, on the 4th day of April, 1903, he was induced and persuaded to make certain false and fraudulent entries which were "then and there made," etc. The witnesses for the government, and the

tract book of the Land Office, show beyond dispute that each and every of these preliminary entries was made on the 7th and 8th of October, 1902. So that these entrymen must have been "persuaded and induced" to undertake this scheme before that date. In like manner it is conceded by the government that the final proofs were made as to each and every of these tracts of land, the consideration thereof paid to the government, final certificates issued, and a conveyance taken from each of the entrymen, on or before the 17th day of March, 1903. Thereby everything was accomplished which was contemplated by the conspiracy, as laid in the indictment. Every step had been taken and had been ratified and approved by the officers of the Land Office, and a transfer secured of the fraudulent titles so acquired. The only overt acts to support the indictment are certain payments made to the entrymen between the 4th day of April and the 13th day of June, 1903, to carry out the agreement made in the preceding September when they joined the conspiracy.

An overt act presupposes a pending conspiracy. So that the act of any one done in furtherance of the conspiracy, may bind all of his associates. When a conspiracy has been completely effected, this implied agency disappears. *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown v. United States*, 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010. It is a contradiction of terms to speak of an act done to effect the purpose of the conspiracy after the conspiracy has been accomplished. Such an anomalous doctrine might prolong a conspiracy, and would keep it in active operation until every obligation incurred during the formative period of the plot had been liquidated. In *United States v. Donau*, 11 Blatchf. 168, Fed. Cas. No. 14,983, the function of an overt act is declared to be "to show that the unlawful combination became a living active combination." I believe no case can be found where the overt act post-dated the consummation of the conspiracy. Where would be the locus penitentiae in such a case? So that, whether you consider the subject-matter of the alleged overt act or its date, weeks after the conspiracy had been completed, the indictment discloses a desperate effort on the part of the pleader to confuse the distinction of the law, and to resuscitate a cause of action which, presumably, through the neglect of some one, has been allowed to lapse.

Third. It is apparent from the evidence that the cause of action set out in the indictment is barred by the statute of limitations. By section 1044, Rev. St. [U. S. Comp. St. 1901, p. 725], Congress has declared:

"No person shall be prosecuted, tried or punished for any offense * * * unless the indictment is found * * * within three years next after such offense shall have been committed."

Judge Bunn, in *United States v. McCord* (D. C.) 72 Fed. 159, says:

"I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the government have felt the difficulty."

This language seems to fit the case at bar, and to explain some eccentricities of the pleader. When was this offense committed, and

when did the three years begin to run? The indictment avers that the conspiracy was formed in September, 1902, to bring about the fraudulent entry of certain lands therein described. The filing of the necessary affidavits on the 7th and 8th of October, 1902, must have set the statute running, because it was an open act on the part of the defendants to effect the purpose of the conspiracy. Therefore, according to the general precepts of the law, the action would be barred on the 8th day of October, 1905. The indictment in this case was found on the 3d day of April, 1906. To escape this dilemma the pleader has been driven to skillful fencing and adroit expedients.

It is contended on the part of the government that this was a so-called continuing crime. Conceding for the purposes of the argument that a conspiracy may, under certain circumstances, be recognized as a continuing crime; what fact or feature is there here to bring this case within such a classification? Here the conspiracy was confined to a single undertaking, limited to particular descriptions of land, and completed within six months. The entrymen were handled like a drilled squad, and transported from place to place, taking the several necessary steps which culminated, on the 17th day of March, 1903. No effort was made to enlarge the original conspiracy to embrace any other lands, or adapt it to any further or different transaction. In the *Greene-Gaynor Case*, *United States v. Greene* (D. C.) 115 Fed. 349; *Greene v. Henkel*, 183 U. S. 251, 22 Sup. Ct. 218, 46 L. Ed. 177, the conspiracy was formed in 1891. From year to year the old conspiracy was adapted to new contracts, whereby the government was defrauded; and in 1897 it was revived as to certain new government contracts. There might be some reason for treating that as a continuing offense, which was revived afresh with each new contract. But there is no well-reasoned case to which my attention has been called which justifies the doctrine that in every case of conspiracy the statute begins to run from the last overt act instead of the first. In cases of that nature the doctrine of *Commonwealth v. Bartilson*, 85 Pa. 482, and *Insurance Company v. State*, 75 Miss. 24, 22 South. 99, is the more sane and reasonable. If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a new conspiracy, and the jury may be warranted from all the evidence in finding the existence of such new offense within that period. This appears to have been the course adopted in *United States v. Greene* (D. C.) 115 Fed. 349. The indictment charged a conspiracy in 1891 and another in 1897, notwithstanding what is said in the opening about a continuing crime. Certain it is that on the 8th day of October, 1902, a definite overt act was performed, and on the 9th day of October, 1902, an indictment, charging the conspiracy might have been found. Certainly the statute began to run at that date. What circumstance has intervened in this case to interrupt it? The law in such case has been well laid down by Judge Bunn of the Western District of Wisconsin, in *United States v. McCord*, *supra*:

"They (counsel for the government) admit that the indictments may properly have been found in March, 1891; that the conspiracy to defraud the

government was then formed by the defendants, and various acts performed intended to effectuate its objects. If this be so, it is difficult to see why the statute did not then begin to run. Otherwise, you would have a different period of limitation in conspiracies from what you have in other offenses against the government, which could not have been the intention of the law. * * * Counsel no doubt anticipated this difficulty, and sought to avoid it by alleging an overt act committed on October 23, 1891, so as to avoid the claim of the running of the statute. Now to make good this contention, it is claimed that a conspiracy is a continuing offense. No doubt a conspiracy is a continuing offense in this sense: that whenever an individual comes into the conspiracy, however late, he is considered as adopting all the previous acts of his co-conspirators, and is liable in the same degree with them. But that it is a continuing offense in the sense that, as to the first and original parties to the conspiracy, this statute begins to run anew from the time of the commission of every overt act, is a contention that the court is unable to affirm."

The same doctrine was announced in the district of Oregon in *United States v. Owen* (D. C.) 32 Fed. 534, which was a case of the same nature as this, where the court says:

"But, admitting this is a continuous crime, the demurrer must be sustained on this point. That being the case, the prosecution of the defendants for any act committed three years before the finding of the indictment is barred by lapse of time, and those alleged to have been committed within three years of such finding are not sufficient to constitute the crime defined by the statute. The very foundation of the crime, the conspiracy, is shut out, and, without this circumstance, the offense in question is not charged in the indictment. However, this is an instantaneous crime, composed of the conspiracy, and the first act done to effect the object thereof at whatever distance of time therefrom. When the conspiracy is formed the crime is begun, and when the act is committed it is consummated. An indictment will then lie against the criminal, and the limitation on the right of the government to prosecute him begins to run, and in three years the bar is complete."

This decision accurately defines the situation here. On the 3d day of April, 1906, when the indictment was found, the conspiracy alleged to have been formed on the 1st day of September, 1902, was barred, and we have a naked overt act, without any living active conspiracy to support it. It was said upon the argument that in certain cases not yet reported, the District Court of Oregon has adopted a different rule from that laid down in the *Owen* Case. Such opinions were not brought to the attention of the court, and I doubt whether they overturn the reasoning of the *Owen* Case.

Ordinarily, a case like this under the statute of limitations would involve a conflict of evidence, in which case the prisoners should be removed so that the issue might be disposed of in the trial court. But as we have seen, the case at bar involves no conflict, and the court in the interest of the liberty of the citizen, feels constrained to intervene and discharge the prisoners; and it is so ordered.

MEYER, JOSSEN & CO. v. CITY OF MOBILE.

(Circuit Court, S. D. Alabama, July 5, 1906.)

No. 247.

1. LICENSES—INTOXICATING LIQUORS—VALIDITY OF ORDINANCE—IMPOSING LICENSE TAX.

Unless it clearly appears upon the face of a city ordinance imposing a license tax upon the business of selling liquor that its purpose was to exact a tax and not to regulate the business, it should be sustained as within the police power of the city.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 6; vol. 36, Cent. Dig. Municipal Corporations, §§ 1368, 275.]

2. COMMERCE—INTERSTATE COMMERCE—INTOXICATING LIQUORS—MUNICIPAL LICENSE LAW—CONSTITUTIONALITY.

An ordinance of the city of Mobile imposing a license tax on dealers in beer held one enacted in the exercise of the police power conferred on the city by its charter and by virtue of the Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]) not invalid as in violation of the interstate commerce clause of the federal Constitution as applied to the sale of beer in the bottles in which it was brought from other states.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, § 105.]

Taxation of interstate commerce by states, see note to Board of Assessors v. Pullman's Palace Co., 8 C. C. A. 492.]

3. SAME.

Seemle that articles of interstate commerce being subject to taxation by the state into which they are brought while there held for sale in the original packages, a city ordinance imposing a license tax on dealers in beer even if enacted under the city's power of taxation, and not as a police regulation, is valid as to beer brought from other states and sold in the original bottles, irrespective of the Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177].

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, § 134.]

In Equity. On motion for preliminary injunction and demurrer to bill.

Richard W. Stoutz, for complainant.

B. B. Boone, for defendant.

TOULMIN, District Judge. The complainants challenge the validity of the ordinance enacted by the council of the city of Mobile imposing a license tax on dealers in beer. They decline to take a license from the city or to pay the annual license fixed by such ordinance, and they file this bill praying that the city and its officers be enjoined and restrained from enforcing it. The bill charges that the ordinance is invalid as against the complainants, and that the city is without authority to enforce such ordinance against them because it conflicts with the interstate commerce clause of the Constitution of the United States; that the said ordinance seeks only to raise revenue and not to regulate the complainants' business; and that it imposes a tax for revenue, and is not passed in the exercise of the police power of the city. As I view the case made by the bill, it is conceded that,

under the decisions of the Supreme Court, prior to August 8, 1890, when the Wilson Act was enacted (Act Aug. 8, 1890, c. 728, 26 St. 313 [U. S. Comp. St. 1901, p. 3177]) the contention of complainants would be sustained. That court decided that a state statute prohibiting the sale of intoxicating liquors, except for designated purposes or under a license, was, as applied to a sale by an importer in the original packages of liquors manufactured and brought in from another state, in violation of the interstate commerce clause of the Constitution of the United States. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Lyng v. Mich.*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150. The rule then was that an importer of intoxicating liquors into any state from any other state could by himself or agents, sell such liquors, so long as they remain in the unbroken packages in which they existed during their transportation, without regard to the laws of the state into which such liquors were imported. In the case of *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, the Supreme Court said: "The settled doctrine is that the power to ship merchandise from one state into another carries with it as an incident the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding. * * * The proposition, however, while generally true, is no longer applicable to intoxicating liquors since Congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale in the original packages of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages except in conformity to the lawful state regulations. A state law which provides equal regulations for the inspection and sale of domestic and imported liquors is valid as a lawful exercise of the police power. *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; *Minn. Brew'g Co. v. McGillivray* (C. C.) 104 Fed. 258.

The plain purpose of the act of Congress referred to was to allow state regulations to operate upon the sale of original packages of intoxicants coming from other states. It permits the state laws to attach to, and control, the sale in case the states absolutely forbid the sale of liquor, and it applies as well in case the states determine to restrict or regulate the same. *Vance v. Vandercook Co.*, *supra*. The Wilson law permits the police laws of a state to be applied to liquors which have been shipped into such state as an article of interstate commerce after such liquors have reached the end of the shipment, and have been delivered to the consignee. In *re Bergen* (C. C.) 115 Fed. 340; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. I take it that, since that act, it is not disputed that if the ordinance in question was enacted in the exercise of the police power of the city of Mobile, it would not be in conflict with the interstate commerce provision of the Constitution. But it is claimed that the said ordinance was passed not for the purpose of regulation, but of revenue.

If revenue only was designed, it was not a police regulation. "It is doubtless true," say the authorities, "that the legislation must have reference to the supervision, control, or regulation of some act or thing which may, in some way, injuriously affect the peace, good order, health, morality, or safety of society." *Duluth Brew'g & Malt Co. v. The City of Superior*, 123 Fed. 356, 59 C. C. A. 481; *Pabst Brew'g Co. v. City of Terre Haute (C. C.)* 98 Fed. 330. "As a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause in the Constitution of the United States." *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 133, 21 L. Ed. 929; *Beer Co. v. Mass.*, 97 U. S. 33, 24 L. Ed. 989; *Van Hook v. City of Selma*, 70 Ala. 363, 45 Am. Rep. 85. "Since the Wilson Act, liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature." *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. That act, in effect, provides that such merchandise when transported from one state to another shall lose its character as interstate commerce upon the completion of delivery under the contract of interstate shipment, and before sale in the original packages. *Adams Exp. Co. v. Iowa*, 196 U. S. 142, 25 Sup. Ct. 185, 49 L. Ed. 424; 17 A. & E. Enc. of Law (2d Ed.) 294. "The purpose of the act referred to was to make liquor after its arrival a domestic product, and to confer power upon the state to deal with it accordingly." *Pabst Brew'g Co. v. Crenshaw*, 198 U. S. 17, 27, 25 Sup. Ct. 552, 554, 49 L. Ed. 925. "The manifest purpose of the act was to subject original packages to the regulation and restraint imposed by the state laws." *Pabst Brew'g Co. v. Crenshaw*, *supra*; *Vance v. Vandercook Co.*, *supra*. "The police laws of a state do not attach to the liquors brought from another state while in transit nor until the receipt and delivery to the consignee or receiver. From the moment of such receipt or delivery such liquors fall within the police power of the state in the same manner and to the same extent as like liquors of domestic manufacture." *Pabst Brew'g Co. v. City of Terre Haute*, *supra*. "The control by appropriate regulations from the time of their delivery belongs to the state as though they were of domestic manufacture. The state possesses plenary power to regulate and control the sale of intoxicating liquors within its territorial limits." *Pabst Brew'g Co. v. Terre Haute*, *supra*; *Van Hook v. Selma*, *supra*.

There can be no doubt that upon its arrival in this city and delivery to the complainants the beer purchased by them out of this state was subject to the operation and effect of any ordinance of the city enacted in the exercise of its police powers. The question then is whether the ordinance imposing the license in question in this case was enacted as a police regulation in the exercise of the police powers of the city, or under its power of taxation. "A city, when authorized by its charter, may impose license and business taxes upon natural persons and corporations." 21 A. & E. Encyc. of Law (2d Ed.) 782; *Kentz v. Mobile*, 120 Ala. 623, 24 South. 952. The City of Mobile is authorized by its charter to assess and collect from all

persons and corporations, trading or carrying on any business or trade in the city, a license tax. Charter of Mobile, § 43. "A very usual method of exercising the police power in the regulation of business enterprises is by the requiring of licenses for engaging in certain lines of business." 22 A. & E. Enc. of Law (2d Ed.) 935; *Humes v. City of Ft. Smith* (C. C.) 93 Fed. 857. "License laws are regarded as police regulations." *Troll v. Hudson*, 78 Mo. 302; *Pabst Brew'g Co. v. Crenshaw* (C. C.) 120 Fed. 144; *City of Little Rock v. Barton*, 33 Ark. 443; *State v. Ludington*, 33 Wis. 107. "The power to license should be used only for regulation." *Laundry License Cases* (D. C.) 22 Fed. 701; *Van Hook v. Selma*, *Supra*. The right here conferred is authority to license, and the power for the purpose of revenue is not thereby inferred. "It is, indeed, excluded by the clearest implication." *Van Hook v. Selma*, *supra*.

In the case of the *Pabst Brewing Co. v. Terre Haute* (C. C.) 98 Fed. 330, cited by complainant's counsel the court held that the law authorizing the imposition of the license in question in that case was not an exercise of the police power of the state, but was purely a revenue measure enacted in the exercise of the power of taxation. The court in its reasoning to sustain its ruling said, among other things: "The ordinance in question contains no provision for any control or regulation of the business of handling, storing or selling beer, and contains no reference to the maintenance of good order or safety of society." "In other words, it seeks simply to make the depot or agency pay a tax for the general revenue of the city without any attempt to control or regulate either the custody or sale of beer."

The ordinance under consideration in that case is very unlike the one here in question. The ordinance we are considering by authority of law imposes a license for carrying on the business of selling beer which, in effect, must more or less control or restrain its sale. As suggested by the court in *Duluth Brew'g Co. v. The City of Superior*, *supra*, *Bartemeyer v. Iowa*, *supra*, and *Beer Company v. Mass.* *supra*, such business is one, which, looking to the preservation of public morals, good order, and the safety of society, should be regulated. If the city of Mobile, under legislative authority, might prohibit outright the sale of liquor because detrimental to public interests or against public morals, as to which there can be no two opinions, the manner of dealing with it is a matter solely addressed to the Legislature. It is a subject-matter peculiarly within the province of the state. Unless it clearly appears upon the face of the ordinance that the purpose of it was to exact a tax, and not to impose a license for regulation, the court should sustain it as being within the police power of the city. If there exists any doubt upon the question it should be resolved in favor of the law being within the police power. *Duluth Brew. Co. v. City of Superior*, *supra*; *Minn. v. McGillivray*, *supra*. I may add that irrespective of the Wilson act and the question of police regulations hereinabove discussed, I am of opinion that the rule announced in the case of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538, would require a deci-

sion here in favor of the city of Mobile. The court there holds that goods brought from another state and not from a foreign country are subject to state taxation after reaching their destination and whilst held in the state for sale in the original packages. *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663.

My conclusion is that the motion for an injunction as prayed for should be, and it is hereby, denied, and that the demurrer to the bill should be sustained, and motion to dismiss bill granted. Let a decree be entered accordingly.

THE CITY OF CAMDEN.

(District Court, S. D. Alabama. July 25, 1906.)

No. 1,119.

1. MARITIME LIENS—REPAIRS AND SUPPLIES IN HOME PORT—LIEN GIVEN BY LOCAL LAW.

Claims for materials, repairs, and supplies for a vessel which arise in the home port, and for which a lien is given by the local law, stand on the same footing as is given by the maritime law to similar claims arising in a foreign port.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 60.

Maritime liens created by state laws, see note to *The Election*, 21 C. C. A. 21.]

2. SAME—MONEY LENT TO PAY OFF LIENS.

One who lends money on the credit of a vessel to enable the owner to pay off liens thereon given by the state law, and which is so used, acquires a lien of equal standing with those discharged.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, §§ 18, 36; vol. 44, Cent. Dig. Subrogation, §§ 65, 66.]

3. SAME—CORPORATION OWNER—MONEY LENT BY TREASURER.

The fact that one who lent money to a company which owned a vessel to be used in paying off claims which were liens thereon under the state law was the treasurer of such company does not prevent him from acquiring a lien of equal standing, where it is clearly shown that the loan was made on the credit of the vessel; and while his being the legal custodian of the company's funds is strong evidence that the loan was made on the credit of the company, and not of the vessel, it is not conclusive, and may be overcome by evidence showing the company's condition.

4. SAME—MONEY DUE FOR INSURANCE PREMIUMS.

The admiralty law gives no maritime lien on a vessel for unpaid premiums for insurance thereon.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 17.]

In Admiralty. In the matter of the claim of T. T. Tunstall, intervener, for money lent or advanced.

Pillans, Hanaw & Pillans, for intervener.
Gregory L. & H. T. Smith, for defendant.

TOULMIN, District Judge. It is well settled that, by the general maritime law, one who loans or advances money to the master or

owner of a vessel, who is without funds, in a foreign port, to be used in furnishing materials, repairs, or supplies to the vessel, and which is actually used for that purpose, is entitled to a maritime lien on the vessel therefor; and that where funds are loaned in a foreign port to discharge valid existing maritime liens, and are so used, the lender may properly and equitably stand in the place of the lienholders whose demands have been discharged with the funds furnished by him. *The Guiding Star* (C. C.) 18 Fed. 263; *The Augustine Kobbe* (D. C.) 37 Fed. 701; *Nippert v. Williams* (C. C.) 42 Fed. 542; *The Worthington*, 133 Fed. 725, 66 C. C. A. 555, 70 L. R. A. 353; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *Hughes on Admiralty*, 96. "By the general maritime law, which gives a lien on a vessel for necessities furnished to her in a foreign port, money is registered as material." *The City of Salem* (D. C.) 31 Fed. 616, 2 L. R. A. 380. It is likewise well settled that, by the maritime law, for supplies or other necessities furnished a vessel in her home port, or for money advanced or loaned to her to pay for the same, there is no implied lien. In such case the credit is presumptively given to the owner personally, and not to the vessel. *The Emily Souder*, supra; *The Samuel Marshall*, 54 Fed. 399, 4 C. C. A. 385; *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; *The Queen of St. Johns* (C. C.) 31 Fed. 24.

Money advanced upon the credit of the boat, to pay off claims of a maritime nature, entitled to liens in admiralty, and actually used for that purpose, are entitled to the same rank in the distribution as the claims which were thus paid off. Claims for materials, repairs, and supplies, which arise at a home port for which a lien is given by the local law, are entitled to the same footing with claims arising in foreign ports. These claims while maritime in their nature, as founded upon maritime contracts, are not invested by the maritime law with a lien upon the vessel, enforceable as such by admiralty process in rem; but a lien upon the vessel in respect to them being given by the local law of her home port, it is enforceable in the admiralty court, and is controlled by the principles of the admiralty law. *The Guiding Star*, supra, and other authorities cited supra; *The Sylvan Stream* (D. C.) 35 Fed. 314. The state law of Alabama declares a lien on any steamboat in this state for work done or material supplied by any person within the state, in and about the repairing, furnishing, and supplying such steamboat; and for wages of laborers, and shipkeepers of the same. Code Ala. 1896, § 2758. It seems to be settled, at least by the weight of authority, that money advanced to pay maritime claims that are liens by virtue of a local law, as well as of the maritime law, may itself become a lien against the vessel whose debts have thus been discharged. "But in order to establish a lien for money advanced, it must be clearly shown that it was advanced on the credit of the vessel to pay lien claims, and that it was so used." *The Wyoming* (D. C.) 36 Fed. 493, and authorities cited therein. "Before a lien exists for money advanced, it must be clearly shown that the purposes for which it is advanced are entitled to a lien. If advanced for the purpose of paying claims to which a lien in admiralty

attaches, in that case a lien attaches to that money, but not otherwise." *The Guiding Star* (D. C.) 9 Fed. 521.

To entitle the intervenor to a decree it must appear from the evidence that he loaned to the owner of the steamboat, City of Camden, money to pay off valid claims against her; that he so loaned the money on the credit of the boat, and that said claims were entitled to liens on the boat. To entitle said claims to such liens, it must appear that the materials and supplies, on account of which said claims were made, were used by the boat, and that the repairs, work, and labor which were paid for with the money loaned by the intervenor, were done on, in, or about the boat. There are cases which hold that the state statutes which provide for liens on a vessel in her home port create a conclusive presumption of credit to the vessel—notably the case of *The Iris*, 100 Fed. 104, 40 C. C. A. 301. There are also cases which hold to the contrary—notably the case of *Samuel Marshall*, 54 Fed. 399, 4 C. C. A. 385. I think the decided weight of authority sustains the case last cited.

However, in this case, the question as to which line of decisions shall be followed is not a practical one, as the evidence tends to show that the intervenor loaned the money on the credit both of the vessel and the owner. The case of the *Murphy Tugs* (D. C.) in 28 Fed. 429, which is mainly relied on by the contestants of intervenor's claim, I think is distinguishable from this case. In that case, Thomas Murphy, the chief engineer of a line of tugs, whose services consisted in planning, superintending, and directing the operation and repairs upon the several vessels of the line at a salary, presented a claim for salary, and also bills for repairs put upon these vessels. The court disallowed the salary, and postponed the lien for repairs. It appeared that Murphy was a stockholder and director, and the treasurer of the company to which the tugs belonged. Judge Brown, who decided the case, said that he did not think the mere fact that Murphy was a director and stockholder would necessarily prevent his contracting with the company, or from acquiring a lien upon the property. But that his position as the legal custodian of its funds was strong evidence to show that he relied upon the personal credit of the company, or rather, upon his ability to pay himself out of its funds, and his lien should therefore be postponed to that of the other creditors.

The effect of the decision, it seems to me, is that the stockholder of a company is not prevented from contracting with the company, and from acquiring a lien on its property, but the fact that he is the treasurer of the company, and as such the legal custodian of its funds, is strong evidence that he relied upon his ability to pay himself out of its funds, and hence contracted upon the personal credit of the company, and, therefore, his lien should be postponed to that of other creditors. The decision recognizes the right of a stockholder and treasurer to contract with his company, and to acquire a lien upon its property, but it holds that the treasurer having the legal custody of the funds of the company, or the right to have them, and to pay himself out of them, by waiving such right or failing to exercise

it, his lien should be postponed to those of other creditors. In the case at bar, the claimant was a stockholder and the treasurer of the company owning the boat, but it appears that the company had no funds at the time he loaned the money to the company to pay off the claims against the boat, and has had no funds in his custody since that time, and it appears that he loaned the money to pay such claims at the request of the manager of the company. The same reasons do not exist in this case as in the Murphy Tugs Case for denying the lien claimed.

It seems to me, in accordance with the weight of reason and authority, the intervener, who loaned the money on the credit of the boat to enable the owner to pay off liens given by the state law, and which was so used, acquired a lien of equal standing to those discharged with the money so loaned. Money loaned to pay a bill stands in the same relation to the boat as the bill paid. If that was a lien so is the new debt created by the loan, but not otherwise. *Nippert v. Williams*, *supra*; and other authorities cited, *supra*. Admiralty law gives no maritime lien on a vessel for unpaid premiums on insurance thereon. The *Daisy Day* (C. C.) 40 Fed. 603, and authorities cited therein. The items for insurance claimed in the intervener's account are, therefore, disallowed. The other items in his account disallowed are found in statement hereto annexed, marked "A." They are disallowed because not shown by the evidence to have been material used by, or work done on, the boat, and therefore lien claims of a maritime nature. The items of said account allowed are found in statement hereto annexed, marked "B." These will be paid *pro rata* from the proceeds of the sale of the vessel.

The exceptions of the intervener to the report of the commissioner are sustained; said report will be amended in accordance with the conclusions herein expressed, and a decree entered confirming the report as thus amended. And it is so ordered.

THE CLAVERBURN.

(District Court, S. D. New York. September 19, 1906.)

1. SHIPPING—LOSS OF CARGO FROM LEAKAGE—EXCEPTION IN BILL OF LADING.

A provision of a bill of lading that the shipowner shall not be liable for loss by leakage protects him as to all leakage, however great, unless caused by negligence, which must be shown to establish his liability.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 493.]

2. SAME—DAMAGE TO CARGO OF WOOD OIL—IMPROPER PACKAGES.

A loss through leakage of wood oil shipped from China to New York in ordinary barrels *held* not to have been due to improper stowage but to the insufficiency of the packages, for which the carrier was not liable under the terms of the bill of lading, it being shown that such oil has a tendency to shrink the barrels and cause leakage unless they are specially prepared.

In Admiralty. Suit for damage to cargo.

Stimson & Williams, Avery F. Cushman, and Victor M. Hungerford, for libellants.

Convers & Kirlin, for claimant.

ADAMS, District Judge. This action was brought by Louis C. Gillespie and others, against the steamship Claverburn, to recover the damages they sustained through the alleged negligent stowage of 272 barrels of China Nut Oil, known commercially as Wood Oil, at Shanghai, on the 5th day of October, 1904, bound on a voyage to New York. When she arrived there, the barrels of oil were found to be deficient in contents to a considerable extent and the libellants allege that the consequent loss, amounting to some \$1,700, was in consequence of improper stowage and that large and heavy cargo was stowed on top of the barrels in such a manner that the weight of the cargo was allowed to press directly upon the bilges of the oil barrels and thus injured many of them. The answer denied the allegation of improper stowage and set forth the exceptions contained in the bill of lading, which, among other things, provided that the ship should not be liable for insufficient packing, reasonable wear and tear of packages, leakage, drainage, inherent quality or vice of the goods shipped.

The oil was brought from Hankow, China, to Shanghai by another steamer and there loaded upon the Claverburn in good order and stowed, properly dunnaged, upon the bottom of No. 2 hold, in two tiers, each barrel in the second tier resting upon the quarters of four barrels in the lower tier. The steamer then proceeded to Singapore, where some of the barrels were re-stowed, so that from that port they were in three tiers. Up to Singapore nothing was stowed on top of them, but there a platform was built over the barrels and raised sufficiently to keep the weight of the superincumbent cargo off and clear of the bilges of the top tier of barrels. On this platform were stowed cases of jelotong which also extended over some bags of gambier stowed on the floor of the hold forward of the oil and separated from it by a partition of deal. This took the place of some coal which had been stowed there and was used on the voyage up to that place.

The gambier received some damage to cover which the ship tendered and paid into court a sufficient sum, and there only remains for decision the questions concerning the oil. No unusual weather was encountered on the voyage. There was a large and somewhat unusual amount of damage, said to amount to $26\frac{1}{2}$ per cent., while it appeared that many shipments had been brought here with small damage, about 4 per cent., and some came without any.

The mere fact that there has been excessive damage does not, however, prevent the ship from resorting to proper exceptions with reference to the character of the cargo or packages. In *The Helene*, L. R. 1 Privy Council, 231, it was said (240):

"The condition that the shipowners are not to be accountable for leakages does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms. Nor are we aware of any authority for doing so. It follows that, in our judgment, the memorandum in the bill of lading protects the shipowner as to all leakage except that caused by negligence, and, therefore, if no negligence is shown, there is no cause of action."

The question therefore is, was there negligence in the stowage? The testimony seems to be almost uniform that the method adopted was proper. There was no superincumbent cargo until the Singapore shipment was taken aboard, yet evidence of leakage was discovered after the ship left Shanghai and before there was any weight whatever above the oil barrels. There the jelotong was loaded but there was then no detrimental weight. The leakage, however, continued to the end of the voyage, notwithstanding usual and careful stowage.

The testimony satisfactorily shows that this kind of oil possesses drying qualities and has a tendency to shrink the barrels, to render the wood brittle, and almost invariably causes the barrels to leak and drain heavily when carried in large shipments. At one time this oil was imported in iron drums and latterly the libellants, who are large importers, have instructed their Chinese correspondents to ship it in barrels of special construction lined with glue and paper.

When the libellant Gillespie was first examined as a witness, he said that he had examined two barrels of the shipment which were brought into court as exhibits and that they were of the special construction designed for this trade. Upon an examination, however, it proved that they were not specially built or lined as he testified they were and he was compelled to admit that they were not such barrels but merely ordinary oil barrels. These must be regarded as fair samples of all the barrels. It is apparently well established that ordinary barrels are not proof against the qualities of this oil and I have concluded that the packages were insufficient to safely transport it, and that the damages must be deemed to be due to that cause.

It follows that the libel should be dismissed.

In re FRANKLIN LUMBER CO.

(District Court, D. New Jersey. October 5, 1906.)

1. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—CONDITIONAL SALE CONTRACT.

Under sections 71 and 72 of the New Jersey act respecting conveyances (P. L. 1898, 699), which provide that contracts for the conditional sale of chattels which are delivered to the purchaser, unless recorded, shall be void as against his judgment creditors or purchasers from him without notice, property in possession of such a purchaser under an unrecorded contract at the time of his bankruptcy is property which he could have transferred, and which might have been levied upon and sold under judicial process against him, and passes to his trustee under Bankr. Act July 1, 1898, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], free from any claim of the seller thereto.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 199.]

2. SAME—EXECUTION AGAINST BANKRUPT—PROPERTY VESTED IN TRUSTEE.

Property of a bankrupt, the title to which has vested in his trustee under Bankr. Act July 1, 1898, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], is not subject to seizure on execution against the bankrupt issued on a judgment recovered after the adjudication.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 238.]

In Bankruptcy. On two petitions of American Wood Working Machinery Company for delivery of property to it.

John J. Marnell, for the American Wood Working Machinery Co.
Otto A. Stiefel, for Schofield Bros. and Jacob D. Flock.

LANNING, District Judge. On April 14, July 14, and August 17, 1905, the American Wood Working Machinery Company sold, by written contracts of those dates, to the Franklin Lumber Company, three parcels of machinery. Each of these contracts contained the following language: "It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash." On October 21, 1905, a petition in involuntary bankruptcy was filed against the Franklin Lumber Company, and on November 6, 1905, it was adjudged bankrupt. Partial payments only had been made on the three contracts. The American Wood Working Machinery Company now seeks by its first petition to have the machinery returned to it by the bankrupt's trustee.

Sections 71 and 72 of the New Jersey act respecting conveyances (P. L. 1898, p. 699) are as follows:

"Sec. 71. In every contract for the conditional sale of goods and chattels hereafter made, which shall be accompanied by an actual delivery and be followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until said goods and chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as against the judgment creditors not having notice thereof, and subsequent purchasers and mortgagees in good faith not having notice thereof, whose deeds or mortgages shall have been first duly recorded, from the person so contracting to buy the same, and as to them the sale shall be deemed absolute, unless such contract for sale with such conditions and reservations therein be recorded as directed in the seventy-second section of this act.

"Sec. 72. The instruments mentioned in the seventy-first section of this act shall be recorded in the office of the clerk of the court of common pleas of the county wherein the party contracting to buy, if a resident of this state, shall reside at the time of the execution thereof, and if not a resident of this state, then in the said clerk's office of the county where the property so conditionally bought shall be at the time of the execution of such instrument."

At the dates of the execution of these contracts, the Franklin Lumber Company was a resident of Hackettstown, Warren county, N. J., and, in order that the American Wood Working Machinery Company might reserve a title that would be good as against judgment creditors and subsequent purchasers and mortgagees in good faith of the Franklin Lumber Company, the contracts should have been recorded in the office of the clerk of the court of common pleas of Warren county. They never have been so recorded. The result is that, at any time prior to the filing of the petition in bankruptcy, the Franklin Lumber Company might have conveyed to a purchaser or mortgagee in good faith not having notice of the conditional sale a perfect title to the machinery. A further result is that, at any time before the filing of the petition in bankruptcy, a judgment cred-

itor of the Franklin Lumber Company might have secured a valid levy under execution upon the machinery.

Now section 70 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. p. 3451]) provides that the trustee of the estate of a bankrupt shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all property "which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." The argument that the bankrupt in the case now in hand had no title to the machinery is not in all respects sound. As between it and the American Wood Working Machinery Company alone, without the intervention of the rights of others, the argument is sound. But as between it and its judgment creditors or bona fide purchasers or mortgagees, not having notice of the conditional sales, the argument is not sound. As to such purchasers and mortgagees the sale would be deemed absolute, and not conditional. Therefore, since the Franklin Lumber Company, at any time before the filing of the petition against it, could have conveyed the machinery by a good title to any bona fide purchaser or mortgagee in good faith not having notice of the conditional sales, and since a judgment creditor could have secured a valid levy thereon, the bankrupt's trustee, by the provision of section 70 of the bankruptcy act above quoted, is now vested with a title unimpeachable by the American Wood Working Machinery Company. The conclusion thus reached is sustained by *Chesapeake Shoe Co. v. Seldner*, 122 Fed. 598, 58 C. C. A. 261, and also by the reasoning in *Hewitt v. Berlin Machine Co.*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

This petition of the American Wood Working Machinery Company must be dismissed.

A second petition of the same company shows that Schofield Bros. commenced a suit at law against the bankrupt on October 6, 1905, two weeks before the petition in bankruptcy was filed, and recovered judgment thereon March 17, 1906, more than four months after adjudication of bankruptcy, and more than three months after the trustee Flock was appointed. As already stated, section 70 of the bankruptcy act provides that the trustee of a bankrupt's estate shall be vested by operation of law with the title of the bankrupt "as of the date he was adjudged a bankrupt." Execution was issued on the judgment of Schofield Bros., and a levy made March 19, 1906. But the judgment was against the bankrupt. The command of the writ of execution was to levy on the property of the bankrupt. This was not done. The property levied on was that of the trustee in bankruptcy. The title was in him, and not in the bankrupt. Besides, he is an officer of the law. He took his title as such. The property is in custodia legis. When it became so Schofield Bros. had not yet recovered their judgment. From the time it became so the jurisdiction of this court over the property has been supreme and exclusive. It was not possible for the sheriff, to whom Schofield Bros. delivered their writ of execution, to secure a valid levy upon

the property, at least without the consent of this court. The pretended levy therefore is invalid. It is the duty of the trustee to hold the property and protect his title. It follows that the prayer of the petition that the sheriff be ordered to deliver the property to the American Wood Working Machinery Company cannot be granted.

This petition, also, must be dismissed.

SCHOELLKOPF, HARTFORD & MACLAGAN v. UNITED STATES.

(Circuit Court, D. New Jersey. July 23, 1906.)

No. 1,093.

1. CUSTOMS DUTIES—APPEAL FROM GENERAL APPRAISERS—REVIEW OF FINDINGS—INCOMPLETE RECORD.

Where, on review by a Circuit Court of a decision of the Board of General Appraisers, under Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1333], the record returned by the Board was defective by reason of the loss of the evidence on which the Board's findings were based, *held* that, no other evidence being presented, it must be conclusively presumed that the findings by the Board were proper and justifiable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 205.]

2. EVIDENCE—PRESUMPTION FROM SIMILARITY OF NAMES.

It was contended by the importers of an article known as "dead oil" that it should have been assessed with duty at the rate held in various court decisions to be applicable to so-called dead oil. *Held*, that it cannot be assumed that dead oil is always and everywhere, either actually or commercially, the same article, nor, in the absence of evidence, that the article in question was the same as that covered by the decisions referred to.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 507, T. D. 11,064, which affirmed the assessment of duty by the collector of customs at the port of Perth Amboy.

Stanley, Clarke & Smith (Frederick W. Brooks, of counsel), for importers.

John B. Vreeland, U. S. Atty.

CROSS, District Judge. The importers' petition was filed in this court May 21, 1891, and an order was made on the same day directing the Board of General Appraisers to return to this court the record and evidence taken by them, together with a statement of the facts in the case, and their decisions thereon. The return of the Board made pursuant to this order, was filed August 9, 1905, and embraced only a copy of the importers' entry, a copy of the decision of the Board, together with a decision of the Board made in an earlier case and followed in this. The return stated that it was impossible to comply fully with the court's order by furnishing the en-

tire record, owing to the fact that the papers originally in the possession of the Board had been mislaid and could not be found, and that the duplicate papers formerly in the files of the custom house at the port of Perth Amboy had been destroyed under authority of the Secretary of the Treasury. The pertinent facts concerning the subject-matter of the importation, so far as they appear, and the findings and conclusions of the Board thereon, may, perhaps, best be given in the language of the Board of Appraisers, which follows:

"The merchandise the subject of this protest consisted of 3,593 barrels of dead oil imported into the port of Perth Amboy January 16, 1890. The collector levied duty thereon at 25 per cent. ad valorem under Act Oct. 1, 1890, c. 1244, § 1, Schedule A, par. 76, 26 Stat. 570, adding the value of the barrels as per invoice to make market value. The protestants claim that the dead oil is only dutiable at 20 per cent. under paragraph 19 (Schedule A, 26 Stat. 567), as a preparation of coal tar, also that the barrels should have been admitted free under paragraph 493 (section 2, Free List, 26 Stat. 603), as 'barrels * * * of American manufacture exported filled with American products * * * and returned filled with foreign products.'

The classification of dead oil under paragraph 76 was recently affirmed by the Board in G. A. 453, T. D. 10,958; and we adopt the findings and conclusions therein expressed. The collector refused to admit the barrels free, because the shipper and importer failed to comply with the treasury regulations of March 12, 1884 (T. D. 6,235), continued in force by order of August 7, 1890.

The protestants' entry did not contain a declaration by the importer of the name of the exporting vessel, the date of the shipper's outward manifest, and the marks and numbers upon the articles for which free entry is sought, or in fact any information except the statement 'barrels of U. S. manufacture.' In the oath annexed to the entry it is stated that the several articles of merchandise mentioned in the entry are, to the best of the knowledge and belief of the affiant, truly and bona fide manufactures of the United States, and that they were truly exported and imported as therein expressed. The shipper also declares in his shipping bill that the articles hereinafter named are truly of the manufacture of the United States, but he does not state what the articles are. The face of the shipping bill states 3,593 barrels of dead oil. These documents are palpably erroneous, incomplete, and wholly fail to meet the requirements of the 'second' paragraph of the regulation before mentioned. The protestants, having failed to furnish the proof required for free entry of said barrels, could not properly insist upon their admission free under paragraph 493. The protest is overruled and the action of the collector affirmed."

As the foregoing statement contains all of the facts now before the court, it is impossible to see how any relief can be afforded the appellants. In the absence of any proof to the contrary it must be assumed that the findings of fact and the conclusions of the Board thereon were proper and justifiable. That is the only presumption in the premises. The following citations are pertinent to this view: It is apparent that the usual presumption of a legal collection is not changed by the circumstances of this case, and that the burden is upon the importer of overcoming this presumption by proof that the exaction of the duties was unlawful. *Erhardt v. Schroeder*, 155 U. S. 124, 130, 15 Sup. Ct. 45, 39 L. Ed. 94. The presumption is that the collector of customs acted rightly in imposing a duty on imports, and the burden is on the one contesting validity of the duty to show that it was not properly imposed by the tariff laws. *Weilbacher et al. v. Merritt* (C. C.) 37 Fed. 85. Where an importer on the trial of an action at law in the circuit court to recover the amount

of duties paid under protest fails to introduce any competent evidence of one of the essential facts in relation to the goods alleged in his protest, and on which he based his claim for a different classification, the presumption of correct classification will prevail, and the direction of a verdict for the defendant is proper. *Davies et al. v. Miller et al.*, 91 Fed. 647, 34 C. C. A. 37. Where, on appeal from a decision of the Board of General Appraisers, affirming the collector's classification of imported merchandise, there is no evidence to overthrow the classification, the decision of the Board must stand. *Bailey & Co. v. United States (C. C.)* 122 Fed. 751; see, also, *Meyer v. Cadwalader (C. C.)* 49 Fed. 26.

The question now presented is not whether this court would have reached a different conclusion had the matter been presented to it in the first instance, upon the facts before the Board of General Appraisers, but whether the finding of the Board is so contrary to the weight of the evidence that the court is justified in setting it aside. *Mexican Onyx & Trading Company v. United States (C. C.)* 66 Fed. 732. As already stated, there are no facts presented, much less facts to warrant a finding that the classification made by the collector was incorrect or that the conclusions of the Board of Appraisers were not justifiable. The counsel for the petitioner have cited cases holding that the merchandise in question, dead oil, is dutiable under paragraph 19 of the act of 1890 (26 Stat. 567), at 20 per cent. ad valorem, rather than under paragraph 76 of said act (26 Stat. 570), at 25 per cent. ad valorem, as determined by the collector. But dead oil is not specifically mentioned in the act; and in the absence of proof it cannot be assumed that it is always and everywhere either actually or commercially the same article. For all that appears, evidence might show that it could properly be classified under either of said paragraphs, depending upon its derivation and manufacture. In other words, it cannot be assumed that the dead oil now in question is necessarily the same product referred to in the cases cited; and when we come to consider the question of the barrels, as to whether they were manufactured in the United States and should have been admitted free of duty under paragraph 493 of the act of 1890 (26 Stat. 603), the findings of the Board obviously put the petitioners out of court. The proceedings are held to be irregular not only, but the documents presented, including the shipping bill, which upon its face called for 3,593 barrels of dead oil, are declared, among other things, to be "palpably erroneous," and the conclusion reached was that the protestants failed to furnish the necessary proof required for the free entry of the barrels. It is useless to argue, however, when no facts are presented upon which to base an argument, and when, too, in the absence of such facts, everything is conclusively presumed in favor of the findings below.

A decree will be entered in favor of the respondent, with costs.

In re DOWNING PAPER CO.

(District Court, E. D. Pennsylvania. July 8, 1905.)

No. 1,948.

SALES—TRANSFER OF TITLE—PROPERTY BOUGHT ON APPROVAL.

Where an engine, sold to a corporation subject to approval after 60 days' trial, was retained and used until the bankruptcy of the corporation nearly a year later, during which time no dissatisfaction was expressed, and the seller sent a number of statements for the price, the sale became absolute, and the engine passed to the trustee in bankruptcy as property of the estate.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 409-417, 557.]

In Bankruptcy. On certificate of referee.

The following is the opinion and order of the referee upon the claim of the Dillon Machine Company:

The Dillon Machine Company has filed its petition, alleging that, at the time of the bankruptcy, the bankrupt had in its possession a certain machine, known as a "No. 1 Jordan Engine," which was delivered to the bankrupt upon trial only, and never was accepted by the bankrupt, and that the title to the same is in the petitioner. The receiver (now the trustee), answering the petition, avers that said engine is not the property of the Dillon Machine Company, but belongs absolutely to the Downing Paper Company, and was its property at the time the petition in bankruptcy was filed. The petition in bankruptcy against said company was filed on May 17, 1904, and the adjudication was entered June 10, 1904.

In support of the petition, M. B. Bacon, salesman of the Dillon Machine Company, testifies that in 1903 he called upon the Downing Paper Company, and "they said they would take one of our engines on trial. I told them I was satisfied it would do the work they required, and they said if it did they would order another one; but they had to try it first. Q. Did they mention the terms? A. They said they would not pay for it unless it was satisfactory. They had to try it first in order to test it, whether it was or not. * * * Q. Was the price mentioned? A. Yes, sir; it was to go in along with another engine of another make. That was to be on trial too. * * * Mr. Stelwagon said * * * the engine, if they got it from us, would be put alongside another engine, and the one that proved the most satisfactory they would order another one like it and throw out the one that did not come up to the requirements. * * * Q. When were they to pay, if it proved satisfactory? A. That was to be arranged with Mr. Dillon. Q. You did not arrange that? A. No. Q. Was there any time fixed during which they were to try it for? A. They said the other people would allow them to try it for two months. I told them if it was a reliable maker we would allow them just as long as the other people did."

After this interview of Bacon with the Downing Paper Company, the following letters were written:

"The Downing Paper Co.

"West Philadelphia, Pa., May 29th, '03.

"Dillon Machine Company, Lawrence, Mass.—Dear Sirs: Your Mr. N. B. Bacon called upon us this morning, and has persuaded us to put in on sixty days trial your No. 1 Jordan engine which he guarantees will do our work, for the sum, if approved, of \$500.00, delivered in Philadelphia. We expect to place alongside of this Jordan one of another make, and the one giving us the best satisfaction will be retained and the second one ordered, when we are convinced of the engine best adapted to our purposes, and of course the one which does not give us satisfaction will be returned; as both makers agree

to put their Jordan in on trial and allow us to be the judge of their merits. We would like to have a blue print and all necessary information, in order that it may be set up properly, and that the best results be obtained. We would also like a special price for refilling your engine, as it is likely that with our stock it will have to be refilled every three or four months. If you have furnished engines to parties in the same line of business as ours, you are undoubtedly aware of the difficulties with which we have to contend, as we get a good deal of foreign substance with our stock. We shall, of course, take all possible precautions to keep metal and wood out of the engine, and we hope not to be troubled very greatly in this respect; but we want you to know that our stock is the hardest kind of stock the Jordan can be used on.

"Kindly advise us how quickly you can forward us an engine, and oblige,

"Respectfully,

The Downing Paper Co.,

"W. C. Downing, President."

"Dillon Machine Co.

"Lawrence, Mass., June 1, 1903.

"The Downing Paper Co., West Philadelphia, Pa.—Gentlemen: We are in receipt of your order of the 29th ult., for one of our No. 1 Jordan engines on sixty days' trial. We will accept your order. We have inclosed you a print of the machine referred to. In regard to the filling for these machines, our regular price is \$85.00 f. o. b. Lawrence, Mass., but we will make the price \$80.00, freight allowed. This filling costs a little more than the ordinary filling, as there is more of it. The bars are $2\frac{3}{4}$ " by $3\frac{3}{16}$ " in the plug and $1\frac{3}{4}$ " by $\frac{3}{16}$ " in the shell. These Jordans have a 15" end thrust which gives longer wear than the ordinary Jordan. We will probably ship the Jordan the latter part of this week.

"Yours truly,

Dillon Machine Co.

"Dic. by I. P. Dillon, Pres."

The engine was shipped on June 9, 1903, and in due time received by the bankrupt and set up and used by it to the time of the bankruptcy. Entry of the transaction was made in the order book of the Dillon Machine Company as follows:

Date.	No.	By whom ordered.	Description.	Price.	Terms.
5/29/03	1511	The Downing Paper Co. Philadelphia, Pa.	1 #1 Jordan Engine	\$500.00 if approved.	60 days' trial.

The bookkeeper of the Dillon Machine Company testifies that in addition to above entry the transaction is shown on their books, as follows: "Q. Have you ever sent them a bill? A. A bill was sent with the shipping receipt. Q. Was the engine charged up on the daybook? A. Charged up on the journal. Q. By you? A. Yes. It was put originally on the order book. Q. My question was, 'was this engine charged against the Downing Paper Company on any book,' and you answered 'on the journal?' A. It was entered on the journal. Q. You have not that with you? A. No, sir. Q. Do you know what it says? A. Downing Paper Company, No. 1 Jordan Engine, \$500.00. Q. And you sent them a bill with the shipment? A. Yes, sir. * * * Q. Does this appear on your ledger? A. Yes, sir. Q. You have not the ledger with you? A. No. Q. Did you enter it on the ledger? A. I did. Q. What does the ledger say? A. Merely the date of the invoice and the amount. That is all that is on the ledger, and the initial of the book it was taken from. Q. A charge against the Downing Paper Company as of June 9, 1903, of \$500.00? A. It appears so on the ledger."

The bookkeeper of the Dillon Machine Company further testifies that there was no correspondence between the parties, except the two letters above mentioned; but that there were some statements sent, as to which he says: "Q. Never requested payment? A. There were some statements sent. Q. When? A. I sent statements once or twice, I believe. Q. When? A. I could not tell you the dates. Q. What did those statements say? A. After they had had the machine about six months, I sent them a statement. Q. What did it say? A. There was nothing on the statement, except the date and the amount of the indebtedness, that was all. Q. The statement showed

that your company wanted them to pay \$500.00, did it not? It was a paper reading something like this, Downing Paper Company, Dr., to your company, Jordan engine, June 9, 1903, \$550.00? A. There was nothing said about a Jordan engine. Q. Well, merchandise, \$550.00? A. \$500.00. Q. How many statements did you send? A. I think I sent two or three. Q. All alike? A. Yes, sir. Q. Are any copies of your statements in your order book? A. No, we don't copy statements. Q. Did you get any answers to those statements? A. No. Q. Did you ever draw on them? A. No."

The bankrupt company did not take any evidence. It is not shown that the bankrupt company did put in another engine and test it in competition with the engine of the petitioners. The Dillon Machine Company allowed the engine to remain in the possession of the bankrupt from the time of shipment early in June, 1903, for about six months without inquiring whether the engine was approved, without agreement extending the time fixed in the contract, namely, 60 days on trial, and without inquiry as to the result of the test of the engine in competition with another engine, if such competition was had, and at the end of six months sent several statements to the bankrupt company claiming the price of the engine. The bankrupt company did not at any time express dissatisfaction with the engine or offer to return it, but retained it and used it, and by its acts asserted absolute ownership of it. Where there is a sale upon trial, with a time fixed by the parties, a failure to return the goods, or give notice in accordance with the agreement, makes the sale absolute. *Butler v. School District*, 149 Pa. 355, 24 Atl. 308, and cases cited.

Applying the law to the facts of this case, the sale of the engine must be held to be absolute, and the title to it is vested in the trustee. The Dillon Machine Company was allowed by the court to take said engine upon giving bond in the penal sum of \$1,000 conditioned to abide by all the lawful orders of the court relating to said engine and the interests of the estate and its creditors therein.

It is ordered that the said Dillon Machine Company pay to the trustee the value of said No. 1 Jordan engine at the time the said engine was delivered to the Dillon Machine Company by order of the court.

Harry S. Hopper, for Dillon Mach. Co.
J. Siegmund Levin, for trustee.

HOLLAND, District Judge. For the reasons set forth in the report of the referee, the order recommended by him is approved. This order is as follows:

"It is ordered that the said Dillon Machine Company pay to the trustee the value of said No. 1 Jordan engine at the time the said engine was delivered to the Dillon Machine Company by order of court."

And it is so ordered.

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In re TILLYER et al.

(District Court, E. D. Pennsylvania. July 8, 1905.)

No. 1,648.

BANKRUPTCY—DISCHARGE—GROUNDS FOR REFUSAL.

Evidence considered, and *held* not to sustain a specification of objection to a bankrupt's discharge, on the ground of a fraudulent concealment of property, by causing stock in a corporation in fact paid for by him, to be bought by his wife, and held in trust for his benefit, but to show that the stock was bought with the separate money of the wife.

In Bankruptcy. On report of referee recommending discharge.

The following is the report of David Werner Amram, referee in bankruptcy:

William Tillyer and Issac H. Tillyer, individually, and trading as Tillyer Bros., were adjudicated bankrupts upon their own petition on May 22, 1903, and the matter was referred to me as referee. At the first meeting of creditors held before me the bankrupts were examined, and a copy of the testimony then taken is handed up with this report. Thereafter the bankrupts filed their petition for discharge, and objections were filed thereto by Albert J. Tillyer, administrator of the estate of Charles Tillyer, deceased. The petition for discharge, and the specifications of objection, were thereupon by order of your honorable court, made on the 28th day of September, 1903, referred to me to ascertain and report the facts, together with the testimony and my findings thereon. I held several meetings at which testimony was taken on behalf of the objecting creditor, and a copy of the testimony is handed up with this report.

The specification of objection to the discharge of William Tillyer is entirely insufficient both in form and in substance, and I therefore recommend that this specification of objection be dismissed, and the discharge of William Tillyer granted. There were three specifications of objection to the discharge of Isaac H. Tillyer. The first and third specifications are insufficient in form and in substance, and were not pressed by the objecting creditor. I therefore recommend that they be dismissed. Objection might have been made to the sufficiency of the second specification of objection. Whether or not the bankrupt's failure to object to the sufficiency of the specification, and his willingness to submit in this proceeding to an examination on the merits, is a waiver of such defect need not now be considered, inasmuch as I am of the opinion that, even if the sufficiency of the specification of objection be assumed, the objecting creditor has entirely failed to substantiate the charge of fraud made therein. The objection to the discharge was made by the administrator of the estate of the bankrupt's father; the only creditor that filed a proof of debt and appeared in these proceedings. The charge is based upon the following alleged fact: That the wife of the bankrupt holds 80 shares of stock valued at \$4,000 in the Vineland Window Glass Company, of which the bankrupt is superintendent and manager, and that she purchased this stock with money given to her by her husband, so that the certificates might be placed in her name under a secret trust for her husband, for the purpose of protecting them from his creditors.

The only testimony taken was that of the bankrupt and his wife, and this testimony shows that Mrs. Tillyer purchased the 80 shares of stock between the years 1899 and 1902, and that she paid the \$4,000 for them with money derived from the following sources:

From the sale of a piece of real estate owned by her at Frankford avenue and Dauphin street in the city of Philadelphia.....	\$1,200 00
From two mortgages on a piece of real estate owned by her at 211 East avenue, Vineland, New Jersey.....	1,400 00
Cash of her own saved by her from moneys received from her husband	100 00
A loan made by her for which she gave the stock in the Window Glass Company as collateral security.....	1,300 00
Total	\$4,000 00

The real estate in Philadelphia out of which Mrs. Tillyer realized \$1,200 formerly belonged to Charles Tillyer, the bankrupt's father, but, on his death, the title vested in Julia Tillyer, his widow, and Isaac Tillyer, Harriet Brown, William Tillyer, and Albert Tillyer, his children. The property was thereafter sold by the sheriff under a judgment of Julia Tillyer against her husband, and bought in by her at the sheriff's sale. Immediately thereafter, to wit, on September 26, 1895, she conveyed her title to Kate Tillyer, the bankrupt's wife, and three years later, to wit, on November 15, 1898, Harriet Brown, Albert

Tillyer (the objecting creditor) and William Tillyer joined in a deed of their interest to Kate Tillyer, and about two months later she (her husband joining her) sold the property to William Arnell, and it was out of this sale that she made the \$1,200. This \$1,200 was given by her to her husband, the bankrupt. He repaid it in payments made to her from time to time out of his salary as superintendent of the glassworks, and she used the money thus repaid to her by her husband to pay for a part of the stock in the glass company. The property at 211 East avenue, Vineland, was mortgaged by her for \$1,400 more than she paid for it. According to her testimony, it appreciated in value to that extent, and enabled her to make the loan. All of these facts are uncontradicted, and show that the money paid for the stock in the glassworks was the money of Mrs. Tillyer, and not that of her husband, the bankrupt. There was other testimony, likewise uncontradicted, that the bankrupt owed his wife \$2,300 for two loans which she made him in 1889 and 1892, respectively, and that the moneys which he had been paying to her out of his salary as superintendent of the glassworks was upon account of this indebtedness, as well as on account of the balance due her on the \$1,200 loan.

It appears that 20 years ago the bankrupt had a grocery store in Philadelphia, and owned some building association stock; that he was then perfectly solvent, and had transferred his building association stock to his wife. He was about to give up his grocery store because he contemplated removing to Winslow, N. J., when, at the suggestion of his wife, he allowed her to continue to conduct the store in Philadelphia instead of selling it. He removed to Winslow to conduct a glass business there, and she kept the store in Philadelphia. While conducting the store in Philadelphia, she appropriated the profits thereof, as she considered it to be her property by gift from her husband; and with the moneys thus saved she kept up her building association stock. Subsequently she borrowed \$1,900 and \$400 from the building association, and gave the money to her husband. He lost it in the glass business in Winslow. He became insolvent, and his wife was one of his creditors to the amount of \$2,300, and he now alleges that from time to time he paid her, out of moneys earned by him, small sums on account of this indebtedness. It is true that business relations between husband and wife, which are made the basis of claims against a bankrupt estate, or which are used for the benefit of either of the parties thereto in bankruptcy proceedings, are to be subjected to most careful scrutiny. Such transactions are rarely free from suspicion. The testimony in this case does not warrant the referee in finding that the allegations made by the husband and wife are untrue, and, in view of the fact that theirs is the only testimony in the case, the second specification of objection has not been sustained.

For the above reason, I recommend that the second specification of objection be dismissed, and that Isaac H. Tillyer be discharged.

William A. Carr, for bankrupts.

William S. Divine, for objecting creditor.

HOLLAND, District Judge. For the reasons stated in the report of the referee in this case, the recommendation that the bankrupts be discharged is approved; and it is so ordered.

In re SCHOFIELD.

(District Court, E. D. Pennsylvania. June 19, 1905.)

No. 387.

1. BANKRUPTCY—ASSETS OF ESTATE—LIFE INSURANCE POLICY.

An endowment policy of insurance on the life of a bankrupt, payable to him at the end of the term if living, or in case of his prior death to his

wife, is one in which he has an interest which passes to his trustee for the benefit of his creditors.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 201.]

2. SAME—DISCHARGE—FRAUDULENT CONCEALMENT OF PROPERTY.

The failure of a bankrupt to schedule a life insurance policy payable to his wife in case of his death, taken out at her instance and on which she had paid all the premiums, even though such policy as matter of law belonged to his estate and should have been scheduled, will not debar him from the right to a discharge on the ground of concealment of property or making a false oath, where the omission was made in good faith on the advice of counsel that the policy was the property of his wife, and where he frankly stated the facts in relation thereto on his examination, produced the policy when required, and on a determination that it belonged to the estate paid the surrender value; such facts being insufficient to show that the omission was knowingly and fraudulently made.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 611, 729, 775.]

In Bankruptcy. On report of referee.

The following are the reports of Theodore M. Etting, referee, omitting the formal parts:

From the evidence above referred to, I find the facts to be as follows:

J. Dobson Schofield, whose application for discharge is now under consideration, was adjudged a bankrupt upon his own petition on the 21st day of December, 1899. Some 6½ years previous thereto, the bankrupt had taken out a policy of insurance on his own life. This policy, the premiums on which had been paid by his wife, was in full force and effect at the time of the application and adjudication before referred to. Being in doubt as to whether or not the policy in question should be included in his schedules, the bankrupt consulted his counsel, and under his advice the policy was omitted, and the answer made to the inquiry contained in Schedules B3c in reference to the existence of policies of insurance was "None." When examined by his creditors, in answer to a specific inquiry relative to insurance, the bankrupt stated that he had an endowment policy of \$5,000, which was payable to his wife, at whose instance it had been taken out and who had paid the premiums thereon, and in whose keeping the policy then was. At the next meeting of creditors, the policy was, on call, produced.

I find that said policy of life insurance is dated July 13, 1893, and that it was issued by the New England Mutual Life Insurance Company, of Massachusetts, upon the life of J. Dobson Schofield, for the sum of \$5,000, payable at the end of 30 years to the said J. Dobson Schofield, or, in case of his death prior to that date, to his wife, Annie P. Schofield, if she survived him, otherwise to his executors or administrators. On the back of the policy is printed section 76 of the Massachusetts insurance act of 1887 (St. 1887, p. 818, c. 214), which provides against forfeitures for nonpayment of premiums after two full annual premiums had been paid; and further provides that every such policy shall have a surrender value, that its holder may, upon any subsequent anniversary of its issue, surrender the policy and claim and recover its cash surrender value, but that no surrender shall be made without the written assent of the person to whom the policy is made payable. I find the surrender value of the policy above mentioned at the time of the bankruptcy was \$681.63.

Upon its production the policy was claimed by creditors as a part of the assets of the bankrupt's estate. This claim was resisted by the bankrupt on the ground that the policy belonged to his wife. Pending the determination of the issue thus presented, the referee directed that delivery of the policy be made to the trustee in bankruptcy, and this order the bankrupt forthwith obeyed, continuing to protest, however, that the property was not his, but his wife's. The interest of the local agent of the company was enlisted by the bankrupt, who called upon him on several occasions, to obtain his assistance.

The trustee was likewise informed that the position taken at the home office of the company was that the policy was the property of the beneficiary, Annie P. Schofield, the wife of the bankrupt, and that its surrender value could only be paid by her signature or with her approval. The referee heard argument on the question thus raised, and, after concluding that the bankrupt had an interest in the policy, entered an order directing him to assign such interest to the trustee in bankruptcy. The bankrupt after some delay concluded to pay, and did pay, the trustee the full cash surrender value, less an allowance of \$208, on account of his exemption, and the policy was then returned by the trustee to the bankrupt.

In the objections raised to his discharge the bankrupt is charged with having knowingly and fraudulently concealed a policy of life insurance in which he had an interest, to wit, the cash surrender value of \$681.63, which it is averred was payable to him, and also with having knowingly and fraudulently made a false oath, in that in the petition and schedules he stated he had no policies of life insurance. The same questions of fact and law are involved in both specifications. The only witnesses examined were the bankrupt, his counsel, the local agent of the insurance company, and the trustee. From the evidence thus presented, it is clear that the policy was taken out at the request of Annie P. Schofield, the wife of the bankrupt, some 6½ years before the filing of the petition of his bankruptcy, and that the premiums were paid by her. It further appears that the bankrupt was in doubt, when his schedules were being prepared, whether the policy should or should not be included therein, and that upon this subject the advice of counsel was sought. That the advice thus sought was given with full knowledge of the circumstances is abundantly proven by the testimony of counsel. "The schedules," he says, "were prepared by me with particular reference to the omission in the schedules of the policy of insurance in question in these proceedings. The omission was made upon my advice with full previous knowledge of all of the facts which have been testified to in these proceedings. * * * Whilst I never saw the policy, I saw a copy of the policy and advised the bankrupt to put the word 'none' upon the schedules opposite the question of insurance policies. The answer is in my handwriting."

Recurring to the policy, it follows, as a conclusion of law, that the bankrupt had an interest therein which passed to the trustee in bankruptcy as a part of his estate, whether the policy had or had not a cash surrender value. In re Welling, 7 Am. Bankr. Rep. 340, 113 Fed. 189, 51 C. C. A. 151. The existence of the policy, therefore, should have been disclosed in the schedules. If there was a doubt, the doubt should have been resolved in favor of its inclusion. But, whilst this is the rule, the more important question is whether the bankrupt's failure in the above regard should bar his discharge. The answer to this question depends, not upon his mere fault in the above respects, but upon his ability to satisfy the court of his good faith. If he can do this, then the law will relieve him. The bankrupt's conduct was, in my judgment, consistent with good faith. I think he honestly believed at the time the schedules were prepared that the policy belonged to his wife, and that his signature was appended and his oath taken under that belief. Upon a question which was primarily one of law rather than of fact, he sought the advice of counsel; and that the advice of counsel was sought and given in good faith I have not the slightest doubt. The case above referred to had not been then decided, and the question submitted was not free from difficulty or uncertainty. When the existence of insurance was inquired into by his creditors, the bankrupt without hesitancy frankly avowed that the policy in question had been taken out. I can see no impropriety whatever in his obtaining the testimony of the local insurance company in support of his contention that the policy belonged to his wife. If he had a right to contest at all, he was surely entitled to obtain such evidence as was requisite for the proper presentation of the case.

The trustee was paid the full cash surrender value of the policy, less the amount allowed on account of bankrupt's exemption. I think it may well be doubted whether the creditors have not thus obtained a considerably larger sum than the trustee could have obtained by adverse proceedings or by a sale to any third party of the bankrupt's interest.

No evidence has been submitted of fraudulent intent or corrupt motive, and for the reasons above stated I respectfully recommend that the objections be dismissed, and the bankrupt be discharged.

Supplemental Report of Referee on Exceptions Filed.

Notice having been served by the referee on counsel for bankrupt and for creditors opposing his discharge that his report was completed, and that he would file the same on the 24th day of February, 1905, counsel for creditors opposing the bankrupt's discharge filed exceptions thereto, which are hereto attached. After giving careful and attentive consideration thereto, and after hearing argument thereon, I can find nothing to warrant the disturbing of the findings of fact previously reported. If authority be required to support the conclusions of law deducible from the above facts, it is believed that it will be found in the following cases: In re Rauchenplat, 9 Am. Bankr. Rep. 763; In re Blalock (D. C.) 9 Am. Bankr. Rep. 269, 118 Fed. 679; In re Breitling, 13 Am. Bankr. Rep. 126, 133 Fed. 146, 66 C. C. A. 212.

I have accordingly dismissed the exceptions.

Charles S. Schofield, for bankrupt.

J. Siegmund Levin, for objecting creditors.

HOLLAND, District Judge. Specifications of objection to the discharge of J. Dobson Schofield, bankrupt, were filed by creditors, and referred to a referee, who, after taking much testimony, filed a report on March 31, 1905, recommending that the objections be dismissed and the bankrupt be discharged.

The referee's findings of fact are justified by the evidence; his conclusions of law are approved; and the report recommending that the objections to the discharge of the bankrupt be dismissed, and that the bankrupt be discharged, is affirmed.

UNITED STATES v. PORT OF PORTLAND.

(District Court, D. Oregon. October 12, 1906.)

No. 4,856.

COLLISION—LIABILITY IN PERSONAM OF MUNICIPAL CORPORATION.

The Port of Portland, a municipal corporation created by the state of Oregon to which are delegated the powers of the state over the navigable waters of the Columbia and Willamette rivers at the city of Portland, and between there and the sea, with authority to improve the same, and to that end to make contracts, employ men, and do all other acts necessary or convenient, is liable in damages by the maritime law for a collision caused by the negligence or fault of its employes in charge of one of its vessels employed in performing the duties for which it was created.

In Admiralty. On exceptions to libel.

William C. Bristol, U. S. Atty.

Williams, Wood & Linthicum, for respondent.

WOLVERTON, District Judge. This is a proceeding, by libel in personam, by the general government against the port of Portland, whereby it seeks to recover for damages sustained by reason of the alleged negligent navigation, while upon the Columbia river, of the

tug, John McCracken, and the dredge, Columbia, as tug and tow, on the part of the respondent and the officers and crew in charge of such vessels, whereby they collided with the lighthouse tender Manzanita, a vessel of which the government is owner. Exceptions are interposed to the libel, for the reason "that it appears therefrom that respondent is a public corporation created by and under the laws of the state of Oregon and that the dredge, Columbia, and tug, John McCracken, are the property of the respondent, and were owned and operated by it in its public capacity and that it, as such public corporation of the state of Oregon, is not liable for torts committed by its employés while operating any of its property in such public capacity."

This presents the question for consideration. The port of Portland was created by act of the Legislative Assembly of the state of Oregon, with power to make all contracts, to hold, receive and dispose of real and personal property, and to do all other acts and things which might be requisite, necessary, or convenient in carrying out the objects of the corporation, to sue and be sued, plead and be impleaded, and to improve the channel of the Willamette and Columbia rivers between Portland and the sea in aid of shipping and commerce, and with full authority, to the same extent that the state might enter into the exercise thereof, from time to time to make, establish, change, modify, or abolish such rules and regulations for the use or navigation of the Willamette and Columbia rivers between Portland and the sea, or the placing of obstructions therein, or the removal of obstructions therefrom, as it might deem convenient, requisite, or necessary, or in the best interests of the maritime, shipping, or commercial interests of the said port of Portland, and, to that end, was duly authorized to employ such engineers, superintendents, mechanics, clerks, and other persons as it might find requisite or convenient in carrying on its work, or any part thereof, and at such rate of remuneration as it might deem just. Sections 4635-4638, 4661, B. & C. Comp. As was said in the case of the same title as this, which was instituted as a proceeding in rem to recover for the same alleged negligence (D. C.) 145 Fed. 705:

"The constitutionality of the act was brought to a test in the case of *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533. It is there declared in effect that the port of Portland is a municipal corporation, and that its purposes and powers are 'all public, political, or governmental,' and that the corporation, and the commissioners who exercise its powers, are as well the agents of the state, delegated to exercise a part of its prerogatives. 'The sole object of the corporation,' says Mr. Justice Bean, speaking for the court, 'is to so improve the Willamette and Columbia rivers at the city of Portland and between that point and the sea, as to create and maintain a ship channel of a specified depth, and, for this purpose, it is given full power over these rivers, so far as the state can grant the same.'"

In so far, therefore, as the state had the power and authority in the premises; that is, over the navigable waters of the Columbia river and the channel thereof, the Legislature has constituted the port of Portland, as it were, an arm of the state, to perform its functions in the particulars specified in the act creating the municipality. But, however this may be, the whole contention, it seems to me, is precluded in

all its important features by the case of *Workman v. New York City, Mayor, etc.*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314. The primary position there considered is stated by Mr. Justice White, who announced the prevailing opinion of the court as follows:

"Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not because, by the rule prevailing in the state, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property, it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and, therefore, as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted."

It was answered by the eminent jurist that the premise would result in the practical destruction of a uniform maritime law, designed and suited to give relief to every character of maritime tort where the wrongdoer was subject to the jurisdiction of admiralty, and, therefore, that it could not be maintained. It was next considered whether, under the maritime law, the city of New York was liable for an injury negligently inflicted by one of its fire boats, and determined that it was. The conditions recounted were that the fire department of the city was an integral branch of the local administration and government of the city; that the ministerial officers who directed the affairs of the department were selected and paid by the city; that all the expenses of the department were to be borne by the city, which was bound by all contracts made for such purpose; that all the property of the department, including the fire boat, belonged to the city; and that the city was rendered liable by charter, in case of an authorized destruction on land of property of individuals to prevent the spread of conflagrations; by reason whereof it was concluded that the relation of master and servant existed between the city and those in charge of the fire boat; that especial relation being established, and the city being the owner of the offending vessel committing the tort, it was further concluded that in maritime jurisprudence the city was responsible in damages to the injured party under the rule of *respondeat superior*. This was adjudged to be so, notwithstanding it is the uniform and settled rule, sanctioned by the courts of last resort in every state in the Union that has passed upon the question, that an action is not maintainable against a municipal corporation for any injury to person or property caused by the negligence of the members of its fire department acting in the line of their duty. See dissenting opinion by Mr. Justice Gray, 179 U. S. 575, 576, 21 Sup. Ct. 220 (45 L. Ed. 314). And, further, as to the rule just stated, *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300.

Now, if such is the case by judicial enunciation in maritime law, that the officers and agents of the fire department of an incorporated city or municipality are the servants of the municipality, as it respects the relation of master and servant, for whose acts of negligence the master is liable, there can be but one result as applied to the present contro-

versy. The master and officers of the tug, John McCracken, and dredge, Columbia, must be considered the servants of the port of Portland, for whose acts it is liable. The municipality was authorized and empowered to employ them, to pay them for their services, and to discharge them in manner best suited to the judgment and discretion of its commissioners. All the expenses of carrying on the project were and are to be borne by it, and all the property employed in the service, including the offending vessels, belonged to it. So that the essential conditions there assigned for legal responsibility for negligence of the servant are here present. But the present is even a stronger case, because the responsibility of the port of Portland is more nearly analogous to that of an incorporated city, having the control and charged with the supervision and care of its public streets. Such a municipality is liable within the federal jurisdiction, as well as in other courts, for dereliction in duty in permitting an unnecessary and dangerous obstruction or a defect to exist in such highways, whereby injury ensues. *City of Chicago v. Robbins*, 2 Black, 418, 17 L. Ed. 298; *Robbins v. City of Chicago*, 4 Wall. 657, 18 L. Ed. 427; *McAllister v. City of Albany*, 18 Or. 426, 23 Pac. 845.

If negligent in manner as alleged in the libel, the tug and tow might be regarded as a dangerous, and perhaps an unlawful, obstruction in the navigable channel of the Columbia river; so that in view of the closer analogy to the case of a city as it respects the repair of its streets, the port of Portland would then be amenable upon the same principle. But in any event it is clear that under the authority of *Workman v. New York City*, *supra*, the respondent is liable in damages in maritime law for the alleged negligence conducing to the collision complained of.

It follows, therefore, that the exceptions should be overruled; and it is so ordered.

In re SCHENECTADY ENGINEERING & CONSTRUCTION CO.

(District Court, N. D. New York. August 7, 1906.)

1. BANKRUPTCY—REFERENCE—RESIDENCE OF REFEREE.

Bankr. Act July 1, 1898, c. 541, § 22, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], provides that, after a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate or refer it to any referee within the territorial jurisdiction of the court, and that the judge may, for the convenience of the parties or for cause, transfer a case from one referee to another. *Held*, that such section refers to referees in bankruptcy appointed within the district where the case is pending, and that the court has no jurisdiction to refer a case to a referee appointed and residing in another district for any purpose.

2. SAME—REFEREES—JURISDICTION.

The jurisdiction of referees in bankruptcy prescribed by Bankr. Act July 1, 1898, c. 541, § 38, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], is confined to the limits of the districts for which they are appointed by the judge, and does not extend to cases pending outside such districts, except where the referees are specially appointed to fill a vacancy tem-

porarily, as authorized by section 43, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438].

In Bankruptcy. This is an application to transfer the reference of the case from the referee in the Northern district of New York, where the petition was filed and the adjudication made, to a referee in the Western district of New York, where most of the creditors of the bankrupt reside, under the provisions of section 22 of the bankrupt law.

Lewis & McKay, for the motion.

RAY, District Judge. In May, 1906, the Schenectady Engineering & Construction Company, a partnership, and the individual members thereof, were, on petition duly filed in the District Court of the Northern district of New York, duly adjudicated bankrupts by said court, and an order was made referring the matter to a referee within its territorial jurisdiction. The bankrupts reside in the Northern district of New York, and no petition in bankruptcy has been filed in the Western district of New York. The real estate is in the Northern district, but the personal estate is mostly in the Western district. Eighty of the creditors of the partnership, 106 in number, reside in the Western district, as do most of the creditors of the individual members thereof. In that district the firm not only had a large amount of property, but was doing business there. Litigations involving the estate are, and will be, pending in the Western district. It is a case where the convenience of the most of the creditors and of the attorneys for the petitioners would be best served, perhaps, by having all matters passed upon by a referee or the court in bankruptcy in the Western district, although that question is not directly passed upon, as the motion to transfer the case or refer it to a referee in bankruptcy of the Western district must be denied upon another ground.

Section 2 of chapter 2 of "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, provides as follows:

"That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several states, the Supreme Court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction." Act July 1, 1898, c. 541, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3420].

From the facts now presented to the court it would seem clear that a petition in bankruptcy might have been filed in the Western district, as well as in the Northern, and, had that been done under section 32 of the act the case might have been transferred to the Western district. Section 32 reads as follows:

"Sec. 32. Transfer of Cases.—(a) In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest." 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434].

But it was not done, and section 32 has no application.

This application is made under section 22 of the act, which reads as follows:

"Sec. 22. Reference of Cases after Adjudication.—(a) After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

"(b) The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another." 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].

This section refers to the referees in bankruptcy appointed within the district where the case is pending, and the court has no jurisdiction or power to refer the case to a referee appointed by and residing in another district. By section 2 of the act already quoted, in part, the District Courts are made courts of bankruptcy, and are vested "within their respective territorial limits" only with the powers enumerated in that section. Section 22 must be read in the light of section 2 and also of section 38, which defines the "Jurisdiction of Referees" and reads as follows:

"Sec. 38. Jurisdiction of Referees.—(a) Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings." 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435].

It is seen that their jurisdiction is confined to the limits of their districts, meaning the districts for which appointed by the judge, and does not extend to cases outside, except where specially appointed to fill a vacancy temporarily under section 43 of the act, which reads as follows:

"Sec. 43. Referee's Absence or Disability.—(a) Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy." 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438].

The court of bankruptcy in the Northern district of New York has no control or jurisdiction over a referee residing in and appointed by the District Court of the Western district, or of any other district.

So the court of bankruptcy of one district has no power to appoint a referee residing without its territorial jurisdiction. Section 35 of the act provides:

"Qualifications of Referees. Individuals shall not be eligible to appointment as referees unless they are respectively, * * * (4) residents of, or have their offices in, the territorial districts for which they are to be appointed." 30 Stat. 555 [U. S. Comp. St. 1901, § 3435].

It follows that neither for convenience nor for any other reason can a court in bankruptcy or a judge thereof appoint a referee not having an office in the territorial district of the court as defined by law, or refer a case to a referee appointed by some other court.

The application is denied.

LANSTON MONOTYPE MACH. CO. v. MERGENTHALER LINOTYPE CO. et al.

(Circuit Court, S. D. New York. July 12, 1906.)

1. LIBEL.—INNUENDOES.

A complaint for libel cannot be assisted by innuendoes which do not serve to interpret the idea which would naturally reach the mind of an intelligent reader.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 205-208.]

2. SAME.—LIBELOUS PUBLICATIONS.

Defendant addressed to the President a petition praying that he would direct the public printer to recall a "certain order given for certain type-setting machines and direct an investigation as to the facts surrounding the order, its propriety, and legality"; that "such order was made corruptly, clandestinely, and in violation of law and the unbroken custom which has governed such purchases," and that, in violation of the printing laws, certain immediate assistants of the public printer have a stock interest in the company to which the order was given; that the order was bad administration, extravagant, and scandalous, etc. *Held*, that such petition was a direct and exclusive attack on the public printer and his methods of administration, and was not a libel on plaintiff corporation by whom the machines were sold.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 103.]

3. SAME—DAMAGES—RE MOTENESS.

Where, on defendant's petition, the President appointed a commission to investigate a contract for the purchase of typesetting machines from plaintiff, and plaintiff claimed that such petition was libelous, expenses incurred by plaintiff in defending the contract before the commission were too remote to be recovered as damages for the libel.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 343-346.]

Adrian H. Larkin and George E. Hargrave, for plaintiff.
William M. K. Olcott and Henderson Peck, for defendants.

PLATT, District Judge. This is a libel suit in two counts, and the complaint is too voluminous to admit even a condensation of its salient features. The record may be consulted therefor.

The defendant demurs to the first count: (1) Because plaintiff is a corporation, and it does not appear that the alleged libelous matter is calculated to injuriously affect its credit, or to occasion it any pecuniary injury. (2) Because it does not state facts sufficient to constitute a cause of action. It demurs to the second count, because it does not present a cause of action, and it demurs to the whole complaint because two causes of action have been improperly united.

With a running pen, let me look at the complaint in respect of its sufficiency. It is contended that the alleged libelous matter was not published concerning the plaintiff or its business. The complaint says that it was so published, but if, after examination, the court can say that it would not convey any such idea to the intelligent reader, then the complaint is insufficient, and it cannot be helped out by innuendoes which do not serve to interpret the idea which would naturally reach the mind of such intelligent reader. In other words, the demurrer does not admit the truth of unintelligent innuendoes. The innuendo in no sense enlarges or expands the matter which appears in the rest of the complaint. The alleged defamatory matter is contained in a petition addressed to the President, dated June 24, 1905, praying that he "will direct the public printer, Mr. F. W. Palmer, to recall a certain order given on the 19th day of June instant, for 72 Lanston Typesetting Machines," and to "direct an investigation as to the facts surrounding such order and as to its propriety and legality"; that "said order was made corruptly, clandestinely, and in violation of law and the unbroken custom which has governed such purchases"; that "said order was placed without the recommendation or requisition of the foreman of printing, as required by law * * *"; that the foreman did not think the machines ought to be purchased, and that his signature was only obtained by the direct command of the public printer; that the public printer had repeatedly advised the petitioner that the purchase of machines was not in contemplation, thus preventing competition; that in violation of the printing laws certain immediate assistants of the public printer have a stock interest in the Lanston Company, to which the order was given; that to apparently justify the public printer for the order, the Lanston machines were given favorable matter to work upon, thus doubling their apparent output; that the records of output made by the public printer and

published in apparently unauthorized interviews are grossly incomplete and misleading; that the order was bad administration, extravagant, and scandalous; that to expend so much money on a private and secret order, without notice to makers of more efficient machines, was unwise, since the government might have saved 25 per cent. by taking a different course. Then follows a statement as to the extent to which the two kinds of machines are used, and an offer to prove the truth of what was said.

This is the substance of the alleged libelous matter, and it must be manifest to the reader, no matter whether he be careless or careful, that it contains nothing of or concerning the plaintiff or its business, but is plainly a direct, exclusive attack upon the public printer and his methods of administration. It is the refinement of subtlety to say that the word "order," as used in the petition, has any reference, either by itself or by its connection with other parts of the article, with a contract which was, as it now appears, entered into on June 19, 1905, between the plaintiff herein and the public printer on behalf of the United States. The article does not attack the plaintiff as to its fame, credit, business, reputation, or character. The plaintiff is only mentioned once, and that in an incidental way, when, in a direct attack upon the public printer, it charges that certain subordinates of his have a stock interest in the plaintiff corporation, but this can in no sense be imputed to the plaintiff as a crime. It is a necessary part of the specification required to show that the public printer had violated the law, and nothing more. It is in its entirety a savage attack upon the public printer. The article discussed has no intelligent application or reference to the plaintiff in a defamatory sense, and when language, fairly construed, is incapable of such construction, it is the duty of the court to deny the right of the plaintiff to maintain an action thereon. The contract which the complaint refers to is signed by the public printer and by the plaintiff, has two witnesses, and the teste of an assistant secretary, and nothing more. The order referred to in the alleged libelous article is said to have the signature of the foreman attached, he being compelled thereto by the public printer. Thus on the face of the paper the order mentioned is clearly distinguished from the contract. The words order and contract cannot be confounded, either legally or in ordinary usage. A contract could not be recalled, which is what the petition wishes done with the order.

Time forbids discussing the law of libel upon things, but it is deemed relevant, and adds another reason for the action taken. All that has been said, and much which could be added, applies with equal force to each count, and beyond that, the second count appears to be for a different cause of action. It appears to be aimed at recovering expenditures before a commission which was appointed by the President as the result of said petition. Nothing in the petition would warrant the plaintiff in going to any such expense. The public printer was not his protegee, and was undoubtedly able to take care of himself. If plaintiff had a notion to advertise its machines at such a hearing, that is entirely a business proposition with which we have

nothing to do. Admitting, for the moment, the words to have been libelous and the expenditures to have been properly set up as special damages, they were not the immediate and legal consequence of the words published in the petition. Non constat, that a commission would be appointed and an investigation instituted on account of them. The voluntary act of the President intervened, and all the books teach us that such expenditures were the remote consequence. If the pleader had not conceived the second count to contain a different cause of action, it is not easy to discover any reason for the elaborate repetition of the paragraphs of the first count with such a meager addition. The new matter might have as well been put at the end of the so-called first count.

Only a few of the reasons for my conclusion, that the complaint is insufficient, have been noted. Time forbids further explanation. Let the complaint be dismissed.

WAKEM & McLAUGHLIN v. UNITED STATES.

(Circuit Court, N. D. Illinois, E. D. April 26, 1906.)

No. 26,831 (1,565).

CUSTOMS DUTIES—BROKEN RICE—No. 12 SIEVE—TREASURY REGULATIONS.

Under the provision in paragraph 232, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1649], for "rice broken, which will pass through a sieve known commercially as number twelve wire sieve," the Secretary of the Treasury prescribed for the use of customs officers one of several kinds of sieves which were known commercially as "No. 12," though they varied somewhat in the size of their meshes. The kind selected was not the one which would allow the greatest quantity of rice to pass through. *Held* that the exclusive use of such a sieve might be prescribed, regardless of the fact that it was not the one most favorable to importers.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,350, T. D. 24,492, which affirmed the assessment of duty by the collector of customs at the port of Chicago, on importations of broken rice. The importers contended that the collector had improperly excluded the rice from classification under the provision in paragraph 232, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1649], for "rice broken which will pass through a sieve known commercially as a number twelve wire sieve."

The facts of the case are shown by the following excerpt from the opinion of the board:

"FISCHER, General Appraiser. It is satisfactorily established by the record that a sieve known commercially as No. 12 wire sieve is one which has 12 openings, squares or meshes to the inch, without regard to the thickness of the wire, and that such commercial sieves are made of different gauge wires. The Treasury Department, in T. D. 22,680, issued instructions that the sieve to be used by customs officers in applying the provisions of the paragraph in question should be one made of No. 24 brass wire, either Stubbs or Birmingham gauge. It is obvious that since all No. 12 sieves have 12 openings or

squares to the inch, the coarser the wire the smaller will be these openings or squares, and while the importers do not deny that the sieve used by the government is known commercially as a No. 12 wire sieve, they contend that a No. 12 sieve with finer wire and hence larger openings should be used, and at the hearing produced a commercial No. 12 wire sieve of about No. 32 gauge (Stubbs or Birmingham). Experiment showed that about 90 per cent. of the rice would pass through this sieve, and it is urged by the importers that, since they have produced a sieve through which the greater bulk of their rice will pass, they have shown that their rice is within the language of the paragraph as 'rice broken which will pass through a sieve known commercially as number twelve wire sieve.' While this may be true, it is none the less true that, when the government sieve is considered, the importers' rice will not pass through a sieve known commercially as No. 12 wire sieve, and hence is excluded from the provision quoted."

The Board held that, in view of the existence of these different styles of No. 12 commercial wire sieve, it was proper for the Treasury Department to prescribe the use of the sieve that was employed by the customs officers in this case, as the subject came within the general authority conferred upon the Secretary of the Treasury by section 251, Rev. St. (U. S. Comp. St. 1901, p. 138).

The importers made the following assignments of error in their application for review: "The Board of Appraisers erred, as matters of law: (1) In deciding that the Secretary of the Treasury had a right to arbitrarily select one variety of No. 12 sieve for use in enforcing paragraph 232 of the tariff act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1649] and exclude all other sieves from use. (2) In holding that the importer had no right to have classed as broken rice, at one-fourth of 1 cent per pound rice which would pass through a commercial No. 12 wire sieve, because it would not pass through one selected by customs officers under an arbitrary ruling of the Secretary of the Treasury."

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

Robert W. Childs, Asst. U. S. Atty.

BETHEA, District Judge. Extract from order. It is ordered, adjudged, and decreed that the decision of the said Board of United States General Appraisers in this cause be, and the same is, hereby affirmed, and said action of the collector of customs for the port and district of Chicago in the classification of the merchandise in question be, and the same is, sustained.

THE CHIEF.

(District Court, E. D. Pennsylvania. July 23, 1906.)

No. 40.

SALVAGE—TOWING DISABLED TUG IN FROM SEA—COMPENSATION.

A tug became partially disabled by the leaking of her boiler while passing up the Atlantic coast and gave distress signals. She was taken in tow behind a barge by another tug and towed to a port. The rescuing tug and barge were together worth about \$135,000, and were chartered at \$500 per day. They were delayed 1½ days and consumed 22 tons of coal extra in rendering the service. The disabled tug was sold for \$5,600. She was not in any great danger when taken in tow, nor were the other vessels or their crews subjected to any great danger or required to go on board the towed vessel. *Held*, that the service was one of salvage,

but not of high order, and that the rescuing tug and barge were entitled to an award therefor of \$1,000.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 23, 24, 80-83.

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Francis S. Laws and John F. Lewis, for libellant.

J. Warren Coulston and Alfred Driver, for respondent.

HOLLAND, District Judge. The claim of the steam tug Veit against the steam tug Chief in this libel is for salvage. The Chief, a wooden boat about 102 feet long, 23 feet beam, 10½ feet in depth, was built in 1892, and had been engaged in southern waters. On May 13, 1902, she left Mobile for Philadelphia, for the purpose, among other things, of providing a new boiler. On her way north the boiler then in use began to leak, and on May 21, 1902, when she was about 25 miles north of Cape Hatteras Shoals, the leak had increased to such an extent that she was unable to proceed further and raised a distress signal, which was sighted by the tug Veit. The wind was blowing a gale of about 25 miles an hour from the northeast. The boiler in the Chief began leaking early in the morning and grew worse as the vessel strained in the heavy seas. Shortly after she had been taken into tow, the blow cock blew out and let the entire contents of the boiler (some 3,500 gallons) into the hold. At the time she was taken into tow her machinery could still be operated, which enabled her to maneuver as directed by the Veit. The Veit was on her way south with the barge Providence in tow at the time, and at the request of the captain of the Chief took the latter in tow behind the Providence, to which point the Chief was propelled by her own machinery and without any aid from the crew of either of the boats. The pumps were successfully worked by the crew of the Chief, and the water was all pumped out by them without help from either of the other crews. The Veit experienced no difficulty in towing both the barge and the Chief into port. The value of the Veit was between \$25,000 and \$30,000, and that of the barge Providence about \$110,000. This tug and barge were under charter at \$500 per day. The Veit, as a result of its coming up with the Chief, deviated from its course about 35 miles, was delayed on its voyage 1½ days, and consumed about 22 tons of coal extra. The Chief was in no very great danger at the time she was taken in tow, and none of the property of the Veit or the Providence was greatly endangered, nor was there any great danger to the crew of either vessel in the service rendered the Chief. The latter was sold at a marshal's sale for \$5,600. The claim for salvage was for \$5,000.

This is one of the cases that comes close along the line which divides the ordinary towage service from that of salvage service. We are of the opinion, however, that this was salvage service. The Chief was partially disabled and had been flying danger signals and requested the aid of the Veit. It required very little skill to render the required

services, as the Chief was still in condition to run her machinery and help herself to the extent of maneuvering into position to be taken in tow, and the danger to person and property was not very great. The matters which enter into and control in fixing the value of salvage service are set forth in *The Blackwell*, 77 U. S. 14, 19 L. Ed. 870: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued. In this case there was no very arduous additional labor rendered, nor was any of the crew required to perform any service on board the Chief. They rendered her service, however, when she was in distress, at the expenditure of additional time and cost.

We are of opinion, under the circumstances, that the total amount of salvage in this case should be \$1,000, with costs of suit; this amount to include the separate claims of the chief engineer and chief mate. Decree accordingly.

In re WOOD.

(District Court, E. D. Wisconsin. March 19, 1906.)

1. COURTS—FEDERAL COURTS—RULES OF DECISION—STATE LAW.

Under Bankr. Act 1898, providing that it shall not affect the allowance to bankrupts of the exemptions conferred by state laws in force at the time of the filing of the petition, etc., it is the duty of bankruptcy courts to adopt the construction placed on the state exemption statutes by the highest state court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 957.

State Laws as rules of decisions in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. BANKRUPTCY — EXEMPTIONS — HOMESTEAD — PURCHASE WITH NONEXEMPT PROPERTY.

Under the laws of Wisconsin governing exemptions, a homestead owned by a bankrupt is exempt, though it was purchased by him while insolvent from the proceeds of nonexempt property.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 659-670.]

In Bankruptcy.

This is a review of an order made by Charles H. Forward, referee, in the above entitled matter, declining to compel the bankrupt, at the instance of the trustee, to turn over to said trustee for the benefit of creditors a certain house and lot claimed by the bankrupt in his schedules as exempt. The contention of the trustee was that the acquisition of the homestead under the circumstances shown in the proofs amounted to a fraud upon the creditors. The evidence makes it clear that the bankrupt, long before his purchase of the property claimed as a homestead, was insolvent, and upon his examination the bankrupt so admitted. The proofs leave us somewhat in doubt as to the source from which funds were derived to purchase this

homestead. The bankrupt made the purchase on the 11th day of May, 1901, and paid \$600 down, giving back a mortgage upon the premises of \$500 to the vendor. On the 8th day of May, 1901, three days before the purchase, he borrowed \$600 of a creditor, which was probably the same money which was used to make the cash payment. The mortgage was paid in installments, the last payment being made in January, 1904. Where he procured the money to liquidate the mortgage is a matter of great uncertainty. His books of account are in a chaotic state. He kept no cashbook, and relied upon his bankbook as to cash items received or paid. The bankrupt claims that the mortgage was paid with money which from time to time he abstracted from his business. The examination of the bankrupt discloses a reluctance on his part to throw any light upon the transaction, or to assist the trustee in any way in the discharge of his duty.

Perry Niskern, for the trustee.

John J. Wood, Jr., for the bankrupt.

QUARLES, District Judge. The question raised by the record is whether the bankrupt has worked a fraud upon his creditors by using nonexempt property or money borrowed of creditors to obtain a homestead which he might claim as exempt under the laws of Wisconsin. This question is one that has been long mooted in the courts, and concerning which the authorities, both state and federal, are hopelessly at variance. If I were permitted to follow my own judgment as to what the law should be, I should be much inclined to follow the federal decisions in Wisconsin, which hold that a statutory homestead cannot be employed as an agency of fraud, and that when a debtor, knowing himself to be hopelessly insolvent, takes the whole estate liable to execution, and, for the purpose of withholding it from his creditors, invests it in a homestead, he has worked a fraud and wrong upon his creditors. This doctrine was held by this court in the following cases: *In re Wright*, 3 Biss. 359, Fed. Cas. No. 18,067; *In re Lammer*, 7 Biss. 269, Fed. Cas. No. 8,031; *Pratt v. Burr*, 5 Biss. 36, Fed. Cas. No. 11,372; *In re Sauthoff*, 8 Biss. 35, Fed. Cas. No. 12,380 (wherein the court, by Dyer, J., expressly sanctions the reasoning); *In re Boothroyd*, 14 N. B. R. 223, Fed. Cas. No. 1,652. But the bankruptcy act of July 1, 1898, c. 541, § 6, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], providing that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition, in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petitions," seems to make it the duty of the courts to recognize, not only the statutes of the state, but also to adopt the construction imposed by the highest court of the state upon such statute. These decisions are a part of "the state laws." The general rule is that the construction of the highest judicial tribunal of a state of its Constitution of statutes which establishes a rule of property is controlling authority in the courts of the United States where no question of right under the Constitution and the laws of the nation is involved. *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Jaffray v. McGehee*, 107 U. S. 361, 365, 2 Sup. Ct.

367, 27 L. Ed. 495; *Peters v. Bain*, 133 U. S. 670, 686, 10 Sup. Ct. 354, 33 L. Ed. 696.

The peculiar language of the bankruptcy act, above quoted, seems to emphasize the general rule. Here is a homestead located in Wisconsin. Its status must be settled and determined by the local law. When we turn to the Wisconsin decisions, we find a well-settled rule by which the statute creating the homestead exemption has been construed. This rule seems to be that the insolvent debtor commits no fraud upon his creditors by taking nonexempt property and investing it in a homestead, although his purpose may have been to withhold such property from his creditors. There would almost seem to be an implication from these decisions that it was the part of prudence for the insolvent debtor to shelter his family at the expense of his creditors. It is held that one who extends credit to a debtor does so with full knowledge of the statute and the policy of the state, and therefore has no right to complain. A few of such cases may be found: *Hanson v. Edgar*, 34 Wis. 653; *Smith v. Waite*, 39 Wis. 512; *Comstock v. Bechtel*, 63 Wis. 656, 24 N. W. 465; *Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341; *Kapernich v. Louk*, 90 Wis. 232, 62 N. W. 1057. I therefore feel constrained to follow these numerous and consistent rulings of the Supreme Court of the state, and to sustain the ruling of the referee as to the homestead exemption.

Notwithstanding this conclusion, it does not follow that the creditor who loaned the bankrupt \$600 to make the first payment upon the homestead may not have a remedy in the law. If the money was borrowed by the bankrupt knowing that he had no means to repay the same, and not intending to repay it when he borrowed it, it may well be held that that was an actual fraud perpetrated upon such creditor. But it is not my province to discuss that proposition at this time.

The finding of the referee as to the homestead exemption is therefore affirmed.

KIBBLER v. ST. LOUIS & S. F. R. CO

(Circuit Court, N. D. Alabama, E. D. August 22, 1906.)

No. 33.

1. COURTS—JURISDICTION OF FEDERAL COURTS—ACT CREATING NEW DIVISION OF DISTRICT.

Act March 3, 1905, c. 1419, § 3, 33 Stat. 988 [U. S. Comp. St. Supp. 1905, p. 78], creating the Eastern division of the Northern district of Alabama, limits the territorial jurisdiction of the court therein to the enumerated counties composing the division.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1120.]

2. SAME—FOREIGN CORPORATIONS.

A foreign corporation, which under the Constitution and statutes of the state can be sued in the state courts only in counties in which it does business, is not suable in a federal court in the state unless it does business in some one of the counties within the territorial jurisdiction of such court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 814.]

On Demurrer to Plea in Abatement.

Stallings, Nesmith & Drennen, for plaintiff.
Campbell & Walker, for defendant.

TOULMIN, District Judge. The plaintiff is a resident of the Southern division of the Northern district of Alabama. The defendant is a foreign corporation. Hence this action is between citizens of different states. It is brought in the district of the residence of the plaintiff, but not in the division of the district in which the plaintiff resides. The Northern district of Alabama comprises four divisions. The act of Congress creating the Eastern division provides that it shall consist of certain counties named therein, and that all civil process issued against persons residents in said counties shall be made returnable to the court "to be held at the city of Anniston" in said division. A subsequent act provides "that all suits against a single defendant inhabitant of said state must be brought in the division of the district where he resides." Act March 3, 1905, c. 1419, § 3 33 Stat. 988 [U. S. Comp. St. Supp. 1905, p. 78].

The facts, as shown by the record, are that the defendant is not a resident of either division of the Northern district of Alabama, has no agent in the Eastern division of said district, has no place of business in said division, and does no business in any county therein. The defendant being a foreign corporation, that part of the act referred to providing that suits against a defendant must be brought in the division of the district where he resides has no application to it. The plaintiff was at liberty to sue the defendant in the district of his own residence, but to make the right available to him the defendant must be found, for the purpose of being served with the summons, within the territorial limits of the court before which the suit was cognizable. "No judicial process, whatever form it may assume, can have any lawful authority outside the limits of the jurisdiction of the court by which it is issued." *Ableman v. Booth*, 21 How. 524, 16 L. Ed. 169.

It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in his behalf, or, if a corporation is the defendant, upon an agent appointed to act for the corporation. "No court can, in the ordinary administration of justice, in common-law proceedings, exercise jurisdiction over a party, unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. Such process cannot reach the party beyond the territorial jurisdiction of the court." *Kendall v. U. S.*, 12 Pet. 526, 9 L. Ed. 1181. In the case of *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 209, 13 Sup. Ct. 859, 37 L. Ed. 699, the court said:

"It is well settled that, at common law, no court can exercise jurisdiction over a party unless he is served with process within the territorial jurisdiction of the court, or voluntarily appears."

The well established and settled principle is that, to give a court jurisdiction, a defendant against whom a plaintiff claims a judgment must be found and served with process within the limits of the jurisdiction of the court. *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853. I think the clear intent and meaning of the act creating the Eastern division of the Northern district of Alabama, and providing for the court therein to be held at the city of Anniston, was to give that court territorial jurisdiction within the limits of the counties named in the act, and to that extent only. Its territorial jurisdiction is, I think, unquestionably limited to the counties composing said division. Act March 3, 1905, c. 1419, § 3, 33 Stat. 988 [U. S. Comp. St. Supp. 1905, p. 78]. Moreover, a state may by its laws require, as a condition precedent to the right of a corporation to transact business within its limits, that it shall appoint an agent there on whom process may be served, and service must be had on the agent or person specially designated. In a suit against such corporation it, or some one authorized to receive process for it, must be personally cited; otherwise, there is no jurisdiction. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Ins. Co. v. Woodworth*, 111 U. S. 146, 4 Sup. Ct. 364, 28 L. Ed. 379; *Amy v. Watertown*, 130 U. S. 302, 9 Sup. Ct. 537, 32 L. Ed. 953. In *Railroad Co. v. Koontz*, 104 U. S. 10, 26 L. Ed. 643, it is said:

"It is now well settled that a corporation of one state, doing business in another, is suable where its business is done, if the laws make provision to that effect."

And in the case of *Insurance Co. v. Woodworth*, 111 U. S. 146, 4 Sup. Ct. 364, 28 L. Ed. 379, it is said:

"That a corporation of one state, doing business in another, is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws." *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *U. S. v. Am. Bell Telephone Co.* (C. C.) 29 Fed. 35.

Article 14, § 4, of the Constitution of Alabama of 1875 provides that:

"No foreign corporation shall do business in the state without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in the state." Code Ala. 1886, p. 47.

By section 4207 of the Code of 1896 of Alabama, it is enacted that "a foreign corporation may be sued in any county in which it does business by an agent."

Prior to these laws a foreign corporation could not be sued in this state. Such corporation cannot be sued elsewhere than within the sovereignty of its creation without legislative authority of the forum in which suit is instituted; and it is then subject to suit in such mode as the law of the state provides. *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543; *Insurance Co. v. Woodworth*,

111 U. S. 146, 4 Sup. Ct. 364, 28 L. Ed. 379. A suit may now be maintained against a foreign corporation in any county where it does business, and where there has been service of process on the corporation's agent appointed under the law requiring a foreign corporation doing business in the state to appoint an agent or agents on whom process may be served. *Gale v. South Bldg. & Loan Ass'n of Ala.* (C. C.) 117 Fed. 732; *Barnes v. Western Union Tel. Co.* (C. C.) 120 Fed. 550; *McCord Co. v. Doyle*, 97 Fed. 22, 38 C. C. A. 34; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. The defendant, by doing business in this state on the conditions prescribed by its laws, has consented to be sued in any county in the state where it does business by an agent; but it is not suable elsewhere in the state without its consent.

The facts of this case, read in the light of the state laws, show that the defendant was and is not found, for the purpose of suit, in any county of the Eastern division of the Northern district of Alabama, and that it is not subject to suit in the courts, state and federal, exercising jurisdiction within said division. This court has no jurisdiction of this case unless the defendant is subjected by the state law to the jurisdiction of the state court in some one of the counties in this division of the Northern district of Alabama. *Ex parte Schollenberger*, 96 U. S. 369-376, 24 L. Ed. 853; *Dinzy v. Illinois Central R. R. Co.* (C. C.) 61 Fed. 49. We have seen that the defendant corporation may be sued only in a county in which it does business by an agent (Code Ala. 1896, § 4207), and that it does no business in any county of this division. My opinion is that the defendant is not within the territorial jurisdiction of this court, and, moreover, that it is not subjected, under the state laws, to suit in any county in this division.

The demurrer to the plea in abatement is therefore overruled.

THE MOBILA.

(District Court, S. D. Alabama. June 2, 1906.)

1. COLLISION—DAMAGES—FINDINGS OF COMMISSIONER.

The finding of a commissioner as to the value of a vessel lost in collision is entitled to great respect, and will not be set aside unless it is made to appear that his valuation is manifestly erroneous, as in conflict with the weight of the evidence, or that there was clear mistake in the process by which his conclusions were reached.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 302.]

2. SAME—TOTAL LOSS OF VESSEL—MEASURE OF DAMAGES.

Where a vessel is a total loss as the result of a collision, the measure of damages recoverable is not her cost to the owners, nor her intrinsic value, but her market value at the time of her destruction, which may be determined from the opinions and estimates of competent witnesses who are qualified by their experience and knowledge of the vessel to testify as to such value.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 287; vol. 20, Cent. Dig. Evidence, §§ 2330, 2333.]

In Admiralty. On exceptions to commissioner's report.

Gregory L. & H. T. Smith, for libellant.

Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. The finding of a commissioner as to the value of a vessel lost in collision is entitled to great respect, and it will not be set aside unless it is made to appear that his valuation is manifestly erroneous as being in conflict with the weight of the evidence, or that there was clear mistake in the process by which his conclusions were reached. *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *The Gertrude* (D. C.) 112 Fed. 448. The vessel here was a total loss. The rule of damage is the market value of the vessel (if it is of a class which has a market value) at the time of her destruction. *The Baltimore*, 8 Wall. 386, 19 L. Ed. 463; *The Granite State*, 3 Wall. 313, 18 L. Ed. 179. The measure of damages is the value of the vessel in its condition just prior to the collision, to be measured by its market value, and not by the price for which the owners would have been willing to sell it, or may have paid for it. The party in fault cannot reduce the amount recoverable by showing that the lost vessel was worth intrinsically less than its market value. 25 Am. & Eng. Enc. of Law (2d Ed.) 1029.

Where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such property can ordinarily be determined with accuracy; but where there is no fixed or certain standard by which the real value can be ascertained, and no market value ascertainable, the court is compelled to reach its conclusion by comparison of various estimates or opinions. At best, the evidence of value is largely a matter of opinion. Where the value of property is in controversy, persons acquainted with it may state their opinion as to its value. "As value rests merely in opinion, the exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety." *St. Louis, I. M. & S. Ry. Co. v. Edwards*, 78 Fed. 747, 24 C. C. A. 300. "After a witness has testified that he knows the property, and its value, he may be called upon to state such value." *Montana Ry. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96, 34 L. Ed. 681; *Sutherland on Damages*, § 442. The market value is such a sum of money as the property is worth in the market to persons generally who would pay the just and full value for it. 19 Am. & Eng. Encyc. of Law (2d Ed.) 1153, and authorities cited in note 5. The market value is not what property is worth solely for the purpose to which it is devoted, but the highest price that it will bring for any and all uses to which it is adapted, and for which it is available. All uses to which it could be put should be considered. Am. & Eng. Encyc. of Law (2d Ed.) 1154, and note. While evidence of the cost of the vessel is admissible, the cost plainly is not of itself proof of her actual value at the time she was lost.

Full compensation for the loss is the rule in such cases, and it is

to be measured by what it would cost to replace her. There is perhaps no direct evidence on this point or as to the market value of the vessel at the time and place she was lost, but there are opinions and estimates given by many witnesses as to her value, and they range from \$6,200 to \$15,000, the average of which is between \$10,000 and \$11,000, and nearer the latter figure. The commissioner seems to have based his valuation of the vessel solely on its cost to the libelant. I think it clear that he fell into an error in this, and that his finding was contrary to the weight of the evidence. My opinion is that the evidence entirely warrants the conclusion reached by me that the vessel was worth at least \$10,000 at the time of her loss. Libelant's exceptions to the commissioner's report are sustained, and he is awarded \$10,000 as his damages herein, for which a decree will be entered.

The claimant's exceptions to said report are overruled for want of evidence to sustain them, or rather, to show that the commissioner erred in his finding excepted to, while individually I believe many of the items charged for by the colibelants are excessively valued.

JOHN D. PARK & SONS CO. v. BRUEN et al.

(Circuit Court, S. D. New York. July 6, 1906.)

EQUITY—PLEADING—ANSWERS TO INTERROGATORIES.

Defendants in a suit in equity cannot be required to answer interrogatories by stating facts necessary to complainant's case, but which are not within their knowledge and which they can only ascertain by a tedious and expensive investigation outside of their own records.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 431, 432.]

In Equity. On exceptions to answer.

Alton B. Parker and Morris & Fay, for complainant.
Robinson, Biddle & Ward, for defendant

LACOMBE, Circuit Judge. The bill is a printed document, 70 pages in length, containing 22 interrogatories addressed to each of the 19 defendants. The answer consists of 13 typewritten pages, besides the separate answers of the several defendants to the 22 interrogatories. A perusal of the bill and answer leaves the impression that, as an answer, the latter sufficiently joins issue with the averments of the bill; but that impression can be confirmed or dissipated only by a minute and careful analysis of the averments of both pleadings, a task which is made all the more difficult by the extreme verbosity and frequent repetitions which characterize the bill. When it is stated that 137 exceptions are filed to the general answer, and 21 to the answers to the specific interrogatories, it is manifest that the matter should be sent to a master. The time of the court is not to be taken up with work which is largely clerical. It is understood that defendants do not contend that the waiver of an answer under oath excuses them from fully answering the averments of the bill, nor

from answering all proper interrogatories, where oath as to such answers is required. The exceptions are somewhat inartificially drawn; but, since they are to go to a master, who will have the leisure to dig out the various relevant averments of the pleadings, any irregularity in form may be disregarded.

For the guidance of the master it may be noted that the first and second specific interrogatories are altogether too broad. The entire theory of the bill is that the "rebate" system complained of was and is applied indiscriminately to goods of the class referred to (drugs, toilet articles, etc.), whether covered by letters patent, by trade-marks, trade labels, etc., or not. If the complainant deems it material to show that some are patented, some covered by trade-mark, and others not, although the bill does not indicate the necessity of thus classifying them, that is part of its case, to be ascertained and proved by it. The classification is one with which, so far as the bill shows, none of the defendants have ever concerned themselves, and as to which necessarily their information is scanty. Complainant cannot, by propounding these two interrogatories, require the defendants to enter into a tedious and presumably expensive investigation to determine which of the many thousands of articles druggists deal in are covered by existing patents or valid trade-marks. The fifth clause of the answer is all that can be required, in this particular, from the defendants, except that in answering the specific interrogatories each defendant should give such information as he or it may be possessed of. This appears to have been done, so far as a cursory examination of the answers to interrogatories discloses. In view of the admission in the general answer that "complainant is not and never has been a member of the National Wholesale Druggists' Association," it would be a sheer waste of time to inquire into any exceptions to the answers to the third interrogatory.

As to the interrogatories generally the master is cautioned that the bill is directed against individual defendants, and that, while complainant is entitled to probe the conscience of each individual, it is not entitled to require each or any individual defendant to enter upon an exhaustive search in order to discover and marshal evidence which complainant may think material to its side of the controversy.

The cause is referred to Robert C. Beatty, Esq., as special master, to examine into the questions raised by the exceptions, and report, with his opinion thereon, in conformity to the usual practice in this circuit

ROBINSON v. AMERICAN LINSEED CO.

(Circuit Court, S. D. New York. July 12, 1906.)

1. CONTRACTS—CONSTRUCTION—TIME.

At the conclusion of negotiations for the storage of defendant's product for a term of five years, plaintiff submitted an offer to store the same for such period at a rate much less than the lowest rate it had ever previously accepted for storage, which offer was accepted. *Held*, that the acceptance of plaintiff's offer constituted prima facie a contract for storage for five years.

2. PLEADING—CAUSES OF ACTION—JOINDER—CONTRACT—QUANTUM MERUIT.

It is no objection to a complaint that it contains a cause of action on contract and on a quantum meruit in the same count, where both are based on the same transaction.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 114.]

3. CORPORATIONS—FOREIGN CORPORATIONS—CAPACITY TO SUE.

A foreign corporation may sue in New York on contracts made outside the state, without complying with New York laws, so as to be entitled to do business within the state.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2524.]

Sur Demurrer.

Cary & Robinson, for plaintiff.

Howland, Murray & Prentice, for defendant.

PLATT, District Judge. On September 22, 1899, the National Storage Company, plaintiff's assignor, entered into a certain instrument with the defendant, the important part of which is as follows:

"Proposal for Warehousing.

* * * * *

"Chicago, Ills., Sept. 22nd, 1899.

"American Linseed Company, Chicago, Illinois—Dear Sir:

"1. The National Storage Company hereby proposes to issue its storage warrants for a period of five years from date hereof * * * upon personal property consisting in part of flaxseed, oil and oil cake to be stored at * * *.

"2. * * *.

"3. Rates, terms and conditions which shall govern the storage of property or issue of warrants under this proposal are as follows:

"On property valued at five million dollars or less, the charge for the first calendar month or fraction will be \$416.66 2-3; for each succeeding month or fraction \$416.66 2-3. * * *

"[Many paragraphs follow which do not affect the present contention.]

"National Storage Co., by Walter Tod, Treasurer."

Upon the left-hand lower corner thereof appears:

"Accepted.

American Linseed Company,

"G. E. Highley, Secy."

Immediately upon the execution of the above instrument the American Linseed Company began storing in accordance with its terms, and warrants for a large amount were issued, but in about two years it stopped storing, paid for all that was actually stored at the rates specified in the instrument, and refuses to pay any more. The plaintiff sues for the minimum rates under the instrument for five years' storage, alleging that it was ready and willing at all times to accept the property for storage, claiming that the defendant is bound to pay that amount, whether it availed itself of its privileges or not.

It is elementary that in the interpretation of a contract the court will look at all the facts and circumstances which surrounded the contracting parties at the time of its execution. It appears that when the instrument in suit was executed the lowest rate for storage ever accepted by the National Storage Company was five times greater than that fixed in the instrument. Such being the fact about rates, the plaintiff said, "I will store your property for the following rate for

five years." The defendant said, "I accept your offer," and began to take advantage of it. It seems to me that in accepting it the defendant made a contract which covered the time as well as the rate. The rate being so ridiculously low, it is fair to say that it was made so by reason of the length of time for which it was agreed that it should run. At any rate, if there is any doubt that such was the intention of the parties, the uncertainty as to what was accepted ought to be settled by parol.

There is no harm in putting in one count an action on the contract and upon quantum meruit. It is all based on one transaction, and simply states two grounds of recovery, but presents only a single cause of action.

The plaintiff has legal capacity to sue. His assignor made the contract in Illinois, and a foreign corporation can sue in this state upon contracts made outside the state, without complying with local laws, so as to become entitled to do business here.

Let the demurrer in all respects be overruled, with costs.

BESSON & CO., Limited, v. GOODMAN, et al.

(Circuit Court, S. D. New York. July 6, 1906.)

1. EQUITY—PLEADING—HEARING ON BILL AND ANSWER.

Where a replication is withdrawn, and the case set down for hearing on bill and answer, complainant admits every positive averment of fact in the answer, and obtains no benefit from any fact alleged in the bill which the answer positively denies.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 711.]

2. SAME—IRREGULARITIES—WAIVER.

Complainant, by setting a suit down for hearing on bill and answer, waives all informalities and irregularities in the answer, which could only be reached by exceptions.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 665.]

3. SAME—DISMISSAL.

There being no way to attack the substance of an answer, except to bring the matter forward for hearing on the bill and answer, where a suit is set down for such hearing in good faith, and a separate defense in the answer is insufficient, the bill will not be dismissed, but the insufficient defense will be stricken, and complainant granted leave to file a replication on payment of one-half the costs.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 827.]

In Equity.

Seymour, Seymour & Megrath, for complainant.

Benjamin Patterson, for defendants.

PLATT, District Judge. The complainant has set this matter down for hearing upon bill and answer. A replication had been filed, but that is, by agreement, to be considered as withdrawn from the files. By such action the answer becomes entitled to a liberal construction in the defendants' favor. To put it more definitely, the complainant admits every positive averment of fact in the answer, and

obtains no benefit from any fact alleged in the bill which is positively denied in the answer. Such being the situation, complainant contends that the answer is insufficient in law to force it to produce proofs in support of the allegations of the complaint. It is true that the court at the hearing allowed the defendants one week in which to amend their answer by inserting "upon information and belief" in connection with their allegation that the instruments by them sold were in fact genuine. The defendants prefer to stand upon their answer and decline to amend.

Upon reflection, the court is satisfied that the complainant, by setting the matter down for hearing on bill and answer, has waived all informalities and irregularities in the answer, and that the only way to reach them was by exceptions. It is also thought that the major part of complainant's criticism of the answer upon this hearing would have been relevant at a hearing upon exceptions. Without going into details, the answer stands in the way of a decree of any kind for the complainant. The only real question to be decided is whether, that being so, the court is bound to dismiss the bill. There being no right to file a demurrer in equity practice, there would appear to be no way to attack the substance of an answer, except to bring the matter forward for hearing on the bill and answer. When this has been done in the best of faith, and the case at bar is an instance of such good faith, it would not conduce to an orderly and speedy disposition of causes if it shall become the rule that the complainant can only make such attack at the risk of being dismissed, if it shall appear to the court that he took a wrong view of things. I do not think that any binding precedent for such action exists, and I am not willing to aid in establishing one.

The separate defense is insufficient, and gave the complainant some reason for the course taken. Let it be stricken out. Let the complainant pay the defendants one-half the costs which have accrued by reason of setting this matter down for hearing on bill and answer. The replication may then be filed, and the cause proceed in the regular way under the rules.

UNITED STATES v. SCRUGGS, VANDERVOORT & BARNEY DRY
GOODS CO.

(Circuit Court, E. D. Missouri, E. D. September 17, 1906.)

No. 5,253 (1,793).

CUSTOMS DUTIES—CLASSIFICATION—SILK-WOOL DRESS GOODS.

Construing Tariff Act July 24, 1897, c. 11, § 1, providing (1) in Schedule K, par. 369, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1637], for "women's and children's dress goods * * * in part of wool," and (2) in Schedule L, par. 387, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669], for "woven fabrics in the piece * * * weighing not less than one and one-third ounces per square yard, and not more than eight ounces per square yard, * * * dyed in the thread or yarn, and containing more than forty-five per centum in weight of silk," *held*, with reference

to dress goods composed in chief value of silk, but in part of wool, that the latter is more specific, and is the controlling, provision.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below related to goods imported at the port of St. Louis. Note *U. S. v. Slazenger* (C. C.) 113 Fed. 524. The opinion of the Board reads as follows:

Lunt, General Appraiser. The merchandise covered by this protest consists of certain silk and wool fabrics designated in the invoice by Nos. 4,872 and 29,217, upon which duty was assessed at 11 cents per square yard and 55 per cent. ad valorem under the provision of paragraph 369, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667] for woollen dress goods, which reads as follows:

"Par. 369. On women's and children's dress goods, coat linings, Italian cloths, bunting, and goods of similar description or character composed wholly or in part of wool, and not specially provided for in this act. * * *"

The claim is made that the merchandise is properly dutiable under the provisions of paragraph 387, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669], relating to silk woven goods. The Board has submitted the samples to the United States appraiser at the port of New York for analyses, and from the report, as returned by him, it appears that these goods are descriptively and specifically provided for in paragraph 387. The Board also finds that: (1) The samples consist of silk and wool, silk being the component material of chief value in every instance. (2) The merchandise covered in the invoice by No. 4,872 consists of worsted warp and silk filling, the weight of the fabric being 39.9 per cent. of silk, yarn dyed, and 60.1 per cent. of wool. (3) The merchandise covered in the invoice by No. 29,217 consists of wool and silk, the weight of the fabric being 65.5 per cent. of silk, yarn dyed, and 34.5 per cent. of wool.

We hold: (1) That the merchandise covered by finding 2 is dutiable at \$1.30 per pound under the specific provision of paragraph 387 for "woven fabrics in the piece not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, * * * dyed in the thread or yarn and containing more than 30 and not more than 45 per centum in weight of silk. * * *". (2) That the merchandise covered by finding 3 is dutiable at \$3 per pound under the specific provision of paragraph 387 for "woven fabrics in the piece not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, * * * dyed in the thread or yarn and containing more than 45 per centum in weight of silk, * * * and the weight is not increased beyond the original weight of the raw silk. * * *"

It will be noticed that paragraphs 369 and 387 each contain the "not specially provided for" provision, and therefore one offsets the other, and the paragraphs are to be construed as if this provision was absent from each of them. We think that paragraph 387 is the more precise and specific than the provision for dress goods in paragraph 369, and therefore, hold that these silk and wool goods are dutiable under paragraph 387, as claimed in the protest. This is in accordance with the decision of the Supreme Court in *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. 751, 34 L. Ed. 110. If the specific duty provided for such fabrics in paragraph 387 should prove to be less than 50 per cent. of the value, then said fabrics are dutiable at 50 per cent. as provided in the end of paragraph 387. The protest is sustained to the extent as above indicated and overruled; in all other respects as to all other items.

See *G. A.* 4,724, *T. D.* 22,360.

E. P. Johnson, Asst. U. S. Atty., and *David P. Dyer*, U. S. Atty. *Everit Brown* (Ralph Pierson, on the brief), for importers.

FINKELNBURG, District Judge. The decision of the Board of General Appraisers in the above-entitled cause is affirmed, for the reasons stated in the Board's opinion, as filed in the record; and the collector is ordered to reliquidate the entry in accordance therewith.

SMITH v. COMPUTING SCALE CO.

(Circuit Court, S. D. Ohio, W. D. March 2, 1906.)

No. 5,968 (1,684).

1. CUSTOMS DUTIES—CLASSIFICATION—PRECIOUS STONES—SCALE BEARINGS—“SET.”

In construing the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 102 [U. S. Comp. St. 1901, p. 1676], for “diamonds and other precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set,” *held*, that “set” has a well-known and well-defined trade meaning in connection with precious stones, which would not include the insertion of an agate bearing in a scale, and that the paragraph was intended to cover only precious stones intended for jewelry purposes, and would not cover such as are fitted for use as bearings.

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to *Dennison Mfg. Co. v. United States*, 18 C. C. A. 545.]

2. SAME—AGATE BEARINGS—MANUFACTURES OF AGATE.

Small pieces of agate, fitted for use as scale bearings by being cut, polished, and grooved, are dutiable as manufactures of agate, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 115, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], and not as “precious stones,” under paragraph 435, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].

On Application for Review of a Decision of the Board of United States General Appraisers.

These proceedings were brought in the name of Amor Smith, Jr., surveyor of customs at the port of Cincinnati, and relate to a decision of the Board of General Appraisers which sustained a protest by the importers against the surveyor's assessment of duty, on the authority of *U. S. v. American Express Co.* (C. C.) 147 Fed. 894.

Note In re *John Hope & Sons Engraving & Manufacturing Company* (C. C.) 100 Fed. 286.

Sherman T. McPherson, U. S. Atty.

THOMPSON, District Judge. This is an application for a review of a decision of the United States Board of General Appraisers at New York as to the construction of the law fixing the rate or per cent. of duties imposed upon certain merchandise imported by the Computing Scale Company of Dayton, Ohio. The merchandise consists of small pieces of agate, differing slightly in dimensions, which have been cut, polished, and grooved, thus fitting them for specific use as bearings for scales of superior quality. The collector of customs at the port of Cincinnati decided that these articles were dutiable at the rate of 50 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 115, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], as “manufacturers of agate * * * not specially

provided for." Protests were entered against this decision by the importer, which were duly submitted to the United States Board of General Appraisers at New York, and that board overruled the decision of the collector, and held that said articles were dutiable at 10 per cent. ad valorem as precious stones, cut but not set, under paragraph 435, Schedule N, Act July 24, 1897, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], which provides as follows:

"Diamonds and other precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set, ten per centum ad valorem."

Manifestly these provisions relate to precious stones prepared to be set in articles of jewelry. The word "set," when used in this connection, is defined by the Century Dictionary as follows:

"To frame or mount, as a precious stone, in gold, silver, or other metal; as, to set a diamond."

And the expert witness Mindil testifies that the word "set" has a well-known and well-defined meaning in the trade, in connection with precious stones, and that the insertion of one of the agates in question in a computing scale would not come within the meaning of the word "set" as understood by the trade. These articles were not "precious stones advanced in condition or value from their natural state," to be "set" in some piece of jewelry for personal adornment, but were manufactures of agate to be used as scale bearings. Under former acts, manufactures of agate were subjected to duties under either the similitude or nonenumerated clauses, and much litigation ensued in determining to which class they should be assigned; and paragraph 115 of the act of 1897 probably was intended to meet the difficulties presented by these litigations. See *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99; *Hahn v. U. S.*, 100 Fed. 635, 40 C. C. A. 622; *Hahn v. U. S. (C. C.)* 121 Fed. 152.

The ruling of the United States Board of General Appraisers at New York will be reversed, and the decision of the collector is hereby sustained.

C. B. RICHARD & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 13, 1892.)

No. 714.

CUSTOMS DUTIES — CLASSIFICATION — MEDICINAL PREPARATIONS — MEDICATED FRUIT JUICE.

Fruit juice which has been concentrated and medicated but is not used by itself as a medicine, but as an ingredient in the preparation of a medicine, is not dutiable as a medicinal preparation under paragraph 75, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule A, 26 Stat. 570.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below see G. A. 1,183 (T. D. 12,445), in which the board of general appraisers affirmed the assessment of duty by the collector of customs at the port of New York. The merchandise in dis-

pute was classified under the provision for cherry juice in Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule H, par. 339, 26 Stat. 590. The importers contended that it should have been classified as a medicinal preparation under paragraph 75 of said act, § 1, Schedule A, 26 Stat. 570. The board overruled this contention for the following reasons:

Wilkinson, General Appraiser. The importers testified at the hearing of the case that the article in controversy is a concentrated cherry juice, to which they had instructed the German manufacturer to add three chemical ingredients of an antiseptic and medicinal character. They also presented an affidavit from the manufacturer that the instructions had been duly carried out. The appellants further testified that while the juice in its imported condition is not employed to cure or alleviate bodily disorders, is it used exclusively as an ingredient in a medicinal preparation manufactured by them in New York, and that it is unfit for other use.

"In the opinion of the board, an article to be entitled to classification as a medicinal preparation must be an agent to be used for the cure or palliation of bodily disorders. There is nothing before the board to show that the cherry juice in question has either one of these characteristics."

Comstock & Brown (Albert Comstock, of counsel), for importers.
James T. Van Rensselaer, Asst. U. S. Atty.

LACOMBE, Circuit Judge. I must say that I agree with the board of appraisers. Although this article may have advanced somewhat beyond cherry juice, it has not got quite far enough along to reach the next station, and become a medicinal preparation, as contemplated by law. For that reason I shall affirm the decision of the board of appraisers.

BURDITT & WILLIAMS CO. v. UNITED STATES.

(Circuit Court, D. Massachusetts. September 11, 1906.)

No. 213 (1,828).

CUSTOMS DUTIES—CLASSIFICATION—COATED WIRE ARTICLES.

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639], provides a specific rate of duty on wire, with an additional duty when it is manufactured into articles, also an additional rate when it is coated. *Held*, that articles made from coated wire are subject to each of these latter duties in addition to that applicable to the wire in its uncoated unmanufactured state.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 6,357 (T. D. 27,325), in which the Board of General Appraisers modified the assessment of duty by the collector of customs at the port of Boston.

Charles S. Hamlin, for importers.
Asa P. French, U. S. Atty.

LOWELL, Circuit Judge. This is an appeal from a decision of the Board of General Appraisers, fixing the duty upon rat traps, an

imported article of merchandise. The rat traps here in question were chiefly made of round steel wire coated with copper. The Board ruled that they were dutiable under paragraph 137 of the Dingley act (Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639]), which, so far as applicable here, reads as follows:

"Round * * * steel wire, * * * two cents per pound, * * * provided that articles manufactured from * * * steel * * * wire shall pay the rate of duty imposed upon the wire used in the manufacture of such articles, and in addition thereto, one and one-fourth cents per pound, except that * * * on * * * steel wire coated with * * * any * * * metal, * * * two-tenths of one cent per pound in addition to the rate imposed on the wire from which it is made."

The Board computed the duty at 3.45 cents per pound, as follows: Two cents per pound as the rate of duty imposed upon the steel wire used in the manufacture; 1.25 cents added thereto for the manufacture, and .2 cent for the coating of the wire with copper. The importer here questions only the last element in the computation, which, he contends, should be omitted, leaving the rate of duty 3.25 cents per pound. He argues that to coat steel wire with copper is part of the operation of manufacture and is therefore covered by the additional duty of 1.25 cents, without the further addition of .2 cent for the specific operation of coating. This last addition, he contends, should be made only when coated wire is imported in that form. On the other hand, the government points out that a rat trap made of uncoated wire is dutiable at 3.25 cents, and that, as the act plainly intended to impose an additional duty for the coating, this is due equally upon coated wire as such, and upon articles manufactured therefrom.

While the language of the act is not quite clear, yet upon the whole Congress apparently intended to impose an additional duty for coating wire with metal, and this additional duty is due whether the wire is imported as wire or has been manufactured into some other article.

Decision of the Board is affirmed.

WILFRED SCHADE & CO. v. UNITED STATES.

(Circuit Court, E. D. Missouri, E. D. September 17, 1906.)

No. 5,158 (1,717).

CUSTOMS DUTIES—CLASSIFICATION—COTTON CLOTH OF IRREGULAR TEXTURE.

The fact that substantial numbers of the warp threads and of the filling threads are absent in fancy fabrics of the openwork variety does not remove the goods from the provision for "all cotton cloth not exceeding one hundred threads to the square inch counting the warp and filling," in Tariff Act July 24, 1897, c. 11 § 1, Schedule J, par. 305, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1656].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below related to an importation of fancy cloth of the openwork variety at the port of St. Louis, which was classified as imitation laces, under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181

[U. S. Comp. St. 1901, p. 1662]. The importers contended that the goods should have been classified under the provision for "all cotton cloth not exceeding one hundred threads to the square inch counting the warp and filling," in Schedule J, par. 305, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1656]. The Board was of opinion that, because a substantial number of the warp threads were missing in parts of the fabrics, and of the filling threads in other parts, the goods were not susceptible of count of threads by any practicable means, and on the authority of a former decision (G. A. 5,928 [T. D. 26,062]) overruled the importers' contention.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

David P. Dyer, U. S. Atty.

FINKELNBURG, District Judge. Since the decision of the Board of General Appraisers in this case, the question involved has been decided adversely by the Circuit Court of Appeals for the Second Circuit. See *U. S. v. Ulmann* (C. C. A.) 139 Fed. 3. As this last decision is by the court of the circuit which has the chief port of entry of this country under its jurisdiction, and hence great experience in matters of this kind, I feel that I ought to follow it, more especially as it is based on the reasoning of an analogous decision of the Supreme Court. See *Hedden v. Robertson*, 151 U. S. 520, 14 Sup. Ct. 434, 38 L. Ed. 257.

The decision of the Board will therefore be reversed.

UNITED STATES v. AMERICAN EXPRESS CO.

(Circuit Court, S. D. New York. October 25, 1904.)

No. 3,493.

CUSTOMS DUTIES—CLASSIFICATION—JEWELS FOR BEARINGS—PRECIOUS STONES.

Sapphires intended for bearings for electrical instruments are dutiable as precious stones, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], rather than as articles composed of mineral substances under Schedule B, par. 97, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633].

On Application for Review of a Decision of the Board of United States General Appraisers.

This case relates to an importation of sapphires designed for use as bearings in electrical instruments, classified by the collector of customs at the port of New York under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 97, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], for articles composed of mineral substances, not decorated. The Board held that classification should have been made under the provision in Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for precious stones, cut, but not set, following a precious decision. G. A. 5,382, T. D. 24,577.

Charles D. Baker, Asst. U. S. Atty.

Howard T. Walden, for importers.

HAZEL, District Judge. The decision of the Board of General Appraisers is affirmed.

MERCK & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 19, 1905.)

No. 3,519.

CUSTOMS DUTIES—CLASSIFICATION—PARALDEHYDE—NONALCOHOLIC MEDICINAL PREPARATION.

Paraldehyde, though produced from aldehyde, which is a by-product in the distillation of alcohol, but contains no alcohol, is a medicinal preparation in the preparation of which alcohol is not used, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631].

On Application for Review of a Decision of the Board of United States General Appraisers.

In the decision below the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York. The article passed on consisted of paraldehyde. It was classified under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 67, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631], as a medicinal preparation in the preparation of which alcohol was used, and was claimed by the importer to be covered by paragraph 68 (30 Stat. 154 [U. S. Comp. St. 1901, p. 1631]), as a medicinal preparation in the preparation of which alcohol was not used. The findings and conclusions of the Board appear from the following excerpt from its opinion:

"Lunt, General Appraiser. We find that the paraldehyde covered by these protests is a medicinal preparation in the preparation of which alcohol was used. It appears from the evidence that paraldehyde is immediately produced from aldehyde by the action of a mineral acid thereon; that aldehyde is obtained as a by-product in the manufacture of spirits, where it comes over with the first runnings, a portion of the alcohol being oxidized in the process of distillation, and is also cheaply obtained by the action of ozonized air upon alcohol. In these cases the collector decided that alcohol was used in the preparation of the paraldehyde, and specifically no evidence has been given to the contrary. * * * The Board, in G. A. 4,911 (T. D. 22,983), held that paraldehyde was dutiable at the rate assessed in these cases, and upon this further investigation we do not find any reason to hold to the contrary."

Further evidence admitted in the Circuit Court showed that aldehyde, from which paraldehyde is manufactured, is scientifically a distinct article from paraldehyde and is dealt in as a separate commercial commodity, and that it contains no alcohol; also, that as commercially produced it is not derived from alcohol, but is one of several by-products in the process of distilling alcohol, all of which (aldehyde, fusel oil, etc.), including the alcohol, are produced together at the same time and by the same process, the aldehyde being the first to come over, because its boiling point is lower than that of alcohol and the other distillates.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

MERCK & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 4, 1903.)

No. 3,254.

CUSTOMS DUTIES—CLASSIFICATION—CREOLIN-PEARSON—MEDICINAL PREPARATION.

Creolin-Pearson is not a medicinal preparation within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631].

On Application for Review of a Decision of the Board of United States General Appraisers.

This case relates to so-called Creolin-Pearson, imported at the port of New York. The collector of customs classified it under the provision for medicinal preparations in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631]. The importers contended that the article was not a medicinal preparation, and that, being produced from coal tar, it should have been classified as dutiable under the provision in paragraph 15 of said act (30 Stat. 152 [U. S. Comp. St. 1901, p. 1627]), for "preparations of coal tar. * * * not medicinal." This contention was overruled by the Board of General Appraisers. Note G. A. 4,691 (T. D. 12,139) and G. A. 4,989 (T. D. 23,270).

Albert Comstock, for importers.

Charles D. Baker, Asst. U. S. Atty.

HAZEL, District Judge. The decision of the Board of United States General Appraisers is reversed.

MONTANA MINING CO. v. ST. LOUIS MIN. & MILL. CO. OF MONTANA.

(Circuit Court of Appeals, Ninth Circuit. August 13, 1906.)

No. 1,240.

1. APPEAL AND ERROR—SECOND REVIEW—PRIOR DECISION AS LAW OF CASE.

Where the Circuit Court of Appeals, on a writ of error taken by the defendant, affirmed a judgment of the Circuit Court in favor of the plaintiff, but subsequently, on a cross-writ of error sued out by the plaintiff, reversed such judgment on different questions and ordered a new trial, although the effect of the later decision was to reverse the former, the opinions filed on the two hearings and not withdrawn constitute the law of the case, and questions therein determined will not be reconsidered on a subsequent writ of error from a second judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358-4368; vol. 13, Cent. Dig. Courts, § 340.]

2. SAME—REVIEW—AMENDMENT OF PLEADINGS.

Amendments to pleadings are within the discretion of a federal court under Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], and error will not lie to the granting or refusal thereof.

3. TRIAL—EXCEPTIONS TO INSTRUCTIONS—RULE OF COURT.

Rule 58 of the Circuit Court for the District of Montana, which permits exceptions to the charge of the court or to the refusal of instructions requested to be taken after the jury have retired, but, if practicable, before the verdict has been returned, was intended to permit such course to be followed, where it would be in the interest of justice by avoiding the confusing of the jury or where further instructions were given in the absence of counsel, and not to permit exceptions generally to be taken after the close of the trial contrary to the settled rule of the federal courts; and where the judge, after instructing the jury but before sending them out, retired to his room with counsel and there heard and allowed the exceptions, the rule does not require him to afterward entertain or allow further exceptions.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 680, 681.]

4. WRIT OF ERROR—SUFFICIENCY OF EXCEPTIONS TO CHARGE.

Exceptions to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court.

5. MINES AND MINERALS—TRESPASS—REMOVAL OF ORE—ACTIONS—INSTRUCTIONS.

The charge of the court, in an action of trespass to recover the value of ore taken from a mining claim, considered as a whole and held to contain no error prejudicial to the defendant.

In Error to the Circuit Court of the United States for the District of Montana.

This was an action brought in the Circuit Court of the United States for the District of Montana by the St. Louis Mining & Milling Company, a Montana corporation, defendant in error, against the Montana Mining Company, Limited, a corporation organized under the laws of Great Britain, plaintiff in error, to recover damages for trespass upon a vein of mineral, the top or apex of which lies inside the surface lines of the St. Louis claim, but which vein in its downward course, departing from a perpendicular, crosses the vertical side lines of the St. Louis claim and enters beneath the surface of the adjoining claim owned by the Montana Company, where the trespass upon the vein by the Montana Company is charged to have been committed and the appropriation by that company of large quantities of valuable ore extracted from the vein.

The first paragraph of the second amended and supplemental complaint alleged the corporate character of the plaintiff and defendant.

In the second paragraph of the complaint it was alleged that, at the times mentioned therein, the plaintiff was "the owner of, entitled to, and in the actual possession and occupation of, that certain quartz lode mining claim known as the 'St. Louis Quartz Lode Mining Claim,' and of the quartz, rock, and ore, and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis lode mining claim, although such veins, lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis quartz lode mining claim."

The complaint contained a full description of this claim by monuments, courses, and distances, concluding with this exception: "Save and except that portion thereof known as the 30-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim."

In the third paragraph it was alleged "that the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the 'Nine Hour Quartz Lode Mining Claim,' situate and being east of the said St. Louis lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and that the discovery, location, and recordation of the said St. Louis lode mining claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour lode mining claim."

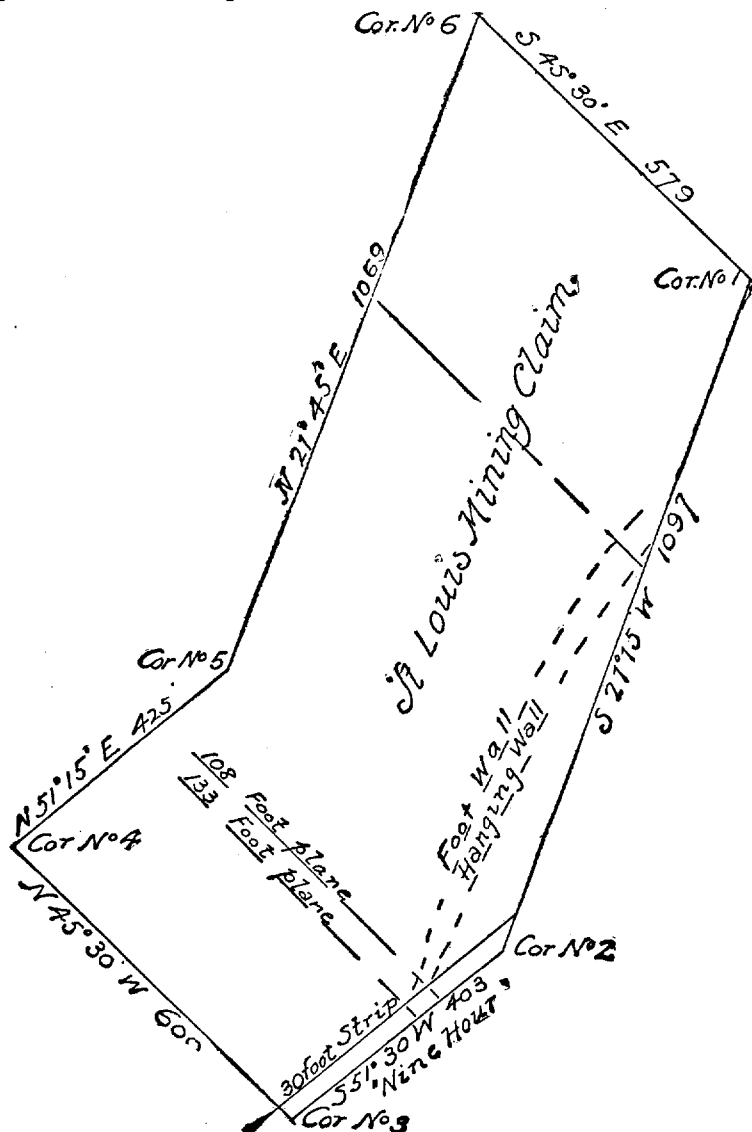
In the fourth paragraph it was alleged: "That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim is to the east and dips under and beneath the said Nine Hour lode mining claim, including the said 30-foot strip, or the compromise ground, which is a part and portion of the said Nine Hour quartz lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis quartz lode mining claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis quartz lode mining claim, bears N. 12 deg. 15 min. E., distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis quartz lode mining claim; thence from where said projected parallel end line passes through said east sideline of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, S. 21 deg. 15 min. W. 512.7 feet to a point, being the intersection of the said east side line of said St. Louis quartz lode mining claim, between corners Nos. 1 and 2, with the west line of the said 30-foot strip hereinbefore described; thence S. 50 deg. 50 min. W. 108 feet, and along the west line of the said 30-foot strip, to a projected parallel end line of said St. Louis quartz lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said 30-foot strip. That it is also the owner of, in possession and entitled to the possession of, an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis mining claim."

In the fifth paragraph it was alleged: "That, notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the 30th day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels, and underground workings, entered into and upon that portion of the vein, lode, or lead so apexing within the said St. Louis mining claim, and commenced extracting quartz, rock, and ore therefrom, and removing the same, and converting it to his own use and benefit, and are now still removing and converting the same, which said quartz, rock, and ore is of the value of \$200,000; on account thereof this plaintiff has been damaged in said sum. That since the filing of the original complaint herein and up to the

26th day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock, and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of \$50,000, and to the damage of this plaintiff in said sum.

"Wherefore, plaintiff prays judgment for the said sum of \$250,000, together with its costs and disbursements in this behalf expended."

A map or plat showing the point at which the said vein enters said St. Louis lode mining claim, as described in the complaint, and the point where the same departs therefrom upon the east line of said claim, is attached to the complaint, marked Exhibit "A," and made a part thereof. A copy of this map is annexed to this opinion for reference.



The last clause of the complaint relates to the damages alleged to have been sustained by the plaintiff after filing the original complaint and up to the 26th day of June, 1899, which were originally stated as being \$50,000, and the total damages as \$250,000. This clause was amended by leave of the court at the close of the last trial on June 30, 1905, so as to change the \$50,000 therein mentioned to \$400,000, making the entire claim for damages \$600,000.

The Montana Mining Company answered this complaint June 30, 1899, admitting the allegations contained in paragraphs 1, 2, and 3, and setting up the defense of an estoppel by deed, as follows:

"And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found, or which may hereafter be found, in said 30-foot strip or compromise ground, for that heretofore, to wit, on or about the 7th day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed, and delivered to William Robinson, James Huggins, and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said 30-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit 'A,' and made a part of this answer; that thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis lode mining claim, including said 30-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff; that thereafter this defendant demanded of and from the said plaintiff and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute, or deliver such a deed, this defendant thereafter, and on or about the 6th day of September, A. D. 1894, commenced an action in the district court of the First judicial district of the state of Montana, within and for the county of Lewis and Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the 1st day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute, and deliver to this defendant a good and sufficient conveyance in fee simple absolute, free from all incumbrances, for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that, in pursuance of said judgment, order, and decree, the said plaintiff, on or about the 1st day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereto annexed, marked Exhibit 'B,' and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or 30-foot strip aforesaid, or any mineral contained therein.

"Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended."

To this answer the plaintiff filed a replication in which it was denied that plaintiff was estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found, or that might be at any time thereafter found, in said 30-foot strip or compromise ground. Plaintiff admitted the execution of the bond as stated in the answer, and averred that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis

lode mining claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said 30-foot strip or compromise ground as being a part of what was known as the Nine Hour quartz lode mining claim. Plaintiff admitted that the said Mayger agreed to convey said 30-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and averred that the said claim of plaintiff comprised no minerals contained in or beneath said 30-foot strip or compromise ground, except such as were contained in leads, lodes or ledges which had their tops or apexes within the St. Louis quartz lode mining claim, exclusive of said 30-foot strip or compromise ground. The plaintiff further averred that it was seeking to recover only such quartz, rock, or ore, and the value thereof, and the damages for the removal and conversion of the same, as comprised lodes, leads, or ledges having their tops or apexes within the boundary lines of the said St. Louis lode mining claim, exclusive of said 30-foot strip or compromise ground.

Plaintiff admitted that Mayger obtained a patent for the said 30-foot strip or compromise ground, but denied that any conveyance was made by him to plaintiff to defraud any one, and averred that all matters in relation thereto had been concluded by the judgment of the court and the deed mentioned in defendant's answer executed in pursuance thereof; that the 30-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim known as the Nine Hour claim; that the same was never a part or portion of the St. Louis quartz lode mining claim; that in the action in the district court of the First judicial district of the state of Montana in and for the county of Lewis and Clarke, wherein the defendant was plaintiff and plaintiff and Charles Mayger were defendants, the action was based upon the agreement mentioned in said answer, and was brought for the purpose of compelling the defendants therein in accordance with said agreement to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the 30-foot strip or compromise ground; that the court found and determined, as a matter of fact, that the said 30-foot strip or compromise ground was at all times a part of the said Nine Hour lode mining claim, and was, by the parties to said agreement, agreed to be a part thereof, and that the said agreement was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour lode mining claim and the St. Louis lode mining claim, the boundary of which claims had been, and was at the time of the execution of said agreement, in conflict, and concerning which a controversy then existed between the parties to said agreement; that the deed mentioned in the answer is the deed which the court adjudged in said action should be executed for the purpose of performing the agreement above referred to; that said deed conveyed no other title than such as was attached and incident to the said 30-foot strip or compromise ground, and that the minerals therein contained were intended to comprise and did comprise all such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of said 30-foot strip.

The controversy between the plaintiff and the defendant, as stated in these pleadings, was whether the deed executed and delivered by the plaintiff on the 1st day of July, 1895, conveying the 30-foot strip or compromise ground to the defendant, included the extralateral right of a vein, apexing within the boundaries of the St. Louis claim but passing on its downward course beyond the vertical side line of such claim into the 30-foot strip or compromise ground, and if this deed did not include such extralateral right, then the extent of such vein and the extralateral right in the 30-foot strip or compromise ground, that is to say, where as in this case the vein has a width of 25 feet and crosses the vertical side line at an angle, whether the extralateral right ceases at the point where a part of the apex of the vein represented by the hanging wall crosses the side line, or whether the right adheres to the vein until its entire apex represented by the foot wall has crossed the side line of the claim into the adjoining ground. The vein described in these pleadings as having its apex within the surface location of the St. Louis mining claim is shown on the map or plat attached to the complaint. The apex of the vein, as described in paragraph 4 of the complaint, commences on a projected parallel end line "at a point from which corner

No. 1, being the northeast corner of said St. Louis quartz lode mining claim, bears N. 12 deg. 15 min. E., distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line 5 feet west of the east side line of said St. Louis quartz lode mining claim"; thence the vein continues within the surface boundaries of the St. Louis mining claim in a general southerly direction to the line of the 108-foot plane, which designates the point where the hanging wall of the vein crosses the vertical side line of the St. Louis claim and the line of the 133-foot plane designates the point where the foot wall of the same vein crosses the same side line. In the course of the trial in the Circuit Court this vein was designated by the witnesses as the Drumlummon vein, and it has since been known in the proceedings by that name.

Upon the issues presented by the pleadings the case was tried by the court and a jury, and on August 12, 1899, a verdict was rendered in favor of the plaintiff for \$23,209. On August 16, 1899, a judgment was entered thereon. The Montana Company, being dissatisfied with this judgment, sued out a writ of error October 7, 1899, and brought the case to this court for review.

It was contended on behalf of the Montana Company as grounds for reversal of the judgment, among other things, (1) that the complaint did not state a cause of action; and (2) that by the execution of the bond, the entry of the judgment enjoining specific performance of the conditions of the bond, and the execution of the deed of conveyance mentioned in the answer, the St. Louis Company was estopped from claiming any ore in the 30-foot strip or compromise ground. This court held that the allegations of the complaint that the plaintiff was the owner and in possession of the St. Louis claim and of the ore and precious metals contained in any and all veins, lodes, ledges, and mineral-bearing rock through their entire depth, the tops or apexes of which were within the surface lines of the St. Louis claim; that the strip of land beneath the surface of which the ores in controversy were mined was located east of the east side line of said claim; that the dip of one of the veins having a portion of its apex inside the surface lines of the St. Louis claim was to the east and dipped under and beneath the 30-foot strip of the Nine Hour claim, and that from this vein so apexing within the St. Louis claim and extending beneath the Nine Hour claim, the ores in controversy had been mined by defendant—were sufficient, in the absence of a demurrer, to support a judgment in favor of the defendant for the conversion of such ores. This court also held that the conveyance by the St. Louis Company to the Montana Company of the land in controversy, in pursuance of a decree of court, had no other effect than to fix the surface boundary of the side line between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral right under the ground so conveyed. In accordance with this opinion the judgment of the Circuit Court was affirmed May 14, 1900. 102 Fed. 430, 42 C. C. A. 415.

At the trial in the Circuit Court the St. Louis Company was restricted by the court to the damages it sustained by reason of the trespass of the defendant upon that portion of the Drumlummon vein under the 30-foot strip or compromise ground and under the Nine Hour claim between lines projected downward along the dip of the vein from the 520-foot plane and the 108-foot plane as represented on the map or plat attached to the complaint. But plaintiff offered to prove in addition the amount of ore taken by defendant from that portion of the vein, the apex of which was divided by the western boundary of the 30-foot strip or compromise ground between points represented on the same map or plat as the 108-foot plane and the 133-foot plane, which part of the vein on its downward course also dipped beneath the 30-foot strip or compromise ground and under the Nine Hour claim. The court refused to admit this testimony, and the value of the ore taken from this point of the Drumlummon vein was not included in the judgment for the plaintiff. The plaintiff, being dissatisfied with the judgment because of the ruling of the court with respect to this testimony and the omission from the judgment of the value of the ore taken from this part of the vein, sued out a cross-writ of error January 30, 1900, and the case was brought here for review upon that question. This court, in deciding this feature of the case,

stated the question to be: "When a secondary or accidental vein crosses the common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong?" After discussing the question, the court said: "Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of the ores taken from the Drumlummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated." In accordance with this opinion, the judgment of the Circuit Court was reversed October 8, 1900. 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725.

To review these two separate judgments of this court the Montana Company sued out two writs of error from the Supreme Court of the United States. In that court both writs of error were dismissed, on the ground that the judgment of this court reversing the judgment of the Circuit Court in the second case operated to reverse the prior judgment of affirmance in the first case, and there being no final judgment in the case, the jurisdiction of the Supreme Court did not obtain. 186 U. S. 24, 22 Sup. Ct. 744, 46 L. Ed. 1039. Upon the coming down of the mandate from the Supreme Court, this court, October 8, 1902, entered a judgment that the judgments theretofore entered be vacated and set aside, and in lieu thereof it was ordered and adjudged that the judgment of the Circuit Court be reversed with costs, and the cause remanded to the said Circuit Court for a new trial, and a mandate was issued accordingly. Upon the new trial before the court and a jury, the court followed the law as declared by this court in the two opinions rendered in the case, and a verdict was returned in favor of the plaintiff for \$195,000, upon which a judgment was entered by the court. To reverse this judgment, the case is here upon writ of error.

Charles J. Hughes, William Wallace, W. E. Cullen, and W. E. Cullen, for plaintiff in error.

Bach & Wight, John B. Clayberg, Arthur Brown, and M. S. Gunn, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). It is contended by the plaintiff in error that the judgment of this court entered October 8, 1902, set the entire case at large, and upon the second trial relieved it from the rule prevailing in the United States courts that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit.

In appellate proceedings the rule was stated by the Supreme Court in *Browder v. McArthur*, 7 Wheat. 58, 5 L. Ed. 397, as follows:

"It was too late to grant a rehearing in a cause, after it had been remitted to the court below, to carry into effect the decree of this court, according to its mandate; and that a subsequent appeal from the Circuit Court, for supposed error in carrying into effect such mandate, brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree."

In *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. Ed. 1167, a motion was made to reform a mandate issued by the court at a pre-

vious term so as to conform the same to the opinion given by the court at that time. In granting the motion the court stated its opinion of the course prescribed by law for it to take after final action upon a case brought within its appellate jurisdiction. The court said:

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded."

In *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260, the Supreme Court, on a former appeal from the Circuit Court for the Southern District of Illinois, had decided that the mortgage in controversy in the case was valid in favor of bona fide holders of the bonds it was given to secure, and that the complainants were entitled to a decree for the amount of the bonds held by them. The direction of the Supreme Court, as stated in the opinion in that case, was that the judgment of the Circuit Court must be reversed and a new trial had. In accordance with this direction the Circuit Court upon the new trial appears to have opened up the case for a further hearing upon issues presented and decided upon the first appeal. On the second appeal the Supreme Court refused to consider these questions, referring to the fact that technically there could be no "new trial" in a suit in equity, and holding that the mandate of the court was to be interpreted according to the subject-matter of the proceedings before the Supreme Court, and if possible so as not to cause injustice; that it was proper to inquire what must have been intended by the use of the term "new trial" in the decree, since it could not have its ordinary meaning, and for the purpose resort might be had to the opinion delivered at the time of the decree, citing the case of *West v. Brashear*, 14 Pet. 51, 10 L. Ed. 350. In refusing, on the second appeal, to consider questions decided on the first appeal, the court said:

"These questions are, therefore, no longer open; for it is settled in this court that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court, after the mandate of this court."

In *Roberts v. Cooper*, 20 How. 481, 15 L. Ed. 969, the case was at law, and was in the Supreme Court on a writ of error. On a previous writ of error the case had been remanded for a new trial (*Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338), and it was contended there, as it is here, that on a review of the case the party is to be heard at large both as to the law and fact. With respect to this contention the court said:

"On the last trial the Circuit Court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled, on a second writ of error in the same case, to review our own decision on the first. It has been settled by the decisions of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out,

it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members."

In *Republican Min. Co. v. Tyler Min. Co.*, 79 Fed. 733, 25 C. C. A. 178, this court had before it the question whether the owner of a mining claim was deprived of the extralateral right pertaining to a vein apexing within the boundaries of his claim because the vein, although entering the claim through an end line and running its course lengthwise nearly parallel with the side lines for the greater part of the length of the claim, passes out of the claim across a side line before it reaches the other end line. The question had been decided by the court, upon a previous writ of error, in favor of the extralateral right claimed by the owner of the vein, and accordingly the court held that, where a case has been brought before an appellate court and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error. In the case of the *Mutual Reserve Fund Life Ass'n v. Beatty*, 93 Fed. 747, 35 C. C. A. 573, this court again referred to this rule in the following language:

"It is clear that the decision of the Circuit Court of Appeals upon the former writ of error is the law of the case, and, so far as the court has considered the questions at issue, they must be deemed to be *res judicata*, and not open for review at this time."

In *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 456, 18 Sup. Ct. 121, 42 L. Ed. 539, the Supreme Court stated the rule with respect to prior decisions and the authority of the opinion of the court in determining what has been decided, as follows:

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. * * * We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for further disposition of the case."

In the present case this court, on May 14, 1900, entered a judgment of affirmance in accordance with the opinion of the court in the case entitled, in this court, "*Montana Min. Co. v. St. Louis Min. & Mill. Co.*" (102 Fed. 430, 42 C. C. A. 415), and on October 8, 1900, it entered a judgment of reversal in accordance with the opinion of the court in the case entitled, in this court, "*St. Louis Min. & Mill. Co. v. Montana Min. Co.*" (104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725), both cases being writs of error from the same judgment in the court below.

The Supreme Court of the United States was of the opinion that the judgment in the last case operated to reverse the prior judgment of affirmance in the first case (186 U. S. 24, 22 Sup. Ct. 744, 46 L. Ed. 1039). In accordance with this opinion this court entered a single judgment of reversal on October 8, 1902, and directed that a new trial be had. The mandate directed "that such new trial and further proceedings be had in said cause in accordance with the judgment of this court * * * and according to right and justice and the law of the United States ought to be had."

There is certainly nothing in this judgment to indicate a purpose on the part of the court to set aside its decisions rendered in the case. On the contrary, the fact that these decisions were not withdrawn or recalled and the case set at large indicates that the court has no intention of doing so. The decisions were allowed to stand as the opinions of this court upon the issues presented by the writs of error, and hence became the law of the case. The fact that the mandate does not contain a reference to these opinions does not determine that they are without authority.

In the case of *Empire State-Idaho Min. & Dev. Co. v. Hanley*, 136 Fed. 99, 66 C. C. A. 87, this court answered a similar objection in the following language:

"The fact that the views of the court so expressed in the opinion are not contained in the mandate which issued to the lower court renders them no less conclusive as the law of the case"—citing *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539.

We think that all questions considered and determined in our former decisions upon prior writs of error have become the law of the case; that the lower court was right in refusing to disregard such decisions; and that this court is without authority, upon this last writ of error, to reconsider the questions so determined. We, therefore, pass over the assignments of error relating to questions which appear to have been determined in our previous decisions and come to the new questions raised upon the last trial.

After the taking of testimony had been concluded, the plaintiff moved the court for leave to amend the ad damnum clause of the complaint so as to change the allegation claiming \$50,000 damages to an allegation claiming \$400,000 damages. To this amendment the defendant objected, and the court overruled the objection. The ruling is assigned as error. Amendments to pleadings are within the discretion of the court, and error will not lie to the granting or refusal thereof. Section 954, Rev. St. [U. S. Comp. St. 1901, p. 696]; *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800.

The remaining assignments of error relate to the charge of the court to the jury. It appears from the transcript of record that, during the argument of respective counsel, the court directed the attention of counsel on both sides to rule 58 of the court and the decision of this court in *Mountain Copper Company v. Van Buren*, 133 Fed. 1, 66 C. C. A. 151, and *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871, concerning instructions to juries. These decisions require that exceptions to instructions, to be available on writ of error,

must be taken to each instruction specifically, and not to the instructions as a whole, and that the record must show that they were taken and the points of exception designated while the jury were at the bar; that it is improper practice to permit formal exceptions to be then noted and the specifications of objections to be supplied in the record later, the object of the rule being that the attention of the trial court shall be called to the precise point to which exception is taken while it may be remedied by the court and before the case is finally submitted to the jury. Rule 58 of the Circuit Court for the District of Montana appears to be the same as rule 58 of the Circuit Court for the Northern District of California, which permits exceptions to the charge or a refusal to give, as a part of such charge, instructions requested in writing, to be taken by any party by stating to the court, after the jury have retired to consider their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs, or in any other convenient manner, the parts of the charge excepted to and the requested instruction, the refusal to which is excepted to.

The record of the proceedings of the court with respect to instructions to the jury is as follows:

"After delivering the charge, the court, before the going out of the jury for the considering of their verdict, requested counsel to submit any exceptions they might have to the charge, and to the instructions requested and given or refused. Thereupon, before the jury retired, counsel for both parties retired to the judge's room with the charge of the court, which was in writing, in their possession, and prepared in writing such objections and exceptions to the charge and the several parts thereof, and to the refusals to charge, as they desired, and thereafter in court the defendant presented the following exceptions and none other, which were then and there received by the court, and signed and allowed before the jury retired."

The exceptions were as follows:

"The defendant, immediately after the court had charged the jury and before they had left their seats or retired to consider of their verdict, submitted in writing to the court its objections and exceptions to the said charge, and portions thereof, which objections were then and there severally overruled, and defendant then and there duly excepted. The defendant also submitted in writing herein its objections and exceptions to the charges offered by the defendant and refused, which objections were likewise severally overruled, and defendant then and there duly excepted.

"Said objections and exceptions are respectively as follows, to wit."

Then follow 40 exceptions to the refusal of the court to give instructions as requested, and 16 exceptions to instructions given by the court. This bill of exceptions concludes as follows:

"Notice of the foregoing exceptions are given by the defendant and are received and considered by the court before the going out of the jury on this 6th day of July, 1905.

"[Signed]

William H. Hunt, Judge."

The verdict of the jury was returned July 7, 1905. The record contains a second bill of exceptions relating to instructions to the jury, proposed after the trial had closed, as follows:

"In defendant's proposed bill of exceptions, upon July 31, 1905, the defendant stated its exceptions to the charge given by the court, in the following language."

Then follow 10 objections to specific instructions of the court and a statement with respect to each objection that the court overruled the objection and gave the instruction. This part of the bill of exceptions concludes as follows:

"The court declined to allow the exceptions as stated in the proposed bill of defendant, and directed that the bill incorporate the exceptions and objections made and allowed before the jury retired, to which ruling of the court the defendant then and there duly excepted."

Then follows 11 instructions which the defendant requested the court to charge the jury and which the court refused, and the defendant excepted. This second bill of exceptions was signed by the judge and made a part of the record August 14, 1905.

The plaintiff in error contends that this second bill of exceptions, proposed after the close of the trial, may be taken and considered as a part of the bill of exceptions in the case, under rule 58 of the Circuit Court. In *United States v. Carey*, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67, the Supreme Court said:

"The rule is well established and of long standing that an exception, to be of any avail, must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of exceptions duly allowed or otherwise."

In *Beaver v. Taylor*, 93 U. S. 46, 55, 23 L. Ed. 797, 798, the court said:

"One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it and give new and different instructions to the jury, if, in his judgment, it should be proper to do so."

In *Thiede v. Utah Territory*, 159 U. S. 510, 522, 16 Sup. Ct. 62, 40 L. Ed. 237, the verdict in the lower court was returned on October 21st. On November 2d counsel for defendant came into court and sought to save other exceptions to the charge. The court noted those exceptions but declined to make any ruling on them. The Supreme Court said: "Obviously, they were too late."

It has been found that the proceedings connected with the taking of exceptions to the charge of the court in the hearing of the jury has sometimes caused the jury to form a wrong impression of the charge and its purpose. It has also frequently happened that after the jury has retired to deliberate upon their verdict they have returned into court and requested further instructions, and the court, in the absence of counsel, has given such instructions. *Merchants' Exchange Bank v. McGraw*, 76 Fed. 930, 936, 22 C. C. A. 622. Rule 58 of the Circuit Court was intended to provide for those two situations and cannot be construed as establishing a method of procedure in conflict with the long line of decisions of the Supreme Court of the United States, from *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182, to *Thiede v. Utah*, *supra*; besides, the language of the rule does not justify such a construction. It was manifestly intended to permit exceptions to be

taken to the instructions or the refusal to give instructions after the jury had retired to consider their verdict where such a course would be in the interest of justice, and where instructions were given by the court, in the absence of counsel, to permit exceptions to be taken as soon as practicable thereafter.

In the present case, after the judge had instructed the jury, instead of sending the jury out, the judge retired to his chambers and there heard the exceptions to the charge out of the hearing of the jury. This action was in accordance with the spirit and purpose of the rule. It gave the parties ample opportunity to take exceptions without confusing the jury with the proceedings connected with the action of the court in ruling upon a multitude of exceptions; but it was not intended by this permission, and the further provision that exceptions should be taken to the charge if practicable before the verdict had been returned, to give counsel the general permission to take exceptions to the charge after the close of the trial. Such permission would be contrary to the rule of procedure declared by the Supreme Court and by this court in numerous cases. But, conceding that this rule was subject to the construction contended for by plaintiff in error, it was subject to another well-established rule, that it is always in the power of a court to suspend its own rules or to except a particular case from their operation whenever the purpose of justice requires it. *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900. This was manifestly such a case, and the action of the court is to be commended rather than made a subject of criticism.

This second bill of exceptions cannot, therefore, be considered. It was not submitted in accordance with the instructions nor in accordance with the rule of the court.

In the first bill of exceptions many of the objections to the instructions of the court were noted in general terms, as, for example, that the instruction "does not correctly state the law," or is "contrary to law," or is "not sufficiently guarded," or is "misleading," or "inapplicable." These objections were not sufficiently specific and direct to call the attention of the court to the specific point claimed to be erroneous. They did not furnish the court with the information necessary to enable it to correct inaccurate, inadvertent or misleading expressions, if any such there were. *Merchants' Exchange Bank v. McGraw*, 76 Fed. 930, 936, 22 C. C. A. 622. Objections are also now urged to instructions which were not noted or presented to the court below in any form. None of these objections can now be considered. In paragraph 5 of the instructions the court instructed the jury as follows:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute and upon its discovery vein, as the question of damages. But if the plaintiff makes a prima facie case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133 foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this prima facie case and these presumptions by showing, to the satisfaction of the jury, that plaintiff has no extralateral rights."

To this instruction the plaintiff in error interposed the objection (1) that the burden of proof never shifts as to extralateral rights for a

discovery vein, and (2) that whoever has the burden is only required to establish the fact by a fair preponderance of the evidence, and (3) that this charge does not correctly state the law. The court afterward instructed the jury, in paragraph 7, as follows:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis quartz lode mining claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis claim."

There was no exception taken to this latter instruction. It was strictly in accordance with the pleadings and the facts stated were admitted facts in the case, and further than this, the previous decisions of this court had determined that the St. Louis Company owned the mineral in this vein within the planes described, and such determination had become the law of the case.

The fifth paragraph of the instructions of the court, to which objection is urged, could not, therefore, prejudice any right of the plaintiff in error. If the instruction is open to any criticism, it would seem to be that the extralateral rights of the discovery vein were not in issue in the case. The only question in controversy under the pleadings was whether the St. Louis Company had conveyed the extralateral rights of the Drumlummon vein to the Montana Company by the deed of July 1, 1895, and if it had not, the damages sustained by the St. Louis Company by reason of the trespass of the Montana Company upon that vein. The first of these questions had been determined by this court in favor of the St. Louis Company, and the second question was being determined in the trial then in progress. Whether the plaintiff had made a prima facie case of extralateral rights to either the discovery or Drumlummon veins was therefore immaterial. It had been determined upon the admitted facts in the case that the Drumlummon vein had such extralateral rights, and that that was all that was necessary to be established to entitle the plaintiff to recover. The instruction that "the defendant must overcome this prima facie case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights," was also immaterial and did the plaintiff in error no injury, even if open to the objections urged against the instruction.

In paragraph 8 the court instructed the jury as follows:

"If you find that the course or strike of the discovery vein in the St. Louis mining claim, as disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location.

"And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and 133 foot planes, that the discovery vein of the St. Louis claim should pass through either end line of said claim, but it is sufficient to give such rights

if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between such planes generally lengthwise of the claim."

To this instruction the defendant excepted, on the ground that it was contrary to the law in that no presumption whatever arises with reference to the course of the discovery vein.

The answer to the objection urged against paragraph 5 of the instructions is a sufficient answer to this objection. If, however, the course, length, and dip of the discovery vein in the St. Louis claim were facts material to the question of the extralateral rights of the Drumlummon vein between the 520 and the 133 foot planes, then the court covered the entire subject in paragraph 9 of the instructions, as follows:

"And If you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) runs lengthwise of the St. Louis claim between its side lines, and extends from the 520 to the 133 foot plane, and dips easterly, then plaintiff would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apexes within the same limits, and running in the same general direction."

To this instruction no exception was taken.

In paragraph 25 the court instructed the jury as follows:

"When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in his favor, but that the evidence of each party upon the issue is equal in your judgment, it is your duty to find such issue against the party having the burden of proof, under the instructions."

To this instruction no exception was taken.

All these instructions must be taken together. They qualify each other, and, considered in that light, we do not think plaintiff in error was prejudiced by the instructions as to the burden of proof as given in paragraphs 5 and 8 under any view of the case, either as to the law or the facts on which the case was submitted to the jury. The use of the word "satisfaction" in paragraphs 5 and 8 of the instructions is specifically objected to on the ground that it required the plaintiff in error to furnish a higher degree of proof than the law demands. What has been said about the burden of proof is applicable to this objection. Assuming that the word is objectionable, it did not injure the plaintiff in error, as it related to a question not in issue on that trial.

The plaintiff in error contends that the instructions concerning the measure of damages were erroneous. The instructions objected to are contained in paragraphs 11, 17, 18, 19, and 32 of the instructions of the court. To paragraph 11 no exception was taken at the trial. In paragraph 17 of the instructions, the court instructed the jury as follows:

"If, from the evidence before you, it appears to your satisfaction that, since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock, and ore, within the planes described in the complaint, from said vein, lead, or lode,

belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass, cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injuries it has sustained."

To this instruction the defendant excepted "for that it is contrary to law, is not sufficiently guarded, and is misleading to the jury." Plaintiff in error contends that in this instruction the court instructed the jury that, as to all ore dug after the commencement of the suit, it was charged with knowledge and notice of the plaintiff's title, and therefore could not be an innocent or other than a willful trespasser. The instruction does not appear to be open to such an interpretation. It was plainly intended to direct the attention of the jury to a question of evidence and to instruct the jury that after the defendant had received notice and knowledge of plaintiff's claim of title to the ore in the vein in controversy the defendant should not be permitted to benefit by its trespass by placing or leaving evidence of the extent of such trespass uncertain. In other words, after notice it was the duty of the defendant to keep a correct record of the quantity and value of the ore extracted, and, failing to do so, it was not to be benefited by this failure; the jury was to award just compensation for the damages sustained by the plaintiff by reason of the trespass. If this is not the correct interpretation of the instruction, it was the duty of the plaintiff in error, in taking its exception at the trial, to point out the precise point of the objection, that the court might have made the instruction clear and direct with respect to the matter involved. Failing to do this, the instruction is not now open to the objection urged against it.

Paragraph 18 of the instructions was as follows:

"The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the money expended in the running of levels, sinking shafts, or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill, and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant or any salaries paid to its officers, or any wages to any persons except those actually employed and engaged in extraction, transportation, and milling of the ores in question."

To this instruction defendant excepted, "for that it is contrary to law and does not correctly define what mining and milling expenses may be deducted." Plaintiff in error now contends that instruction No. 11 (to which no exception was taken) and instruction No. 18 practically told the jury that a willful trespasser could have no credit either for extraction or for cost of treatment or handling, and that the court declined to advance the correct rule by refusing its requested instruction No. 43. This last instruction is not in the record and we are not advised as to its terms; and

instruction No. 18 is not subject to the objection now urged against it. Paragraph 19 of the instructions was as follows:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim, and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries. And therefore I instruct you that, in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom."

To this instruction defendant excepted "for the reason that it does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case."

In *Montana Min. Company v. St. Louis Min. & Mill. Company*, 102 Fed. 430, 435, 42 C. C. A. 415 (one of the former decisions of this court in this case), this court held that the possession of the surface of a mining claim is the possession of a vein or lode having its apex within the surface lines of the claim, although extending downward such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein beneath the surface of an adjoining claim.

Plaintiff in error contends that the court was in error in instructing the jury that the good faith and honest intent of the defendant in trespassing upon the vein in controversy and in extracting ore therefrom must be sufficient to excuse a similar trespass committed upon and within the surface boundaries of the St. Louis claim; that the instruction denied to the plaintiff the benefit of the inference resulting from the work being done within its own surface, and directed the jury in effect to disregard all the peculiar facts bearing on the title to the compromise strip and the present litigation with reference thereto in evidence in that case when considering the issue of honest belief of ownership. The instruction did not direct the jury to disregard any fact tending to show good faith and honest intent. It simply stated that the evidence of good faith and honest intent must be the same in both cases, and this was clearly correct. There cannot be one measure of good faith and honest intent in one case and a different one in the other. The facts may be different, but good faith and honest intent remain the same. In paragraph 12 of the instructions, the court made it clear that all facts and circumstances were to be considered by the jury in determining the question of good faith. The instruction of the court in that paragraph was as follows:

"In determining the question of the good faith of defendant in extracting and removing the ore in question, you are entitled to consider all the facts and circumstances shown by the evidence. If you find that the defendant acted under an honest belief that it was the owner of the ore in the disputed

ground, and had good right and lawful authority to extract the same, and that such belief was based upon such facts and circumstances as that you believe that an ordinary man, acting as you find the defendant acted, would have had the honest belief that he owned such ore and had a right to remove it, then the trespass was not willful."

In paragraph 32 of the instructions the court instructed the jury as follows:

"In considering any ore extracted from block 8, part of which was removed under the authority of this court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to, or were left in the possession of, the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed, you should make a deduction in accordance with the general rule laid down in the charge."

To this instruction the defendant excepted "for the reason that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it." It is urged, however, that the court charged the jury, in effect, that they should give no credit for ores held by the defendant under injunction process secured by the plaintiff itself, because it told them that defendant must have offered or left the ores in the possession of the plaintiff and proved their value, and this in face of the fact that the injunction order directed the defendant not to give them to any one, and the further fact that such surrender would have been an abandonment of defendant's claim of title, which formed the basis of its defense in the injunction suit. It appears that this question was before this court in the case reported in 102 Fed. 436, 42 C. C. A. 415. Discussing this matter, the court said:

"Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from 'disposing of, treating, and reducing any ores heretofore removed or extracted from said premises,' for the reason that such ores were held subject to the order of the court, and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ores had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or left in the possession of, the defendant in error, and to have submitted evidence of their value."

We think this is a sufficient answer to this objection.

We have carefully examined the instructions as a whole, and we find them clear, direct, and in conformity with the law. Where, upon the evidence before the court, they have referred to questions admitted by the pleadings or previously determined by this court, they have in no way prejudiced the rights of the plaintiff in error.

Finding no error in the record, the judgment of the court below is affirmed.

CONDERMAN v. CLEMENTS.

(Circuit Court of Appeals, Fourth Circuit. July 14, 1906.)

No. 589.

1. PATENTS--INVENTION--PLEASURE WHEEL.

The Conderman patent, No. 669,621, for a pleasure wheel similar to the Ferris wheel, except that it is lighter and the parts are detachable, so that it may be taken apart to facilitate its transportation from place to place, is void for lack of invention; the only changes over prior portable structures of the kind being such as required only mechanical skill to make.

2. SAME--SUIT FOR INFRINGEMENT--DEFENSE OF LACK OF INVENTION.

It is the duty of the court to dismiss a suit brought to restrain infringement of a patent where the structure is not patentable, even though the defense be not set up in the answer.

Appeal from the Circuit Court of the United States for the District of Maryland, at Baltimore.

Infringement of patent No. 669,621, dated March 12, 1901, on application filed September 4, 1900, for "improvement in pleasure wheels" granted to J. G. Conderman.

The following is the opinion of Morris, District Judge:

In this case, although it has been fully argued by counsel for both parties, there has been put in by the defendant no admissible testimony, and the sole defense relied upon is want of patentable invention in the complainant's device apparent upon an inspection of the letters patent and a consideration of complainant's testimony. The patent is for a rotating structure for carrying passengers up to some elevation in the air after the manner of the well-known Ferris wheel. It differs from the Ferris wheel because it is intended to be transported from place to place, and set up and taken down as frequently as the effort to reach a new and profitable location for operation requires. The specification states "this invention pertains to improvements in that class of pleasure wheels in which a skeleton wheel turns on a horizontal axis, and carries a circumferential series of cars or seats for the passengers, the object of the improvement being to secure safety, lightness, ease of running, perfection of control, and facility for quick and easy erection and razing. The improvements will be readily understood from the following description taken in connection with the accompanying drawings," and then follows a most minute and detailed statement of the various beams, cross-ties, truss rods, base beams, uprights, guy rods, turn-buckles, gallows frames, axles, spokes, ties for securing the spokes and a driving shaft, counter-shaft, separable seats and a brake mechanism. All (87) these members are described as separable from each other and capable of being readily taken apart and transported on cars or wagons. No special feature is designated in the specifications as new in function, operation, or result, and the 21 claims are simply for so many combinations, of the separable parts, the essential claim in each being that the parts are constructed so as to be detachable one from the other to the end that they may be readily assembled for installation or disassembled for transportation.

The first claim is as follows, and the others are similar in that the elements of each combination are stated to be separable, removable, or detachable: "I claim as my invention—(1) In a pleasure-wheel, the combination substantially as set forth a separable parallel pair of base-beams, a separable pair of base-beams disposed over the first pair of base-beams and secured at right angles thereto, two separable uprights supported by the base-beams, providing a clear space between said uprights, separable guys extending from the top of the uprights to the extremities of the intersecting base-beams, and a separ-

able wheel journaled in boxes carried at the upper ends of the uprights." It must be conceded that all the parts and all the devices by which the parts are made detachable, and all the devices by which they can be made fast to each other and drawn tight are in common use for the several purposes for which they are used in this construction. It must be conceded also that the idea of making structures similar to complainant's, which are used at fairs and with traveling shows, so that they can be readily taken down and set up again is not a new idea. Merry-go-rounds and swings, and similar amusement devices are commonly so constructed. As complainant's structure differs from the Ferris wheel and similar observation wheels only in its parts being light and separable, if his patent is sustained he will probably have a monopoly of all portable pleasure wheels of this class without having been the first to conceive the idea of a portable wheel, and without having invented any new device entering into its construction. If Conderman had constructed a permanent wheel precisely as he did the one patented except that instead of its parts being detachable they had been fastened together by rivets and bolts and the structure anchored in the ground it would not be contended that he had invented anything. He would simply have made a lighter and less costly Ferris wheel. Can it be said that connecting the parts together with hooks and detachable fasteners required invention? It seems to me that once having determined to construct a portable wheel all that was done by Conderman was the result of only mechanical skill and experiment. The only element of the combination that would not be found in a permanently stationary pleasure wheel of the same class is the separable pair of base-beams disposed over the first pair of base-beams and secured at right angles thereto. But this device for supporting a movable upright is frequently seen in music stands, reading desks, work tables, and many larger articles as well, except that they are not usually made separable.

The deposition of Jay G. Conderman, who, as the inventor, applied for the patent, narrates how he contrived his first pleasure wheel, and his deposition is perfectly consistent with mere mechanical experiment. He says that he completed the first wheel about March 1, 1899. That in its construction he met with numerous mechanical difficulties and had to rebuild and strengthen different parts. That the wheel was not strong enough to carry the passengers, and was not easily set up and taken down, and he had to rebuild and renew different parts, and finding that the spokes of the wheel would bend when the wheel was stopped or started he had to put in extra braces, and he was kept constantly studying out the proper strength of the working parts, and how to remedy their defects. This is the substance of all that he himself claims to have done.

Undoubtedly, it requires enterprise to risk the success commercially of investing money and labor in such a structure, and undoubtedly it required thought and experiment to determine how light the parts could be safely made, what guys were required to support the structure, and how many rods were required to stiffen the wheel so as to prevent bending the spokes in starting and stopping. All these were matters of detail requiring mechanical skill and experiment, but that is quite a different thing from invention. All the parts act together just as they would if permanently fastened, their mode of operation and their functions are precisely the same. It is only the convenience of being detachable that differentiates one construction from the other. The following are among the cases which discuss the difference between patentable invention and mere mechanical skill, viz.: *Morris v. McMillin*, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702; *Pope Mfg. Co. v. Gormully*, 144 U. S. 254, 12 Sup. Ct. 643, 36 L. Ed. 426; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707; *Thatcher Heating Co. v. Burtis*, 121 U. S. 286-294, 7 Sup. Ct. 1034, 30 L. Ed. 942; *Palmer v. Corning*, 156 U. S. 342, 15 Sup. Ct. 381, 39 L. Ed. 445; *Consolidated Roller Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292, 34 L. Ed. 920.

The complainant's assignor, no doubt, has the merit of having constructed a practically portable pleasure wheel which has proved a success, but I have not been able to bring myself to decree in her favor for the reason that I cannot come to the conclusion that what her assignor produced has any element

of invention that can be made the subject of a patent. It is the duty of the court to dismiss a suit brought to restrain infringement where the structure is not patentable even although the defense be not set up in the answer. *Slawson v. Grand St., P. P. & F. R. Co.*, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576; *Brown v. Piper*, 91 U. S. 41, 23 L. Ed. 200; *Terhune v. Phillips*, 99 U. S. 592, 25 L. Ed. 293.

It is urged that the fact that the complainant obtained a decree for a perpetual injunction against a similar infringer in the case of *Conderman v. Johnson*, in the Circuit Court of the United States for the District of Indiana, is an adjudication sustaining the patent which should have weight in this litigation. It sufficiently appears, however, in that decree, a copy of which is filed as an exhibit, that the case was undefended, and the court is careful to state that it was only in view of the prima facie validity of the patent that it was held valid.

I am of the opinion that the injunction must be refused, and the bill dismissed.

Fenelon B. Brock, for appellant.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. There is no error in the decree appealed from, and the same is affirmed.

CRAMER v. SINGER MFG. CO.*

(Circuit Court of Appeals, Ninth Circuit. August 13, 1900.)

No. 1,184.

1. WRIT OF ERROR—REVERSAL—COMPLIANCE WITH MANDATE.

The Supreme Court having *held* in an action at law for the infringement of a patent by the device of another patent, that from a comparison of the two patents alone, without the aid of extrinsic evidence, it appeared that there was no infringement, and remanded the case to the Circuit Court for a new trial, that court was required on such trial to direct a verdict for defendant regardless of any new evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4651.]

2. PATENTS—INFRINGEMENT—SEWING MACHINE TREADLE.

The Cramer patent No. 271,426 for a sewing machine treadle is not infringed by the device of the Diehl patent No. 306,469.

In Error to the Circuit Court of the United States for the Northern District of California.

John H. Miller, for plaintiff in error.

M. A. Wheaton, I. M. Kalloch, and Charles K. Offield, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error brought this action against the defendant in error to recover damages for an alleged infringement of the first claim of Letters Patent No. 271,426, issued to him January 30, 1883, for a new and improved sewing machine treadle. The machines which were manufactured by the defendant in error, and which it was alleged infringed upon the Cramer patent,

*Rehearing denied October 29, 1906.

were made under Letters Patent No. 306,469, issued October 14, 1884, to Philip Diehl, for "sewing machine stand and treadle." Claim 1 of the Cramer patent reads as follows:

"The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified."

The specification described the treadle as provided with two trunnions cast as a solid portion thereof, and extending from its sides into loopholes in the vertical double brace, the trunnions being sharpened to an edge or corner along their lower sides, and the lower end of the loopholes being hollowed to an angle more obtuse than the edge of the trunnion, to serve as bearings for the same and to permit the rocking motion common to treadles. The inventor proceeded to say:

"I am aware that sewing machine treadles have before been provided with V-shaped bearings, and I do not claim the same as my invention." *Singer Mfg. Co. v. Cramer*, 109 Fed. 653, 48 C. C. A. 588.

The trial of the action in the Circuit Court having resulted in a verdict for the plaintiff thereto in the sum of \$12,456, and the case being brought here upon writ of error, that judgment was affirmed in the opinion reported in the volume cited, in which we held, among other things, that whether or not the Diehl device infringed the first claim of the Cramer patent was a question of fact for the jury upon the evidence in the case, and not a question of law for the court.

Subsequently, the case was taken to the Supreme Court by writ of certiorari, where the judgment of this court, as well as that of the Circuit Court were reversed, and the cause remanded to the Circuit Court, with directions to grant a new trial, and for further proceedings not inconsistent with the opinion of the Supreme Court. That new trial was had, and upon the conclusion of all of the evidence, the defendant to the suit moved the court for a peremptory instruction to the jury to return a verdict in its favor, which motion was granted, and a judgment for the defendant was duly entered.

The case is again brought here by writ of error, this time by the plaintiff below, upon the contention that the evidence given upon the last trial shows the facts of the case to be in some respects different from those shown when the case was passed upon by the Supreme Court. It is contended by counsel for the plaintiff in error that while it is true that it was old in the art to use diagonal vertical braces for the purpose of keeping the legs of the machine apart, it did not appear, when the case was before the Supreme Court, that, prior to Cramer's invention, there was no such brace which, while performing that office, also performed the duty of supporting the treadle, which latter fact, it is claimed by the plaintiff in error, was made to appear by the evidence given on the last trial. His counsel also say that in the evidence given on the former trial, it appeared as an unquestioned fact that oscillating shafts, having both bearings mounted in a single casting, were found in the prior art, to wit, in saw arbors, lathes,

and engines, whereas it is claimed by him that the evidence in the present record shows without conflict that neither saw arbors, nor lathes, nor high-speed engines ever contained or used oscillating shafts, or any other kind of a shaft but a revolving one. And it is strenuously insisted by the learned counsel for the plaintiff in error that the finding by the Supreme Court in the prior art of oscillating shafts having their two bearings mounted in a single casting, was essential to the sustaining of its decision that the Cramer invention was not of a pioneer character. We do not so read the decision. In considering the character of the invention, the Supreme Court said:

"To ascertain whether the patented invention of Cramer is entitled to be embraced within the term 'pioneer' as just defined, we will consider it in connection with the state of the art.

"In the history of the art it is unquestioned that long prior to the application by Cramer for the grant of the patent in question, devices similar to the vertical cross-brace C and the lower crossbar or tie-rod D, shown in the drawing of the Cramer patent, were commonly employed in sewing machines. This is conceded by Cramer in statements made in the progress of his application through the Patent Office. Thus, in the specification which forms a part of the patent the vertical brace C is referred to (*italics not in original*) as 'the *common* cast iron brace C,' and 'the *usual* cast iron double brace'; while in the first of the proposed specifications as well as in that which was finally adopted, the lower bar or tie-rod D is referred to (*italics not in original*) as 'the *common* cross-brace or crossbar.' And in both the first and second specifications the usual purpose subserved in sewing machines by this crossbar was 'to keep them (the machines) from spreading apart.' It is, of course, obvious that such was also the purpose of the employment of the vertical double or cross-brace.

"The vertical double cross-brace C, as shown in the Cramer drawing, is a solid piece of casting. But it is also an undisputed fact that long prior to the alleged invention of Cramer it was a well-known method of construction when revolving or oscillating shafts were to be placed in bearings, or supports, to have both bearings, or supports, of such shafts attached to a solid metal casting. Instances of such practices, testified to by witnesses, may be referred to. One was a device to hold a saw mandrel or saw arbor, the former being cast in one piece for the purpose of connecting both journals of the arbor to keep it in absolute line. Another device is the headstock of an ordinary engine lathe or machine lathe, where in order to have a proper working machine it is absolutely necessary that the shaft bearings shall be in exact alignment with each other and firmly in one place. Still another illustrative device employed for a great many years is embodied in a high-speed engine. So, also, in the sewing machine art, as evidenced by the Willcox patent No. 166,242 of date August 9, 1870, to be hereafter noticed, the legs of sewing machines had, long before Cramer's application been used as bearings for treadle bars, the bearings being cored out of the leg castings.

"A vertical cross-brace and a lower cross-brace or tie-rod being common adjuncts of sewing machines at the time of Cramer's alleged invention, and it being also customary to support the lower cross-rod or brace in the web of the legs of sewing machines, and to utilize the legs as bearings, and it being old in machinery to employ solid castings as bearings or supports for oscillating shafts where a fixed alignment was essential, we readily conclude that there was no merit in the mere conception or idea that a vertical double brace was capable of being advantageously utilized as bearings for sewing machine treadles, and that the devising of means for so utilizing such a brace did not involve such an exercise of the inventive faculty as entitled Cramer to assert in himself a right to claim a patent broadly for the use in combination of a vertical double brace and a sewing machine treadle. In view of this and of the fact that the principal elements of

the Cramer combination were old, we hold that the Cramer patent was not a primary one, and that it is not, therefore, entitled to receive the broad construction which has been claimed for it."

We think it clear that the reference thus made by the court to the extrinsic evidence was merely in aid of the conclusion it reached in view of the written instruments, which was, of itself, conclusive of the question, and, of course, binding on the court below and on us. Indeed, this is plainly shown in the express language of the court itself, in the beginning of its opinion, where it said:

"As in each of the patents in question it is apparent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject-matter, and as we are able from mere comparison to comprehend what are the inventions described in each patent, and from such comparison to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law, and susceptible of determination on this writ of error. *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Market Street Cable Ry. Co. v. Rowely*, 155 U. S. 621, 625, 15 Sup. Ct. 224, 39 L. Ed. 284."

The Supreme Court having thus held, upon a consideration of the written instruments themselves, that the Cramer invention was not of a pioneer character, and that the alleged infringing device is essentially different in construction from that of Cramer, there was nothing left for the court below to do on the last trial of the case but to follow the decision of the Supreme Court, and instruct the jury as it did to render a verdict for the defendant, nor for this court to do but to affirm that judgment.

The judgment is affirmed.

ALEXANDER CAR REPLACER MFG. CO. v. HEITZMANN TOOL & SUPPLY CO.

(Circuit Court, D. New Jersey. August 27, 1906.)

PATENTS—INFRINGEMENT—CAR REPLACER.

The Alexander patent No. 523,563 for a car replacer, claim 3, covering a device for use in replacing the wheels of derailed cars or locomotives on the track, construed and *held* not infringed.

In Equity.

William C. Strawbridge, for complainant.

Albert M. Austin and Alfred W. Kiddle, for defendant.

LANNING, District Judge. By this suit the complainant seeks an injunction to restrain the defendant from an alleged infringement of patent No. 523,563, for improvements in car replacers, granted July 24, 1894, to Robert E. Alexander, and by him subsequently assigned to the complainant. Claim 3 of the patent only is alleged to be infringed. That claim is as follows:

"A car replacing member consisting of a grooved guide, substantially as described, having an apical portion, and a sloping inner side arranged to lie alongside of, and to diverge away from, the rail at the central or apical portion, whereby the ends of the replacers can be adjusted toward and away from the rail, as and for the purposes set forth."

The "grooved guide" here mentioned is declared to be "substantially as described." Reverting to the specification which forms a part of the letters patent, and the accompanying drawings, for a description of it, we find that it is necessary to use two "car replacing members" in replacing upon a track any pair of wheels of a derailed car or locomotive. One of them is designed for use in replacing the wheel that rests between the two rails of the track, and the other in replacing the wheel that rests outside of the track. The "member" designed for outside use is higher at its apex than the other in order that the flange of the wheel may pass over the rail on which the outside wheel is to be replaced. Each of the "members" is constructed with an upwardly inclined longitudinal groove on its upper surface which diagonally approaches the rail from its lowest point to the apex of the "member." As the inside wheel mounts the inside "member" its flange travels in the groove of that "member," and, as the outside wheel mounts the outside "member," the tread of the wheel travels on the outer ridge of the groove while the flange of the wheel is crowded toward and over the rail by the outer ridge. As the ridge next to the rail in each of the "members" approaches the apex it gradually vanishes so that, at the apex, the surface of the "member" on the side next to the rail is a laterally inclined plane (or, as it is called in claim 3, a "sloping inner side") descending to the top of the rail. When the opposite wheels of a car or locomotive reach these apices the weight of the car or locomotive causes the wheels to slide down the inclined plane onto the rails. Each of the "members" is horizontally bow-shaped, and the

manner of construction between the apex and each end is the same. As the apex is in the middle of the bow-shaped "member" and as, in operative position, the apex of the "member" must be close to the rail, it will be observed that the "member" may be placed for use either in front or back of a derailed wheel. Such, as I understand it, is the substance of the invention described in claim 3 of the patent in suit, and the manner of its operation.

The longitudinal groove on the defendant's inside replacer is continuous from one end of the replacer to the other, and consequently, it has no inclined plane at the apex down which the wheel may slide. The defendant's outside replacer has a tread on which the tread of the outside wheel travels. The flange of the inside wheel travels in the groove of the inside replacer not only up to the apex, but over the apex and down the other side, gradually approaching the rail laterally, and also gradually descending from the apex, until the tread of the wheel rolls upon the upper surface of the rail. The tread of the outside wheel travels on the tread of the outside replacer not only up to the apex, but over the apex and down the other side, the flange of the wheel passing diagonally over the rail and thus allowing the tread of the wheel to roll upon the upper surface of the rail. The defendant's replacers are not bow-shaped but angular, and the apices are not necessarily placed adjacent to the rails. It thus appears that the defendant's replacers differ from those of the complainant in construction and in operation. Furthermore, the evidence shows that a derailed car or locomotive is placed on the track by the use of the defendant's replacers with much less jar or concussion than when the complainant's replacers are used. These facts disclose essential differences between the two types, and make it clear that the defendant is not guilty of the alleged infringement.

This conclusion renders it unnecessary to consider the defense concerning the alleged invalidity of claim 3 of the patent. There will be a decree dismissing the bill, with costs, on the ground that the proofs fail to show infringement.

PERFECTION PILE-PRESERVING CO. v. UNITED STATES.

(Circuit Court. W. D. Washington, N. D. July 24, 1905.)

No. 1,261 (1,701).

CUSTOMS DUTIES—CLASSIFICATION—ROUND TIMBER.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule D, pars. 194, 196, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646], provide, respectively, for "round timber used in building wharves," and for electric light poles, etc.; and paragraph 699, Free List, § 2, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], enumerates "round unmanufactured timber * * * not specially provided for." *Held*, that any round sticks which in their shape as imported are used for any of the purposes specified in said paragraphs 194 and 196, either in the rough or finished, are subject to classification under those paragraphs, rather than under paragraph 699.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below overruled the importers' protest against the assessment of duty by the collector of customs at the port of Port Townsend. Note G. A. 5,715 (T. D. 25,407).

Vince H. Faben and John L. Stout, for importers.
Jesse A. Frye, U. S. Atty.

HANFORD, District Judge. The question to be decided in this case is whether timber imported to be used in its natural round shape in the construction of wharves or as spars may be entered free of duty in a rough condition before being shaved or dressed and prepared for use. There is no important difference between the parties with respect to the material facts. The logs were in fact imported in a rough condition; and part of them were used in this country as piles in the construction of wharves, and part were used for poles to support electric light wires, after additional work had been performed in adapting them for such uses, including the operation of creosoting them.

Referring to the Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646], we find that Schedule D specifies the tariff rate on different kinds of timber, including sawed boards, planks, laths, pickets, railroad ties, and most every variety of timber in a manufactured state. Paragraph 194 fixes a rate of 1 cent per cubic foot upon "timber hewn, sided, or squared (not less than eight inches square), and round timber used for spars or in building wharves;" and paragraph 196 prescribes a rate of 20 per cent. ad valorem upon telephone, trolley, electric light, and telegraph poles of cedar or other woods. Then, turning to the free list, we find that section 2, par. 699, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], exempts:

"Logs and round unmanufactured timber, including pulp-woods, firewood, handle-bolts, shingle bolts, gun-blocks for gun-stocks rough hewn or sawed or planed on one side, hop-poles, ship-timber and ship-planking; all the foregoing not specially provided for in this Act."

This enumeration indicates very strongly the intention of Congress to restrict the free importation of timber to raw material for consumption by manufacturers in this country; and it is my opinion that this paragraph does not include any round sticks to be used in that shape for any of the purposes specified in paragraphs 194 and 196, whether in a rough condition or dressed and finished complete for use at the time of entry.

I therefore confirm the decision of the Board of General Appraisers with respect to the importation of the timber involved in this case.

BOWKER v. HAIGHT & FREESE CO.

(Circuit Court, S. D. New York. June 29, 1906.)

CORPORATIONS—INSOLVENCY PROCEEDINGS.

A federal court which is in charge of the assets of an insolvent corporation by its receivers will not interfere with an action in a state court in which a judgment has been rendered against the corporation by directing it not to appeal therefrom, where such appeal will not involve expense to the estate.

See 140 Fed. 795; 146 Fed. 256.

Win. P. Maloney, for complainant.

Franklin Bien, for defendants.

LACOMBE, Circuit Judge. If the Haight & Freese Company, defendant in the state suit, were refusing to appeal from a judgment which was a claim against its assets, this court might instruct the receivers representing the general body of creditors to prosecute such appeal, so as to protect such assets. But upon what theory it can direct the corporation not to appeal from such judgment, if it chooses to do so at its own expense, is not entirely clear. Certainly there is no reason why it should do so, or why it should interfere in any way with the state court suit. As that litigation now stands, there is a judgment which the surety company is bound to pay, and such company holds collateral formerly of Haight & Freese Company out of which to repay itself. It is now proposed that such collateral be left with the surety company pending an appeal to the state Court of Appeals, and that said company become surety upon such appeal. It will be for the surety company to determine that question. If it does not choose to assume the new obligation, it may sell the collateral, pay itself the amount of the judgment, and turn the balance over to the receivers, without prejudice to any claim it may have against the same. If it chooses to become surety on such appeal, and bond in the sum of \$5,000 be given on behalf of Haight & Freese Company to the receivers, conditioned that in the event of failure to sustain such appeal the obligors will pay to the receivers interest at 6 per cent. on the amount of the judgment, and also the amount of any depreciation in such collateral, application will be entertained to allow the securities to remain with the surety company as collateral for its new bond.

Meanwhile the motion is denied. The motion to punish Franklin Bien for contempt is denied. The time to take testimony is apportioned 30 days to complainants for prima facie, 45 days to defendant, and 15 days to complainant for rebuttal, to commence July 2d. The testimony will be taken before John A. Shields, Esq., as examiner. The final disposition of this cause has been most unconscionably delayed. Temporary receivers were appointed more than a year ago, and the taking of proofs has not yet begun. Under these circumstances counsel for both sides are cautioned that they must complete the taking of testimony within the time named. If the testimony be voluminous, the examiner will sit from day to day and will give morning and afternoon sessions. No application by either side for an extension of the time for taking testimony will be favorably considered.

ILLINOIS CENT. R. CO. v. McCALL.

(Circuit Court, E. D. Louisiana. June 1, 1904.)

No. 13,215 (1,583).

CUSTOMS DUTIES—CLASSIFICATION—DEFECTIVE RAILS—SCRAP STEEL.

Steel rails, which are new, but by reason of defects are depreciated in value, but which have not lost their character or identity as rails, are not within the provision in paragraph 122, Schedule C, § 1, Tariff Act July 24, 1897, 30 Stat. 159, c. 11 [U. S. Comp. St. 1901, p. 1637], for "scrap steel * * * fit only to be remanufactured," but are dutiable as "rails," under paragraph 130, 30 Stat. 160 [U. S. Comp. St. 1901, p. 1636], even though they may be intended to be used as scrap iron.

On Application for Review of a Decision of the Board of United States General Appraisers.

These proceedings were brought against Henry McCall, collector of customs at the port of New Orleans, whose assessment of duty on an importation by the petitioners was affirmed by the Board of General Appraisers, December 31, 1903. The merchandise was classified under paragraph 130, Schedule C, § 1, Tariff Act July 24, 1897, 30 Stat. 160, c. 11 [U. S. Comp. St. 1901, p. 1637] as "T-rails," and was claimed by the importers to be dutiable under paragraph 122, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636] the pertinent portion of which reads as follows: "Cast scrap iron, and scrap steel; four dollars per ton; but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel fit only to be remanufactured."

The following is an extract from the opinion of the Board of General Appraisers:

"Fisher, General Appraiser. We find from the record in this case that the merchandise consists of steel rails which have been cut nearly in half, ranging from 12 to 16 feet in length. * * * It appears, further, that the rails are perfectly new, but, by reason of certain defects, their value as a commercial rail has been depreciated. However, the articles are still rails, and have not lost their character or identity as such. While it may be true, as alleged by the importers, that these rails are intended to be used by them as scrap iron, it is not satisfactorily shown that they are 'fit only' for such use. The principle involved here seems to have been well settled by the courts and this Board in *Dwight v. Merritt*, 140 U. S. 213, 11 Sup. Ct. 768, 35 L. Ed. 450, *Downing v. U. S.*, 122 Fed. 445, 58 C. C. A. 427, G. A. 4,659 (T. D. 22,019), G. A. 5,325 (T. D. 24,369) and G. A. 5,369 (T. D. 24,549).

"Following these rulings, we overrule the protest and affirm the decision of the collector."

Gustave Lemle and Andrew H. Wilson, for importers.
W. W. Howe, U. S. Atty.

Extract from Judgment.

PARLANGE, District Judge. It is now ordered, adjudged, and decreed that the decision of the Board of United States General Appraisers, appealed from, by and in this proceeding, be, and the same hereby is, in all things approved and affirmed.

DESPEAUX et al. v. PENNSYLVANIA R. CO.
(Circuit Court, E. D. Pennsylvania. August 2, 1906.)

No. 44.

DEPOSITIONS—ACTIONS AT LAW—RULES OF COURT.

Rule 7, § 4, of the rules of the Circuit Court of the United States for the Eastern District of Pennsylvania, which provides that "on all motions or rules to show cause on the hearing of which facts are to be investigated, the testimony of witnesses shall be taken by deposition in writing, * * * and no witness shall be examined at the bar unless by special previous order of the court," prescribes a mode of practice which it was within the power of the court to adopt, and a witness may lawfully be subpoenaed to give testimony by deposition to be used on such a hearing in an action at law.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 125.]

On Rule to Set Aside Subpoena.

James W. M. Newlin, for plaintiffs.

John Hampton Barnes, for defendant.

HOLLAND, District Judge. After a careful review of the cases cited by counsel and other authorities which the court could find, we are of opinion that the case of *Bank v. Lyons* (C. C.) 134 Fed. 510, was properly decided, and that the facts upon which the present rule was granted are on all fours with those in *Bank v. Lyons*, supra. The subpoena was properly issued, and the witnesses should appear and answer such questions as pertain to the existence of the books and papers called for and which the answer states have been destroyed. This is the only question about which the witnesses can be interrogated.

Rule to show cause why the subpoena should not be set aside is dismissed.

GREAT LAKES TOWING CO. v. WORTHINGTON et al.

(District Court, W. D. New York. August 2, 1906.)

PRINCIPAL AND AGENT—LIABILITY OF AGENT TO THIRD PERSONS—CONTRACT
MADE FOR PRINCIPAL.

A firm of marine insurance agents, known to be such by one employed to render services in behalf of the insurers in releasing a stranded vessel, cannot be held personally liable to pay for such services, in the absence of an agreement expressly binding themselves.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 478.]

In Admiralty.

Goulder, Holding & Masten and Harvey L. Brown, for libellant.
Clinton & Clinton, for respondents.

HAZEL, District Judge. This is a libel in personam to recover the sum of \$15,641.38 and interest, alleged to be due from the respondents

on account of wrecking services rendered in releasing the steamer *Craig*, which was aground on Simmons Reef. After a careful reading and consideration of the evidence, I have reached the conclusion that Mr. Perew was not authorized by the respondents, Worthington & Sill, to create any obligation and liability binding upon them personally in relation to releasing the stranded steamer. He was in fact a so-called wreckmaster of the underwriters of the hull of the vessel, and is not shown to have had any authority to represent the respondents in so far as to render them responsible for any acts or directions regarding the wrecking operations. The evidence is insufficient to show any liability on the part of the respondents, or, indeed, any intention on their part to create a personal liability or to make a promise binding upon them personally to remunerate the libellant for the services rendered.

Respondents had no interest in either the vessel, cargo, or freight. They were marine insurance agents, pure and simple, a fact which was quite familiar to persons interested in navigation on the Lakes. There is no satisfactory evidence that libellant, in furnishing the services and incurring any expense, did so upon the personal credit of Worthington & Sill. On the contrary, their presumed knowledge of the business of the respondents, the latter's connection with the subject-matter, together with the attendant circumstances, were indicative of their representative relation. Libellant made no attempt to ascertain the names of the underwriters, although to do so was not difficult. This omission, in view of the circumstances, is open to the inference that it knew that Worthington & Sill were acting simply as agents for the insurers of the *Craig*. Such being the fact, the respondents, not having expressly bound themselves, cannot, in my opinion, be held liable.

The cases cited by libellant, holding that an agent who conceals his agency and contracts as ostensible principal is liable, are inapplicable. This conclusion renders unnecessary any discussion of the other points elaborately presented in the briefs.

The libel is dismissed, with costs.

MINES v. SCRIBNER et al.

(Circuit Court, S. D. New York. July 7, 1906.)

1. MONOPOLIES—AGREEMENTS IN RESTRAINT OF TRADE.

An agreement by the members of a publishers' association controlling 90 per cent of the book business of the country, under which all agreed not to sell to anyone who would cut prices on copyrighted books, nor to any one who should be known to have sold to others who cut prices, etc., was an agreement relating to interstate trade or commerce, within the anti-trust act. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

2. SAME—CONSPIRACY—RESTRAINT OF TRADE.

Defendants became members of an association of book publishers controlling 90 per cent. of the book business of the country, which association adopted a rule that they would not sell to any one who cut prices

on copyrighted books, nor to any one who should be known to have sold to others at cut prices. A black list was kept containing the names of such persons, and no one on the black list could buy any books of anybody in the scheme. *Held*, that such scheme constituted a conspiracy in restraint of interstate trade or commerce.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

3. COPYRIGHT—EFFECT—EXTENT OF RIGHTS ACQUIRED.

The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a blacklisted purchaser who was known to cut prices.

Theodore Baumeister, for complainant.

Stephen H. Olin, for defendants.

PLATT, District Judge. This is a demurrer to a complaint brought under the United States statute of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Anti-Trust Act." It contends that upon the facts alleged the case cannot be brought within the statute, for several reasons:

1. Because it does not relate to interstate trade or commerce. I think that it does.

2. Because it does not show that the defendants have entered into any contract, combination, or conspiracy in restraint of interstate trade or commerce, nor that they have attempted to monopolize, either directly or by combination, any article which is the subject of such trade or commerce. I think that it does, and let me say just a word in connection with my conclusion. A rapid glance at the case develops, among other things, the following state of affairs: Defendants, with others, became members of the American Publishers' Association, whereby 90 per cent. of the book business of the country was controlled. A rule was adopted and agreed to all around that they would not sell to any one who cut prices on copyrighted books, nor to any one who should be known to have sold to others who cut prices. A black list was to be kept, containing the names of such persons, and no one on that black list could buy any books of anybody in the scheme. Plaintiff got on the black list, could not buy, and was thereby injured, and claims his treble damages.

It is true that this scheme does not prevent each publisher from putting such price as he sees fit upon his copyrighted book; but it compels jobber and retailer to stand by that price, whatever it may be, and if it is broken in any instance it puts such person out of business. It is not content with refusing to deliver any more copies of the particular book upon which he cuts the price, but it closes him out of all dealings on any and every book, copyrighted or not.

The copyright law cannot help the defendants, because, in the first place the restraint is not confined to copyrighted books, and, if it were, it cannot be so that the right given a single publisher to do as he pleases with his copyrighted book can be extended, so that he can combine with other owners of copyrights and permit his book to be subject to the rules laid down by the united owners.

Let the demurrer be overruled.

CLEMENT v. DOWLING.

(Circuit Court, S. D. New York. July 13, 1906.)

PLEADING—COUNTERCLAIM—STATEMENT OF CAUSE OF ACTION.

Where a complaint alleged that plaintiff and defendant placed a completed contract in escrow, to be delivered after the doing of certain things, and that plaintiff used his best endeavors to bring such things about, but defendant did not, by reason of which the contract did not become operative, to plaintiff's damage, and the answer denied the specific allegations of default on defendant's part, a counterclaim for damages because of the failure of the contract to become operative through the alleged failure of plaintiff to use his best endeavors to that end, as agreed, is demurrable, where it fails to show whether defendant agreed to do anything, and, if so, whether he had kept such agreement.

At Law. On demurrer to counterclaim, on the ground that it does not state facts sufficient to constitute a cause of action.

Townsend, Avery & Button, for plaintiff.

Lathan G. Reed, for defendant.

PLATT, District Judge. Lack of time compels me to forego an analysis of the complaint, answer, and counterclaim in this interesting case. The situation finally settles down to about this: A. sues B. In his complaint he sets forth that they placed a completed contract in escrow, to be delivered after the doing of certain things, which could have been brought about, if they had both used their best endeavors thereto. A. used his best endeavors, but B. did not. Therefore B. must pay A. damages for the failure of the original contract to become operative. B. by way of defense puts up various things in his answer, among others denying that they agreed to take certain steps to have the crucial things done, and then by way of counterclaim says that A. agreed to use his best endeavors to have these things done, and that he had not done so, and must therefore pay B. large damages for the failure of the original contract to become operative. B. fails to allege in the counterclaim that he had anything to do in order that the original contract might be delivered, and that he had done the thing which he agreed to do. The complaint contains allegations, as above stated, that B. did have things to do, and had not done them, and the answer prior to the counterclaim practically denies such allegations.

My understanding of the interpretation which has been placed by the New York courts upon those sections of the Code which are important leads me to believe that, as the matter stands, it is conceded by the pleadings, so far as the counterclaim is affected, that B. did fail to do the things which he ought to have done, and that the counterclaim states no cause of action.

The demurrer to the counterclaim is sustained.

G. W. COLE v. COLE'S MANY-USE OIL CO. et al.

(Circuit Court, S. D. New York. July 20, 1906.)

TRADE-MARKS—SUIT FOR INFRINGEMENT—INJUNCTION.

Evidence *held* not to entitle complainant to a permanent injunction against infringement of a trade-mark and unfair competition broader in its terms than a preliminary order which was entered with defendant's consent, and complainant adjudged to pay the costs made since the entry of such order.

In Equity.

James L. Steuart, for complainant.

Archibald Cox and Charles J. McDermott, for defendants.

PLATT, District Judge. This is a bill based upon infringement of a trade-mark and unfair competition in relation to the use of "Three-in-One" oil; the general facts about the article being set forth in *G. W. Cole Co. v. Am. Cement & Oil Co.*, 130 Fed. 703, 65 C. C. A. 105. The complainant in that case has gone through trials and tribulations since then, and the present suit grows out of differences arising among the parties interested. I do not think it is important to set them forth at length. Suffice it to say that Mr. Cole has been forced out of the complainant company, which still tries to retain his personality and influence. Judge Lacombe heard the matter on a motion for preliminary injunction. The defendants then offered to accept an injunctive order restraining them from doing certain things which they admitted ought not to be done. The judge sanctioned such an order, with this addition:

"All other questions raised upon the moving papers are reserved until the final hearing."

We have reached the day of reckoning. The proofs do not appear in any sense to have strengthened the case made upon affidavits, nor to have enlarged the rights of the complainant beyond the points conceded by the defendant at the very start. In fact, it appears that the sources of possible confusion have been stopped by eliminating the wrongful acts which the defendants agreed to cease immediately after notice. The defendants may have offered to give up too much; but, if so, they ought to abide by their offer. They made their own bed, and it is incumbent upon them to occupy it with becoming grace. It appearing that the injunctive order now existing is amply broad, and the matter of costs being a discretionary one, it is clear to me that the complainant must pay all costs which have arisen by reason of its attempt to enlarge the injunctive order by further proof.

Let the order of April 20, 1905, continue in force, with costs to the complainant up to that date, provided, however, that the complainant shall within 30 days pay to the defendants all costs arising since the date of the order referred to. If the matter of costs shall not be adjusted within the time set, then the bill may be dismissed.

WILMORE COAL CO. v. BROWN et al.

(Circuit Court, W. D. Pennsylvania. September 29, 1906.)

No. 26.

1. MINES AND MINERALS—CONVEYANCE OF MINERAL RIGHTS—CONSTRUCTION.

An instrument granting all the coal and minerals in or under certain land, with the right to mine and remove the same, under the law of Pennsylvania operates as a conveyance of title to the coal and minerals in place, whether or not payment therefor is to be made in a lump sum or by a periodical accounting and payment of a royalty, and notwithstanding a term may be fixed within which the coal or mineral is to be taken out; and a condition in such an instrument that a railroad shall be built into the region within five years, otherwise the grant shall be null and void, does not make it an option nor prevent the title from vesting in the grantee, as a condition precedent, but is a condition subsequent.

2. SAME—CONDITION SUBSEQUENT—FORFEITURE FOR DEFAULT.

A condition subsequent in a conveyance of the mineral under certain land, such as a provision that it shall be null and void unless a railroad shall be built in a designated place within five years, inures only to the benefit of the grantor and his privies in blood, and, being a mere right of action to enforce a forfeiture for breach of the covenant, does not pass to a subsequent grantee of the covenant; but a re-entry by the grantor after default, or any equally significant act asserting title and dominion over the thing granted, such as the execution and recording of a second deed conveying the same mineral to another, who takes possession and mines thereunder, operates to divest the title of the first grantee and to re-vest it in the grantor for the benefit of the second. Nor is such divestiture prevented by the fact that at the time of making the second deed, which purports to convey title in fee simple, the grantor by a separate instrument assigns to the grantee all his rights under the first conveyance, although it will be prevented if the second conveyance is expressly made subject to the first, and therefore conveys only the grantor's rights thereunder.

3. SAME—FULFILLMENT OF CONDITION.

A condition in conveyances of coal under certain lands, with the right to mine the same, that they shall be void "if the railroad be not commenced within five years from this date," will not be construed to require the road to be built on any particular line nor by the grantee, but is satisfied if a road is built into the territory by any one near enough to the lands to afford reasonable facility for the shipment of coal to market.

4. DEEDS—CONDITION SUBSEQUENT—CONSTRUCTION.

Conditions subsequent in conveyances are not favored, and an unexpressed term will not be imported into such a condition on which to claim a breach.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 488.]

5. MINES AND MINERALS—COAL LEASE—IMPLIED COVENANT TO MINE WITH DILIGENCE—FORFEITURE.

A conveyance of coal with the right to mine, providing that the grantee shall render an account periodically and pay royalty on the amount mined, carries with it an implied covenant by the grantee to mine with reasonable diligence, even though no minimum quantity be fixed. But the remedy for a breach is not a bill to forfeit or avoid, but an action at law for damages, or possibly an ejectment, based on the right of re-entry for nonperformance; the grantee having an estate in the coal, which cannot be defeated or divested because of covenants broken, it not being so provided in the deed.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 170.]

6. SAME—ABANDONMENT.

A grant of mineral and mining rights, even though it vests the grantee with a legal estate, may be lost by abandonment; what facts are sufficient to work such forfeiture depending to some extent upon the character of the mineral or thing affected.

7. SAME.

Defendant obtained a large number of contracts, denominated "leases," from owners of land, conveying to him the coal and other mineral in and under such land, with the right to mine the same for 99 years, and of renewal in perpetuity. By the terms of the contracts he was to render an account to the lessors every three months and pay royalty at specified rates. *Held*, that his failure for 24 years after the execution of such contracts to take any steps whatever toward the mining or development of any of lands, or to pay any royalties, during which time coal was extensively mined by others in the vicinity and on some of the lands covered by such leases, operated as an abandonment and relinquishment of his rights thereunder, without regard to his actual intent, and notwithstanding his payment of taxes for some years and attempts to sell his rights; the time in which adverse possession of lands would give title under the state statute being 21 years.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 189.]

8. QUIETING TITLE—REMOVAL OF CLOUD—JURISDICTION.

A bill in equity may be maintained in a federal court by a complainant in possession for the cancellation of a number of coal leases held by defendant and affecting different tracts of land as clouds upon the title, where the material facts are not in dispute, there being no adequate legal remedy; and the court is not deprived of jurisdiction by the pendency of actions at law brought by the defendant in another jurisdiction, on some, but not all, of the leases, against another party, and to which actions the complainant is not a party.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 5.]

In Equity. On final hearing.

W. H. Ruppel and D. L. Krebs, for plaintiff.

H. Snowden Marshall and E. T. McNeelis, for defendants.

ARCHBALD, District Judge.¹ This is a bill to remove an alleged cloud on the plaintiff's title. In the years 1878 and 1880, the defendant J. Willcox Brown, a resident of Baltimore, Md., secured a large number of mining leases, aggregating about 16,000 acres, in different tracts, of various sizes, in Somerset county, Pa., as well as a like number in the adjoining counties of Indiana and Cambria, nineteen of which, of the Somerset lot, covering some 2,400 acres, are involved in the present suit. These leases were indentures under seal, and severally undertook, for the consideration, in some cases of \$5 and in some cases of \$10, to grant, bargain, and to sell to the said J. Willcox Brown, his heirs, executors, administrators, and assigns, "all the iron ore, coal, cement, and fire clay, and all other minerals of every kind," under the different tracts described, "including the privilege of boring any number of wells and taking therefrom, by such means as are or may be most practicable, petroleum, carbon, or coal oil, also any salt water that may be found on the premises and manufacturing the same into salt," together with the full and exclusive right, liberty, and privilege of min-

¹Specially assigned.

ing, taking, and carrying away the said iron ore and other minerals, and of using such stones, earth, and water as might be necessary or required for conducting the mining operations. A few acres were reserved around buildings, and enough coal for the grantor's own use, and in some cases such as he might sell to his neighbors. The leases were to run for 99 years; the grantors covenanting at the end of that time to execute other leases of like tenor, for a similar term, renewable forever. In consideration whereof it was aged by the grantee that on the expiration of every three months, whenever any ore or other minerals were mined, quarried, or otherwise reduced to possession and removed from the premises, he would render to the grantor, his heirs, executors, and assigns, a true and correct account thereof, paying for every ton of iron ore ten cents; for every ton of coal, cement, fire clay, or other minerals than iron, five cents; and for every hundred barrels of petroleum or coal oil, and every one hundred bushels of salt, five per cent. of the net profits. The leases were duly acknowledged and put on record in the office for the recording of deeds in Somerset county, Pa., in July, 1880. A copy of one, as a type of all, although they differ in some minor particulars, is reproduced in the margin.²

The section where these leases were located was entirely undeveloped at that time, except for farming, and was discredited as coal or mineral territory by the State Geological Survey. There was no railroad into it, and in view of this it was provided, in somewhat varying terms, in all but four of the leases here in controversy, that unless one was

²This indenture, made this 3d day of January, one thousand eight hundred and seventy-nine, by and between Abraham Weaver, of the county of Somerset and state of Pennsylvania, of the first part, and J. Willcox Brown, of the city of Baltimore and state of Maryland, of the second and other part, witnesseth: That said party of the first part, in consideration of the sum of five dollars, to them in hand paid by the said party of the second part (the receipt whereof is hereby acknowledged), have granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm, unto the said party of the second part, his heirs, executors, administrators, and assigns, all the iron ore, coal, cement, and fire clay, and all other minerals of every kind, including stone or earth, as may be required for mining operations in, upon, and under all that certain tract of land situated in Paint township, county of Somerset, and state aforesaid, and containing one hundred and seventeen acres, more or less, and described as follows: Adjoining land with T. Hays, D. Shaffer, J. Nerenberger, and others (all minerals are to be drifted), with the appurtenances thereto appertaining, together with the full and exclusive right, liberty, and privilege of mining, taking, and carrying away said iron ore and other materials, as heretofore more fully recited, with such control of, rights in, and privilege of using said land and water as may be necessary in conducting mining operations in a full and convenient manner. To have and to hold all the said iron ore and other materials, as is more fully recited heretofore, and all the rights and easements aforesaid, in, upon, through, and under the said tract of land, and the hereditaments and premises hereby granted or mentioned, and intended so to be, unto the said party of the second part, his heirs, executors, administrators, and assigns, to and for his and their only proper use and behoof, for the period of ninety-nine years from the date hereof. The said party of the first part further covenants, for his heirs, executors, administrators, and assigns, that he will, upon the proper demand of the party of the second part, his heirs, executors, administrators, and assigns, and at the expiration of the term herein provided for, and upon tender by the said party of the second part, his heirs,

built within five years they should be null and void. As to those where no such provision appears, it is charged in the bill that there was a verbal undertaking to the same effect by the defendant's agent at the time of securing them. But this is denied in the answer, and the evidence to sustain it is unsatisfactory; and they must therefore be taken as they stand. A railroad being a recognized necessity, however, the defendant Brown, in addition to his leases, busied himself with getting rights of way, some 64 of which he secured; 7 of these being from parties whose leases are involved in this suit. The railroad which he had in contemplation was to start at Johnstown, Pa., on the main line of the Pennsylvania Railroad, and run up Stony creek, and Paint or Shade creek, to the old Rockingham furnace at the head of the latter, and thence southeasterly, by other waters, in the direction of Hagerstown, Md.; and it was in general conformity with this that the rights of way were taken. No such railroad, however, was ever built. But in 1880 the Baltimore & Ohio Railroad constructed a branch from their line at Rockwood, Pa., northerly about 40 miles, through the center of Somerset county to Johnstown, which followed down Stony creek a part of the way, by the mouth of Shade and Paint; and when it was being laid out the defendant Brown put his rights of way at the service of the Baltimore & Ohio engineers, although none of them were made use of.

The building of this road, however, did not lead to the mineral development of that section, which came about a number of years later in quite another way. In 1892 to 1894, Robert H. Sayre and others

executors, administrators, and assigns, of ——— dollars, execute another lease, with the same covenants and terms as herein contained for a term of ninety nine years, renewable forever. If the railroad be not commenced within five years from this date, then this contract to be null and void.

In further consideration whereof, the said party of the second part, his heirs, executors, administrators, and assigns, promises and agrees with the said party of the first part, his executors, administrators, and assigns, that he will, at the expiration of every three months, whenever any ore or other materials, as hereinbefore more particularly recited, is mined, quarried, or otherwise reduced to possession by the said party of the second part, his heirs, executors, administrators, and assigns, and removed from the premises, render to the said party of the first part, his heirs, executors, administrators, and assigns, a true and correct account of the materials removed and taken from the premises during the said preceding three months, and pay it to the said party of the first part, his heirs, executors, administrators, and assigns, as follows; that is to say: For every ton of iron ore, of 2,240 pounds, ten cents. For every ton of coal, of 2,240 pounds, five cents. For every ton of cement or fire clay, of 2,240 pounds, five cents. For every ton of mineral ores, other than the above, of 2,240 pounds, five cents.

In witness whereof, the parties hereto have set their hands and seals this 3d day of January, in the year one thousand eight hundred and seventy-nine.

Abraham Weaver. [Seal.]
J. Willcox Brown. [Seal.]

State of Pennsylvania, Somerset County—ss.:

Before me, a justice of the peace in and for the said county and state, personally came Abraham Weaver, the grantor, and acknowledged the foregoing instrument of writing to be his act and deed, and desired the same to be recorded as such, according to law.

Witness my hand and seal the 3d day of January, A. D. 1879.

Stephen H. Griffith, Justice of the Peace. [Seal.]

began taking up coal lands in this territory, getting together about 18,000 acres, including much of that which is now in controversy, which they subsequently conveyed to the Wilmore Coal Company, which they had organized; and a year or two afterwards they sold out their interests in the company to Mr. Edward J. Berwind, president of the Berwind-White Coal Mining Company, who thereby secured their holdings, which he increased later to some 35,000 or 40,000 acres. Both Mr. Sayre and his associates, and Mr. Berwind after him, bought outright, at so much an acre, the coal which they purchased; that already leased to the defendant Brown being conveyed to them in fee by the original lessors or those who had succeeded to the title, in most instances without regard to the leases, but in some cases subject to them, the rights of the lessors being assigned, and in all with actual knowledge of them. Having got together this extended acreage, Mr. Berwind endeavored to induce the Pennsylvania Railroad to run in a branch, but they declined to do so; and he was compelled to undertake it individually, which he did at an expense of about \$500,000. This and the development of the different properties for mining, which followed, involving about \$1,000,000 more, extended over two or three years, and not until some time in 1897, therefore, was any mining done; but since that time it has been actively pursued, and an extensive business built up, the operations being conducted by the Berwind-White Coal Mining Company, under the Wilmore Coal Company, to whom a royalty of 10 cents a ton is paid.

In securing the leases in suit and others in that region, Mr. Brown did not expect to do any mining personally, and he has not, either by himself or others, nor has he paid royalties, at any time, on any of them; his purpose being to sell the leases to others or to transfer them to some company in which he had an interest, which would operate them. He sold some of his holdings in the southern part of the county in this way, and he made several attempts to interest parties in the others, including the New York Central Railroad people, the Erie people, and the Baltimore & Ohio. Learning of Mr. Berwind's purchases, he finally offered them to him, but without success; these negotiations ending in the spring of 1895, after which no others were undertaken. In 1892 certain of the leases were assessed and sold for taxes, but were redeemed by Mr. Brown, who paid some \$1,500 to do so. They were sold again in 1896, but this he resisted, and succeeded in having the sale set aside by the court. Learning in 1902 that the Berwind-White Company were mining on certain of the lands which he had leased, he sent an engineer to investigate the matter, receiving from him a detailed and extended report which confirmed the information, upon which he took counsel with the idea of legal action. Some delay was experienced, however, with regard to this; the one-quarter interest, which he had assigned to the agent who secured the leases, being outstanding in the hands of various parties. But, these having been got into line, a corporation was organized—the New Amsterdam Coal Company, defendant—to which all interests were transferred in exchange for stock; and in 1904 actions were brought by that company against the Berwind-White Coal Mining Company in the United States Circuit Court

for the Southern District of New York for damages for taking the coal from six of the different tracts in controversy, following which, in May, 1904, the present bill was filed. These are the general facts. Others will be referred to as we proceed. The question is whether, under the showing made, the plaintiff is entitled to the relief desired.

According to the law of Pennsylvania, by which the subject is necessarily governed, the so-called leases to the defendant Brown constitute a sale and conveyance of the coal and minerals in place. This is the effect of all the cases, from *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760, down, and, if reiterated declaration is to count for anything, is not to be gainsaid or denied. *Sanderson v. Scranton*, 105 Pa. 469; *D., L. & W. R. R. v. Sanderson*, 109 Pa. 583, 1 Atl. 394, 58 Am. Rep. 743; *Hope's Appeal* (Pa.) 3 Atl. 23; *Montooth v. Gamble*, 123 Pa. 240, 16 Atl. 594; *Fairchild v. Dunbar Furnace Co.*, 128 Pa. 485, 18 Atl. 443, 444; *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. 613, 23 Atl. 250; *Lazarus' Est.*, 145 Pa. 1, 23 Atl. 372; *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236; *Plummer v. Hillside Iron & Coal Co.*, 160 Pa. 486, 28 Atl. 853; *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919. "It is now well established," says Rice, P. J., in *Hosack v. Crill*, 18 Pa. Super. Ct. 90, affirmed 204 Pa. 97, 53 Atl. 640, "that an instrument which is in terms a demise of all the coal in, under, and upon a tract of land, with the unqualified right to mine and remove the same, is a sale of the coal in place; and this, too, whether the purchase money stipulated for is a lump sum or is a certain price for each ton mined, and is called 'rent' or 'royalty,' and also notwithstanding a term is created within which the coal is to be taken out." It is true that in *Denniston v. Haddock*, 200 Pa. 426, 50 Atl. 197, there is an apparent attempt to hark back to something else; it being declared to be inaccurate and unfortunate to call such a conveyance a sale, because of the tendency to mislead and the rules with respect to sales being held not to be indiscriminately applied. This is also approved in *Coolbaugh v. Lehigh & Wilkes-Barre Coal Co.*, 213 Pa. 28, 62 Atl. 94. But, whatever may be the modification introduced by these cases, the general doctrine remains that a grant of all the coal, with the right to remove the same, however denominated and by whatever terms conveyed, severs the coal from the surface and vests in the grantee an estate therein, with all that is incident and appurtenant thereto; and that in effect is what we have here. By indenture under his hand and seal, duly acknowledged and put on record, the grantor in each instance grants, bargains, and sells to the defendant J. Willcox Brown, his heirs and assigns, all the iron ore, coal, cement, fire clay, and other minerals of every kind, with the full and exclusive right of mining and removing the same, to and for his and their only proper use and benefit. This brings the case squarely within those which have been cited, and conveys a fee. It is true that a term is fixed within which these rights are to be exercised; but that is not material, and another is provided for, renewable forever, if it were. True, also, it is stipulated in most of the leases that a railroad shall be built within five years. But except as this introduces a condition upon which the estate is taken, and for breach of which it is made defeasible, it does not affect the character of the conveyance or the

interest which passed. It is idle to argue, from this or any other provision, that the arrangement is unilateral, the defendant merely having an option, ineffective until formally accepted by entry or other affirmative act. Not only was the grant out and out and immediate, but there was a reciprocal undertaking by the defendant to account and pay every three months at a certain royalty, for the coal and minerals mined, which notwithstanding there was no minimum, imposed a direct and positive obligation; a covenant to mine with reasonable diligence being implied. Equally useless is it, also, to contend that the provision with regard to the building of a railroad was a condition precedent, according to which, until complied with, no interest was acquired. The importance of a railroad may be conceded, no development of the region being possible without it, and the parties who stipulated for it were therefore wise. But whatever the necessity for it, or the promise with regard to its construction, there is nothing in either, out of which to make a condition precedent, holding up the grant until performed. The provision is, not that the leases shall be ineffective until the railroad is built, but that they shall be null and void unless built within a certain time. This recognizes that the estate conveyed is to vest meanwhile, making it subject to be divested later, in case of a failure to comply, creating a condition subsequent, upon which the estate is taken and held, *Rannels v. Rowe* (C. C. A.) 145 Fed. 296.

As a condition subsequent, however, the promise to build a railroad has to be reckoned with, and the question is as to the effect which is so to be given it. Four of the leases are untrammelled by anything of the kind—the George Fosler, Samuel Wible, Gottlieb Bantlin, and Harrison Lohr—the alleged verbal promise to these parties being unsustained; and as to them the subject may be dismissed. Those which remain differ somewhat with respect to the terms of the condition and the steps subsequently taken to enforce it, requiring a separate examination as to each; but to a certain extent they fall into classes by which the matter is simplified. In four of the leases—the David J. Shaffer, David Seese, Israel Seese, and Samuel Knavel—it is stipulated, with some immaterial variations, that if the railroad is not built or commenced along Paint creek within five years they are to be null and void. This is distinct and specific, and beyond question has not been performed. No claim is able to be made, as is done with regard to some, that the building of the Baltimore & Ohio branch along Stony creek in 1880, within the five years, was a fulfillment. All of the leases named are located in the neighborhood of Windber, four or five miles up from where Paint creek empties into Stony, at which distance a railroad along the latter is of no immediate, although there may be a remote, advantage. At all events it does not meet the terms of the condition, which the lessors had the right to insist on, and is not, therefore, a compliance with it. But a condition subsequent, such as this, is reserved for the benefit of the grantor and his privies in blood, who alone can take advantage of the breach, unless it is otherwise stipulated. *McKissick v. Pickle*, 16 Pa. 140. It is not available—by all the authorities—to any and every one who may happen along afterwards in the title. *Atlantic & Pacific Railroad v. Mingus*, 165 U. S. 413, 17 Sup.

Ct. 348, 41 L. Ed. 770; *Wills v. Mfrs.' Nat. Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603. The estate continues undisturbed until the proper steps are taken to enforce the forfeiture, the right to do which subsists as a mere right of action, which cannot be conveyed to or vested in a stranger. *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101. Nor are the present conveyances leases, within the meaning of Act 32 Hen. VIII, c. 34, by which the right might otherwise be claimed. *Rob. Dig. Brit. Stat.* 227. Unless, therefore, a move was made by those who were entitled to assert the breach, it is not open to the plaintiff company, which has taken title subsequently. The usual means is by entry for condition broken, but it may be by any equally significant act; a freehold estate at common law being able to be determined only by act in pais of equal notoriety with that by which it was created. *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447. It remains to be seen, what, then, if anything, was done in that direction by either of these lessors.

On December 17, 1892, Israel Seese and wife, by deed of general warranty, sold and conveyed to Robert H. Sayre, his heirs and assigns, all the coal underlying the land which they had leased in December, 1878, to the defendant Brown; Mr. Sayre subsequently conveying to the Wilmore Coal Company, by whom entry was made and the coal mined. The out and out conveyance of the coal in this way by the lessor was a direct and unequivocal assertion of title to and dominion over it, which being followed by the recording of the deed, the equivalence of livery (*Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760), as well as the entry on and mining of the coal under it, must be regarded, not only as expressive of an intent to take advantage of the lessee's default, but as effective to do so, the same as by entry and forfeiture actually declared. The two grants being inconsistent and conflicting, the defeasible one, under the assault so made upon it, must give way; the outstanding estate being thereby divested, and revested in the original grantor, for the benefit of his grantee. *Emery v. De Colier*, 117 Pa. 153, 12 Atl. 152; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Wolf v. Guffey*, 161 Pa. 276, 28 Atl. 1117; *Bartley v. Phillips*, 179 Pa. 175, 36 Atl. 217; *Stone v. Marshall Oil Co.*, 188 Pa. 602, 41 Atl. 748, 1119; *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; *Wheeling v. Phillips*, 10 Pa. Super. Ct. 634. The case of *Rannels v. Rowe* (C. C. A.) 145 Fed. 296, where this is denied, is to be distinguished; the second deed, although recorded, not having been brought home to the original grantee by act or entry under it. This lease, so far as the coal is concerned, is therefore dead.

The same facts appear and the same result is reached as to the David Seese lease, where there was a deed of the coal to Sayre December 28, 1892, and by him to the Wilmore Coal Company afterwards. It is true, that on May 3, 1893, the lessor assigned to the same all his right, title, and interest in and to the lease with Brown, except as to other minerals than coal, together with the rents and royalties due and to come due thereon, by which, as it is claimed, the existence of the lease was recognized and the forfeiture waived. But this was long after the deed to Mr. Sayre, and having asserted the forfeiture of the lease in that way and undertaken to convey the title, as so revested in him, he

could not do anything subsequently to call this in question. Nor is this affected by the fact that the assignment of the lease was to the same party.

The case is somewhat different with the Samuel Knavel and the David J. Shaffer leases, but not materially so. In each of these there was a deed of the coal by the lessor to Mr. Sayre—January 19, 1893, in the one instance, and December 29th, of the same year in the other—with a conveyance over to the plaintiff company later, as in the others; and on the same date there were assignments of the leases and royalties to Sayre and to the coal company, respectively. But the deeds and the assignments, although contemporaneous, were separate and independent, and the conveyance of the coal was not made subject to the leases, but was absolute and with general warranty. Whatever, therefore, might be the case, if this were otherwise, and whatever the purpose to be subserved by the assignments taken, which was probably merely precautionary, they cannot be held to qualify the effect of the deeds as an act of intended divestiture, followed, as it was, by mining under them. *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696.

In this connection the Jesse Slick and the John Koontz leases may as well be considered. In the former it was agreed that, if the lessee did not commence mining on the farm within five years, the lease was to be null and void; and in the other, "if the railroad be not commenced along Stony creek to Hagerstown within five years," the same consequence should follow. Admittedly neither of these conditions was complied with, but as to one only was advantage taken of this by the lessor. On August 13, 1900, John Koontz and wife, by deed duly recorded, sold and conveyed to John Itell, trustee, all the coal in the "B" or Miller seam—Itell in turn, May 9, 1902, conveying to Mr. Berwind, under whom the plaintiff company has entered and mined; and this, according to the conclusion reached above, avoided the lease to that extent. On the other hand, no action, so far as appears, was taken by Jesse Slick in his lifetime, nor by his heirs after his death. There was a deed by his executors, January 27, 1900, conveying the coal to D. B. Zimmerman, who, May 1, 1902, conveyed the same to Mr. Berwind. But the executors possessed no authority to avoid, and their act must be regarded as of no effect to that end, leaving the lease, so far as this is concerned, in force.

As to the John D. Shaffer lease, also, the lessee failed to comply. The provision there was that the lease should be void if the railroad was not commenced along Stony creek within five years, which would be fulfilled in terms by the building of the Baltimore & Ohio branch in 1880, if it stood alone. But it was additionally provided that "the railroad must come within one and one-half miles of the said farm," and this is as much a part of the condition as anything; and as the property was located some four miles up Paint creek, and the Baltimore & Ohio along Stony creek came no nearer than that, the condition clearly was not met. This is, however, of no advantage to the plaintiff; for, according to the test applied above, nothing was done to enforce the breach. It is true that there was a deed to Mr. Berwind from John

D. Shaffer, November 9, 1896, for all the coal in the "B" or Miller vein, one of the two veins leased to the defendant Brown. But this conveyance was made expressly subject to the terms and conditions of the lease; the grantee being given the reciprocal benefits and advantages derived therefrom. This was a recognition of the lease, and not an avoidance of it. *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696. And while it was, indeed, further provided that if the lease was void, or at any time thereafter should be held invalid, the coal as so conveyed should be free from its operation, the grantee in this respect, so far as possible, being put in the grantor's place, yet this falls far short of the assertive action required to declare the condition broken and annul the lease, which, while voidable, therefore, at that time, must now be held to be intact.

In five of the leases which remain—the Abraham Weaver, Josiah Custer, John Reel, and two Elizabeth Shaffers—the condition under discussion assumes a somewhat indefinite form: "If the railroad be not commenced within five years from this date, then the contract to be null and void." And in the other three—the Phillip E. Seese, Peter Gindelsperger, and Maria Young: "If the railroad be not commenced along Stony creek within five years," etc. There is the further provision in the Phillip E. Seese, that "as soon as the railroad is completed the second party is to commence opening said minerals"; but this, as is correctly argued, was merely a covenant or promise, and not a condition, the breach of which would entitle the lessor to avoid. With regard to all of these it is claimed that the condition was fulfilled by the construction of the Baltimore & Ohio branch along Stony creek in 1880, and so far as the last three are concerned this would seem to be the case. It is contended, however, that this was not the road contemplated, which was to run quite differently, veering off from Stony creek, up Paint or Shade, to Rockingham furnace, with Hagerstown as an objective point to the east; and that, while Brown may have put his rights of way at the service of the Baltimore & Ohio engineers, it does not appear that they were made use of, so as in any way to connect the two; also that the Phillip Seese and the Peter Gindelsperger leases were up Paint creek, in the neighborhood of Windber, and so not accessible from the road, which was of no benefit to them, except as a long spur was built into them therefrom. But the Baltimore & Ohio branch tapped the general territory, and it ran along Stony creek, which was all that was stipulated for, by the mouth of Shade and Paint, the full distance that the parties had in mind; and it thus fulfilled the letter, if not, indeed, the spirit, of the condition. Nor was it required, in order to do so, that it should be a railroad either promoted or built by Brown; all that was called for being a public means of transportation of this character, by which the coal mined could with reasonable facility be shipped to market. It is true that "the" railroad is spoken of, which might under proper circumstances be held to mean the one which was talked of at the time; but if this was intended to be insisted upon, or one which came into more immediate touch with the properties, it should have been so specified, as was done by some of the others, and the matter not be left in its present indefinite shape. Conditions subse-

quent are not favored, and it cannot be expected that an unexpressed term will be imported into them on which to claim a breach. With regard to the Maria Young, also, this lease, as I understand it, is located on Stony creek along the line of the railroad as built, of which it thus has the fullest possible advantage, and by which, therefore, upon every consideration, the condition is to be regarded as fulfilled. This lease, in addition, appears to have been released by Brown to Itell August 12, 1896, of which the plaintiff company by mesne conveyance got the eventual benefit, and no further notice will therefore be taken of it. It was evidently included in the bill by mistake.

The substance of what has been so said applies with equal force to the Abraham Weaver, Josiah Custer, John Reel, and the two Elizabeth Shaffers, where the condition was simply that "the" railroad should be built, etc., without specifying what or where. One of these, the John Reel, so far as I can gather, is on Stony creek, directly along the line of the Baltimore & Ohio, the same as the Maria Young; and, while the others are up Paint creek some distance, they had a railroad in the one which was built which was reasonably accessible, and, if it was not the one which they intended to stipulate for, it is their own fault in not doing so with more definiteness.

It is not material, in view of the conclusion so reached, to follow any of the last-named leases further, to see whether advantage was taken of the condition, assuming, notwithstanding what has been so said, that it was after all broken. In the mixed state of the record, indeed, it might be somewhat difficult to do so. It may be noted, however, that on May 23, 1895, Josiah Custer and wife conveyed the coal and minerals to Mr. Berwind but it was expressly made subject to the Brown lease in substantially the same terms as in the conveyance from John D. Shaffer noted above, with the additional and further weakening provision that Mr. Berwind should indemnify and save the grantors harmless. On September 7, 1893, Peter Gindelsperger also conveyed to Robert Sayre the coal leased to Brown, Sayre subsequently conveying to the plaintiff company by whom it has been mined out, which, notwithstanding the contemporaneous assignment of the lease, would be effective to avoid it, according to what is held above, if there was anything upon which this could in fact be predicated. There are also similar conveyances and assignments by Abraham Weaver and wife and Elizabeth Shaffer which might possibly have that effect; but, as already stated, the memoranda to be found in the record are not sufficiently clear to enable this to be decided with any certainty, and they must therefore stand. And the same is to be said with regard to the Phillip Seese and the John Reel, both of which are complicated by the division of the tracts, by which the condition, being entire and incapable of apportionment, is thus destroyed. *Brewster v. Lanyon Zinc Co.* (C. C. A.) 140 Fed. 801.

To summarize the results upon this part of the case: Out of the 19 leases in suit, 15 of which have been called into question by reason of the condition with regard to the building of the railroad, the Israel Seese, David Seese, Samuel Knavel, David J. Shaffer, and John Koontz—5 in all—must be held to be no longer in force; the condition in each

instance having been broken, and proper action taken to assert the breach. But as to the rest, some 10 in number, counting the Maria Young for the moment, there is nothing of the kind upon which this can be affirmed; and if they are to be avoided, therefore, it must be upon some other ground.

There remains to be considered, however, the questions of forfeiture and abandonment which have been raised, and which apply to all the leases alike, affording additional ground, if sustained, for declaring invalid those which have been already so held. The claim of forfeiture is based on the failure of the lessee to mine or pay royalty; this being in absolute and flagrant disregard, as it is said, of the purpose of leasing, which was to secure to the lessors an income from the royalties to be received. Although no minimum quantity was fixed, a covenant to mine with reasonable diligence is unquestionably to be implied. *Watson v. O'Hern*, 6 Watts (Pa.) 362; *Lyon v. Miller*, 24 Pa. 392; *Ellis v. Lane*, 85 Pa. 265; *Koch & Balliett's App.*, 93 Pa. 434; *Pittsburg Railroad Company's App.*, 99 Pa. 177; *Ray v. Gas Co.*, 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247; *Aye v. Phila. Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; *Price v. Nicholas*, 4 Hughes, 616, Fed. Cas. No. 11,415; *Huggins v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; *Sharp v. Behr (C. C.)* 136 Fed. 795; *Brewster v. Lanyon Zinc Co. (C. C. A.)* 140 Fed. 801; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Sharp v. Wright*, 28 Beav. 120. But the remedy for a breach is not a bill to forfeit or avoid, but an action at law for damages (*Koch & Balliett's App.*, 93 Pa. 434; *Janes v. Emery Oil Co.*, 1 Penny. [Pa.] 242), or, possibly, an ejectment, based on a right of entry, for nonperformance (*Barker v. Dale*, 17 Pittsb. Leg. Journ. 19, Fed. Cas. No. 988; contra, *Blair v. Peck*, 1 Penny. [Pa.] 247). The lessee, as we have seen, has an estate in the coal, which cannot be defeated or divested merely by reason of covenants broken; it not being so provided in the lease. "The common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term, in the absence of an express stipulation in the lease, or the reservation of the power of re-entry in case of such breach. The general remedy of the lessor in such case is merely by action for the recovery of damages." 18 Am. & Eng. Encycl. Law (2d Ed.) 369. And this applies to implied covenants, the same as to express ones. *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502. It may be that an action at law is not at all times adequate, and that a chancellor under some circumstances would be authorized to interfere in consequence. *Brewster v. Lanyon Zinc Co. (C. C. A.)* 140 Fed. 801. But that is not the case here. It may not, indeed, be altogether easy to say, without any minimum quantity reserved, for just just how much at any given time either of the lessors in the case in hand would be entitled to sue; but that cannot be regarded as insuperable, other mining operations similarly situated and conditioned affording a comparative guide. The lessee was to account and pay every three months for what he had mined; and each lessor would therefore have the right, as the measure of his damages, to sue at the

end of every such period for whatever amount could have been produced with the exercise of reasonable diligence from the tract involved, having regard to its size and the situation of the coal upon it, as well as the methods of mining in vogue at the time in that general section of the bituminous coal field (*Bradford Oil Co. v. Blair*, 113 Pa. 83, 4 Atl. 218, 57 Am. Rep. 442); and that (to meet an objection of defendants' counsel, and notwithstanding what is said in *Price v. Nicholas*, 4 Hughes, 616, Fed. Cas. No. 11,415, which gives some countenance to it), without reference to whether there were railroad or other facilities for transporting or handling it, as to which the lessee took the chance, having made no stipulation with regard to it, other than what we have seen. While, then, it was of the essence of the contract that mining should be prosecuted with reasonable diligence, and it would no doubt be convenient, as well as conducive to justice, if the right to forfeit for the indefinite and long-continued failure to mine or pay royalties could be imported into it—a sort of forfeiture by abandonment, as it is denominated in *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696—no case, by actual decision,³ seems to have gone that far, and nothing, therefore, can be made out of the fact here.

Quite different, however, is the matter of abandonment. Ordinarily this is a question of fact, to be determined by the circumstances; the intent being largely controlling. But under certain conditions it may become a question of law, to be declared by the court, particularly when the facts are undisputed. *Atchison v. McCulloch*, 5 Watts (Pa.) 13; *Forster v. McDivit*, 5 Watts & S. 359. *Sample v. Robb*, 16 Pa. 305; *Paine v. Griffiths*, 86 Fed. 452, 30 C. C. A. 182. Legally defined, it may be said to be the giving up or relinquishment of property to which a person is entitled, with no purpose of again claiming it and without concern as to who may subsequently take possession. 1 Cyc. 4; *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Judson v. Malloy*, 40 Cal. 299; *Hagan v. Gaskill*, 42 N. J. Eq. 215, 6 Atl. 879; *Dikes v. Miller*, 24 Tex. 424; *Burke v. Hammond*, 76 Pa. 172. It is the voluntary forsaking or throwing away of property, leaving it open to be appropriated by the first comer. *McGoon v. Ankeny*, 11 Ill. 558; *Eads v. Brazelton*, 22 Ark. 499, 79 Am. Dec. 88. It may be a question how far a vested legal title to a corporeal hereditament can ever be lost by mere abandonment or neglect (1 Cyc. 6; 2 Washb. Real Prop. [6th Ed.] § 1888; *Mayor v. Riddle*, 25 Pa. 259), although it is held that it may be, in *Holmes v. Railroad*, 8 Am. Law Reg. (O. S.) 716, and seems to be recognized as possible in *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, although by nothing short of the statute of limitations, as it is there said. But with regard to inchoate, and particularly mining and other similar, rights and privileges, the doctrine is well established, differing only in its application with the nature and extent of the rights and estates granted, and the character of the

³Bordering on this, however, it is said by Porter, J., in *Cole v. Taylor*, 8 Pa. Super. Ct. 19, with regard to a two years' delay to operate an oil lease: "It would seem that the failure so to produce for so unreasonable a length of time ought in equity to work a forfeiture of the rights of the lessees."

mineral or other thing affected, whether fugitive, like oil and gas, or solid and stable, like coal and ore in place. 1 Cyc. 7; 20 Am. & Eng. Encycl. of Law (2d Ed.) 775 and 785. Thus, in *Aye v. Phila.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696, where there was a lease of lands for 20 years, with the exclusive right of searching and operating for oil and gas, an unexplained cessation for 4 years was held to raise a presumption of abandonment. In *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247, also, where standing timber was sold for a definite price, with the privilege of manufacturing it into lumber on the land, under which the vendee entered and cut substantially all the saw timber available, and then ceased operating and removed his mill, an attempt to resume 11 years afterwards and cut the timber which had matured meanwhile was held to be a trespass; the rights of the vendee having been lost by abandonment. So in *Paine v. Griffiths*, 86 Fed. 462, 30 C. C. A. 182, a case peculiarly like the one in hand, both in the terms of the grant, the minerals affected, and the neglect to mine, it was held by the Court of Appeals of this circuit, that where coal and other minerals, including oil and salines, had been conveyed upon a certain royalty the failure to operate or do anything under the grant for upwards of 20 years amounted to an abandonment as a matter of law, which justified a bill to declare it void as a cloud upon the title. It was further held that mere speculative attempts by the grantee to dispose of his rights were entitled to no consideration as evidence of a contrary intent; nothing further having been done and there being an utter disregard of the obligation to mine, upon which the grant rested. It is true that the right to abandon was expressly given, of which the neglect of the grantee might be regarded as evidence of a purpose to avail himself. But no point was made of that; abandonment being squarely based upon the facts which have been alluded to. See, also, *Worrall v. Wilson*, 101 Iowa, 475, 70 N. W. 619, for another case of a coal lease which was held to have been abandoned.

In the present instance, at the time the bill was filed, from 24 to 26 years had elapsed since the leases were executed, during which time not a thing has been done by the defendant Brown towards the mining or development of any of the properties covered by them. He has simply stood by and held on, endeavoring at times to interest others who would do something, and in a few instances selling and disposing of his rights for a consideration. According to his own admission, he never intended to do more. In the meantime, by the independent enterprise and efforts of other parties, the territory which was before discredited has been tested and shown to be valuable, and a railroad built into it. The original lessors, evidently despairing of any results from his direction, and in some instances with a declared object of getting rid of the incubus of these leases have sold out to others by whom these developments have been effected and the mining of coal extensively produced. Under the circumstances, the rights granted to the defendant by the leases in controversy must be regarded as relinquished and abandoned. No doubt, he took an estate in the minerals conveyed, but the grant was for a definite purpose; the consideration to the original owners being, not the paltry \$5 or \$10 recited in the deeds, whether paid

or unpaid, but the royalties which were to be derived as the result of mining. The lessee was to make the minerals of value to them, which was the whole inducement for parting with them, and that, with due diligence, an obligation which has been disregarded for nearly a generation. The lessee's idea is that he can lie by indefinitely and yet retain the rights granted, having 99 years, as it is said, in which to mine, with the privilege of 99 more, and after that forever. Time is of no consequence, according to the argument, and haste not contemplated; developments being virtually left to his discretion, subject only to liability in damages for unreasonable inaction. But this is not the construction to be adopted. Judged by its purpose, the grant was not absolute and unconditional, but qualified, and the neglect to exercise the rights and privileges conveyed; for the period which appears here, to the grave detriment of the grantors, is to be taken as a relinquishment and abandonment of them, and that without regard to the acts or intent of the grantee, short of actual assertive operation. Title to land is lost by 21 years' adverse possession, by virtue of the statute, and abandonment may well be presumed by analogy, with regard to mining rights and privileges, conditioned on the payment of royalties, where there has been an absolute neglect to mine or pay, for a like period. No doubt the lessee here has had no idea of abandoning if he could help it, any more than of personally operating. He may also have made efforts to sell to or interest others, although nothing in this direction seems to have been done for a number of years. Within his legal rights, his purpose is immaterial; but speculative attempts of this kind amount to nothing on the question of abandonment. *Paine v. Griffiths*, 86 Fed. 452, 30 C. C. A. 182. It may be further true that, while in the market in this way from the start, there have been no takers, because of the coal in that section being underestimated, and for lack of full railroad facilities, until Mr. Berwind took hold of it. Taxes have also been paid, the few years they were assessed; and, when it was found that the coal was being mined, parties were sent to examine and report; and, finally, action was brought on account of it. But all this was *ex parte* and unrelated, and of no consequence. The fact remains that not a thing was done nor a right exercised under the leases for upwards of 24 years, and looking at it from the standpoint of the lessors, who have waited in all conscience as long as could be expected, they are therefore to be regarded as thrown up and abandoned.

It is said, however, that in *Plummer v. Hillside Coal Co.*, 160 Pa. 483, 28 Atl. 853—followed by the Court of Appeals of this circuit in a subsequent action between the same parties, 104 Fed. 208, 43 C. C. A. 490—even the lapse of 60 years was held not to amount to this. But the distinction between that case and this is manifest. There there was a sale and conveyance of the coal outright for the price of \$200, which in that early day and place was evidently accepted as its full value; an extra \$100 being provided for in case the coal proved to be abundant and of a certain thickness. Beyond this there was no obligation on the part of the lessee, except the nominal rent of \$1 a year, inserted probably to carry out the idea of a lease which was the form of conveyance adopted. The consideration to the lessor was not ~~was~~

the development of the mineral value of the land as here. The lessee bought the coal as it stood in place at a definite price in cash; the only restriction being that he should get it out within the term of the lease, 100 years. This, as the court is careful to point out, is the controlling distinction, and the case affords no guide, therefore, where it does not appear. Nor, in adopting and following it, can the Court of Appeals be regarded as recalling or qualifying the law laid down in *Paine v. Griffiths*, 86 Fed. 452, 30 C. C. A. 182, where abandonment was found, under circumstances and with respect to leases, closely similar to those in hand.

It is finally said, however, that the questions litigated are legal, to be disposed of in a court of law, and that a court of equity cannot constitutionally take cognizance of them. *North Penn Coal Co. v. Snowden*, 42 Pa. 488, 82 Am. Dec. 530; *North Shore R. R. v. Pennsylvania Co.*, 193 Pa. 641, 44 Atl. 1083. Actions, moreover, as is pointed out, have already been brought in the United States Circuit Court in New York, where they can appropriately be considered and passed upon, which it is the purpose of the present bill, as it is said, to forestall. *Meck's App.*, 97 Pa. 313. But the removal of a cloud by bill, in the nature of a bill quia timet, is a well-established ground of equitable jurisdiction, and may be resorted to under proper circumstances even where the legal title is involved, and although it may not have been previously established by action at law. 17 *Encycl. Plead. & Pract.* 278. It is not to be exercised where there is an adequate legal remedy, but that is not the case where the moving party is in possession, and so is not in a position to assert or protect his title by action. *Martin v. Graves*, 5 Allen (Mass.) 661; *Stewart's App.*, 78 Pa. 88; *Dull's App.*, 113 Pa. 510, 6 Atl. 540; *Siegel v. Lauer*, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. Neither is a pending action a bar, where it is between other parties, and extends to only a portion of the controversy, which is the situation here. *Eaton v. Trowbridge*, 38 Mich. 454; *Brewster v. Lanyon Zinc Co. (C. C. A.)* 140 Fed. 801. The actions in New York are against the Berwind-White Coal Mining Company, and not against the plaintiff, and, whatever the relation between the two, they are nevertheless distinct and independent parties, with separate, however intimate, interests. But, more than this, the actions referred to concern only a few of the leases, as to each of which the facts are more or less different, and differ, also, with respect to those which remain. Under similar circumstances it was accordingly held, in *Eaton v. Trowbridge*, 38 Mich. 454, not only that a bill to remove a cloud could be entertained as to the lands not so directly drawn in controversy, but that it might be extended to embrace those actually involved in the actions pending, so as to put an end once for all to the whole litigation.

In the present instance, the material facts are not disputed, and the rights growing out of them are clear; and, having to be determined in any event by the court, it is of no consequence whether they are determined by a court of equity or a court of law. *Ferguson's App.*, 117 Pa. 426, 11 Atl. 885; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. For the reasons given, the leases held by the defend-

ants are clearly invalid; and, outstanding and actively asserted as they are, and that not by one action but by several, which are capable of being indefinitely and vexatiously multiplied according to the number of leases and the mining operations under each of them from time to time, they constitute a serious cloud upon the title, not only as against the present owners, but any others, who might otherwise be inclined to purchase from them. From this, according to all the authorities, there being no other adequate remedy open, the plaintiff company is entitled to be relieved. *Sharon v. Tucker*, 114 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. And to make the decree effective the invalid instruments by which the cloud is created will be required to be delivered up and canceled, and a minute of it made in the office where they are on record. *Neill v. Hitchman*, 201 Pa. 207, 50 Atl. 987. Limited always, however, to the coal, and not the other minerals, as to which alone an issue has been made.

Let a decree be drawn in favor of the plaintiff to this effect, with costs.

UNITED STATES v. CARROLL.

(District Court, D. Montana, August 20, 1906.)

No. 1,156.

1. CONTEMPT—DIRECT CONTEMPT—ACTS IN IMMEDIATE VICINITY OF COURT.

A direct attempt by a person to bribe or persuade a witness to testify contrary to the truth in a cause pending and then on trial, or to influence the jury or any member thereof to find a verdict in favor of one party or the other, made on the street in the immediate vicinity of the court, constitutes a direct contempt, and the mere denial of the charge by the accused under oath is not sufficient to exonerate him, but the matter should be heard and determined upon all the testimony produced.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 32, 36, 37, 173, 187.]

2. SAME—MEASURE OF PROOF REQUIRED.

Accusations of contempt where of criminal import must be supported by evidence sufficient to convince the mind of the trier beyond a reasonable doubt of the actual guilt of the accused, and to establish every element of the offense including the criminal intent.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 185-187.]

3. SAME—ACTS CONSTITUTING—ATTEMPT TO INFLUENCE JURY.

A bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a federal court, did not obstruct the administration of justice, so as to constitute a contempt, punishable under Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], under the rule that, to constitute such contempt, the act done by the accused must naturally and directly tend to such obstruction.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 36-40.]

Proceeding for Contempt.

Carl Rasch, U. S. Dist. Atty.

McBride & McBride and Edward Horsky, for defendant.

WOLVERTON, District Judge. While the case of the United States v. J. T. Carroll was pending, and on trial, the jury having been impaneled therein, the United States Attorney moved the court, based upon the affidavits of J. Miller Smith, Assistant United States Attorney, and one Palmer Paulson, that an order be made requiring one William C. Carroll to appear before the court on a day to be fixed, and show cause why he should not be punished for contempt. An order was accordingly made directing citation to issue, requiring the accused to appear on the afternoon of the same day at the hour of 2 o'clock, and show cause, if any existed, why he should not be punished as demanded. The motion was interposed, and the order made on the incoming of court at 10 o'clock in the morning. Carroll appeared in person, as well as by counsel, at the hour fixed, and first entered a plea of not guilty, but soon thereafter, with leave of court, withdrew such plea, and moved in open court to quash the proceeding. This motion was heard and denied, whereupon a demurrer was deemed to be interposed, which was likewise overruled, and a trial was had touching the merits of the alleged contempt, both the government and the accused calling and examining witnesses respectively in their behalf. The testimony being closed, counsel moved for a discharge of the citation and a dismissal of the defendant from further attendance upon the order of the court. Hearing was had upon the motion, as well as upon the merits of the controversy, and the matter taken under advisement. This briefly outlines what was done in court, and with what summary dispatch, if the term be appropriate, the cause was proceeded with, and the situation will readily be understood.

In order to gain a clear conception of the nature of the charge against Carroll, the material averments of the affidavits of the Assistant United States Attorney and Palmer Paulson should be further set out. The former asserts on information and belief that one William Carroll on the 11th day of August, A. D. 1906, at the city of Helena in said district of Montana, corruptly endeavored to impede the due administration of justice in the case of the United States v. Joseph T. Carroll, now pending in the District Court of the United States, in and for the district of Montana, in the following manner, to wit: That the said William Carroll on the 11th day of August, A. D. 1906, approached one George B. Hopkins, a resident and citizen of the city of Helena, state and district of Montana, and handed the said George B. Hopkins a paper containing a list of the names of the jurors impaneled to try said cause, and asked the said Hopkins if he was acquainted with A. Wiegand, one of the members of said jury, and that if he had any other friends on said jury to use his influence with them for the benefit of said defendant, or words to that effect; and also stated to said Hopkins that he had other lists that he was handing around. The latter of the affiants avers in substance that he had been subpoenaed as a witness for the government in the J. T. Carroll case; that he met the said William C. Carroll on the morning of the 9th of August, 1906, on Main street in the city of Helena, in front of the Hub clothing store, at which time Carroll requested him to testify, contrary to the truth in said cause, that at the time affiant worked for

said Joseph T. Carroll upon the ranch and premises known as the "Carroll Premises," at and near what is known as "Jones' Gulch," the fences were down upon said premises during the time he so worked there.

At the trial, Mr. Hopkins, the person alluded to in the affidavit of the Assistant United States Attorney, testified, in substance, so far as it is material here: That he had been acquainted with William C. Carroll four or five days. That he met him on August 11, 1906, a few minutes before 6 o'clock in the evening, on Main street, in the city of Helena in front of Lockwood's drug store, and that he (witness) spoke to him first. That, at any rate, Carroll said: "Hold on. I want to ask you a question about a carpenter." "Come in here." And that they went into Sass's cigar store. That he (Carroll) then produced a paper, and looking at it said: "Do you know a man named A. Wiegand, a carpenter?" And witness replied: "I know of the man, but I am not acquainted with him personally. I am not well enough acquainted to speak to him on any ordinary matter." That Carroll looked at the paper again, and said: "Do you know any way that I can get at Oscar Carlson?" That witness replied: "I don't know. He is a pretty hard-headed Norwegian." That Carroll unfolded the paper, and said: "Do you know any of those names?" That witness looked at several of them, and replied, beginning at the top: "I think I know this man. I don't know that man. There is another man's name that I know; but he and I are not on very good terms." That witness read down three or four names that way; that Carroll started to fold up the paper, and that, out of curiosity, witness asked him to let him see it again; that Carroll opened it out, and that witness saw the names on it. That Carroll said: "Well, take this paper, anyway. I have others." And continued: "Now, Mr. Hopkins, if there is anything you can do for me in regard to this, I wish you would do it; and if you will do us the favor * * * we will remember it, and reciprocate it at any future time when necessary." The witness further testified that that ended the conversation; that he took the paper and put it in his pocket; that Carroll picked up a little grip that he had, and started off, saying, "I am off for Butte." That witness stopped him and asked: "Are you off for good?" And that he replied, "No; I think I will be back to-morrow night." Witness further testified that he did not know what the list of names appearing on the paper represented; that he has never been positively told the paper contained a list of the jury; that Carroll asked him about Oscar Carlson, but that he did not state his purpose; that when asked how to get at Carlson, witness answered: "I don't know. Oscar is a pretty hard-headed Norwegian." And being asked what the witness understood Carroll to refer to, when he stated that if witness could do anything for him or them, etc., he answered, over objection, that he had an idea from the start that this was a list of the jury in the J. T. Carroll Case; that that was his own inference, possibly, because Carroll never mentioned either jury or jurymen to him. And further, a little later in the examination, the witness testified that his inference and impression during

this conversation with Carroll was that he (Carroll) was endeavoring by some means through witness to reach and create a favorable impression in favor of his brother with some one or more of the jurymen. It should be stated in this connection that both Wiegand and Carlson were upon the jury then impaneled in the J. T. Carroll Case. Upon cross-examination, the witness further testified that he did not ask to see the list; that the word "jury" was never mentioned; that Carroll and witness had had a general conversation in regard to the J. T. Carroll Case, about to come up, two or three days previous; that there was to be a retrial of the case; that he took the list from Carroll, because he had a curiosity to find out whether it was really a list of the jury or not; that at the time he concluded the talk with Carroll, he (witness) did not intend to do what Mr. Carroll gave him to understand he wanted him to do, and being asked: "And you never intended to do anything of the kind, Mr. Hopkins?" he answered: "No, sir; I never did." Witness further testified, as interrogated, as follows:

"Q. And there was nothing in his manner, in Mr. Carroll's manner, was there, Mr. Hopkins, in asking you to do this, or anything that he said or intimated, that was supposed to operate, or that operated sufficiently as a persuasive, to induce you to go ahead with this thing, or to have any intention to do it? A. No, sir. I had no intention to do it. Q. And there was no consideration of any kind offered at all to induce you to help him, other than your friendship? A. His last remark, when we parted, included a promise to return the favor. Q. And reciprocate, or a reciprocation of any courtesy you might extend to him, or do for him? A. Yes, sir. Q. Is that the idea? A. That is the idea."

Paulson testified in effect that he met William C. Carroll on the Tuesday preceding this hearing in Helena, Mont., near a store on Main street that he (witness) came out of. That Carroll talked to him there, and witness continued as interrogated, as follows:

"Q. What did he say? A. Well, he said, I didn't need to say the fences was closed. Q. That you need not say the fences were closed when you were working there? A. Yes. That is what he said. Q. What else did he say, if anything? A. That is all. Q. Had you testified in the case before, with reference to the fences being closed? A. Yes. Q. That was at the former trial, was it? At the first trial? A. Yes. Q. Now, then, you testified that the fences were closed? A. Yes, sir. Q. And he told you that when you testified again that you need not testify that the fences were closed? A. That is what William Carroll told me. Yes. That I need not testify that the fences was closed when I was working there."

On cross-examination the witness repeated that Carroll said to him: "Don't say the fences was closed when you was working there."

William C. Carroll testified that he met Hopkins on Saturday as he was getting ready to leave the city; that Hopkins stopped him and spoke first; that he asked witness how they were getting along with the case, and witness answered: "I can't tell; they have just finished with the jury." That Hopkins asked witness if he knew the jury, and that witness told him he did not know a man on it; that Hopkins then asked him if he had a list of the jury; that witness did not remember at first whether he had a list or not, but that he felt in his pocket, and found that he had such a list; that Hopkins asked him to let him see it; that he did not give any reasons for wanting to

see it; that he read it over, and said that it was a very good list of men, but that there were two men on there that he either said he didn't speak to, or they didn't speak to him; and that they talked in a general way. Witness further testified, as interrogated, as follows:

"Q. Did you ask him to influence the jury? A. I never mentioned it to him. Q. Did he ask you, or, rather, did you ask him anything about Wiegand? A. Wiegand? Q. Yes. A. No, sir. Q. Do you know the name? A. I do not, sir. Q. Did he tell you anything about Wiegand? A. No, sir. He never mentioned Wiegand's name to me. He asked me if I knew the jury, and I told him I didn't know, absolutely, a man on it, and I would not know a man on it now. I do not know a man on it now. The only time I ever saw the jury was when they went down from the court room, down the street, all in a body. * * * Q. Now, you heard the testimony of Mr. Hopkins to the effect that when you and he parted, you said to him, in effect, that if he did something for you, you would do something for him at some future time? A. That was absolutely false, sir. Q. Was there any occasion for your saying anything of that kind? A. No, sir. There was not."

Carroll further denied absolutely the statement of the witness, Paulson, and in this he is corroborated in a measure by another witness named Kinman, who claims to have been present at the time the conversation alluded to should have taken place.

It was strenuously urged by counsel for defendant at the final argument of the cause, upon the motion to discharge, as well as upon the merits, that if the transactions complained of constitute a contempt at all, it is an indirect or constructive contempt, and that the oath of the defendant denying positively and emphatically the culpatory allegations of the affidavits setting forth the contempt charged, although not interposed in the way of a formal answer, constitutes a complete defense to the proceeding under the practice, and, therefore, that it ought to be dismissed without further inquiry. Without seeking to ascertain what the proper practice applicable to the present controversy is, because of the lack of time to investigate the subject fully, it is sufficient to say that I am of the opinion that any direct attempt on the part of any person to bribe or persuade a witness to testify contrary to the truth in a cause pending and then on trial, or to influence the jury, or any member thereof, to find a verdict in favor of one party or the other, where made so near the court as is designated by the witnesses for the government, being not to exceed three blocks away, constitutes, in legal contemplation, a direct contempt; that is to say, it constitutes misbehavior so near to the court as to obstruct the administration of justice, and that the mere denial of the charge by the accused under oath will not serve to exonerate him. In such a case, the practice seems to obtain of hearing the cause in full upon the testimony, pro and con, and determining the guilt of the accused from all the testimony submitted, whether he refutes the charge under oath or not. See *Ex parte McCown* (N. C.) 51 S. E. 957, 2 L. R. A. (N. S.) 603, where is to be found an elaborate and able discussion of the subject in hand, and *Ex parte Summers*, 27 N. C. 149.

Hammond, Judge, in speaking of the power of the court to punish under the act of Congress, as prescribed by section 725 of the Re-

vised Statutes [U. S. Comp. St. 1901, p. 583], in *United States v. Anonymous* (C. C.) 21 Fed. 761-768, says:

"I do not find it necessary to go into the distinctions between direct and constructive contempts, which are so unsatisfactory to all who study this subject. There is always a struggle to relegate every contempt to the odious category of constructive contempts, in order to take shelter under these restrictive statutes. But I may say that in my judgment the courts will find that the Legislature has not taken away any valuable power, when these statutes are properly understood. Notwithstanding the seemingly formidable array of authority, it may be that, after all, it is a mistake to say that all contempts not committed in the presence of the court are constructive only. The mere place of the occurrence may not be an absolute test of that question, and it may depend on the character of the particular conduct in other respects besides the place where it happens. * * * Wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court to become specific in its injury, by intimidating, or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors, and the like, while in the discharge of their duties as such, if it be constructive, because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be."

The case *In re Brule* (D. C.) 71 Fed. 943, covers the proposition I have made distinctly, which will be apparent from the reasoning of Hawley, District Judge, in the last paragraph of his opinion. He says:

"Now, from the reasoning of these cases, it is made perfectly clear that the misbehavior of which *Brule* is guilty, if it had occurred anywhere within the building where the court is held, would have been 'clearly a contempt, punishable as provided in section 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court, and without indictment. Why? Because, under such circumstances, it would have been misbehavior of a person in the presence of the court. But the statute says that the misbehavior of a person so near thereto as to obstruct the administration of justice' may be likewise punished as a contempt of court. If it is a contempt to bribe a witness in front of the courthouse door, is it not a contempt to attempt to do the same thing on the street opposite the court building, or four blocks away? Is not the result the same? Is not the motive of the accused the same? What difference does it make whether the attempt was made on the ground owned by the United States, or at the residence of the witness in the same town, four blocks, or about one-quarter of a mile away, from the court building? In one case the misbehavior would be construed to be in the presence of the court, and in the other 'so near thereto as to obstruct the administration of justice,' and the statute, in clear language, is made to apply to both cases."

See, also, *Ex parte McLeod* (D. C.) 120 Fed. 130.

It is, however, a principle very well settled that accusations for contempt, especially where of criminal import, must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense, including the criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts. *United States v. Jose* (C. C.) 63 Fed. 951; *Sabin v. Fogarty* (C. C.) 70 Fed. 482. In the latter case, Hanford, District Judge, says:

"A contempt case is one in which the court must be convinced beyond a reasonable doubt of the facts before finding a party guilty."

Bearing in mind these legal principles, I will proceed to a consideration of the facts disclosed by the evidence, and determine whether they involve the defendant in a contempt of court. The gist of Hopkins' testimony pertinent to the controversy is that Carroll asked him: "Do you know of any way that I can get at Oscar Carlson," who was a member of the jury then impaneled to try the case of the government against J. T. Carroll, his brother, the second time. Hopkins replied: "I do not know. He is a pretty hard-headed Norwegian." When they were about to separate, Carroll said: "Well, take this paper"—meaning the list—"anyway. I have others." And continued as follows: "Now, Mr. Hopkins, if there is anything you can do for me in regard to this, I wish you would do it; and if you will do us the favor * * * we will remember it, and reciprocate it at any future time when necessary." Hopkins never agreed to do anything for Carroll; nor did he receive any consideration for doing the thing requested, except a promise of reciprocation. Now the question resolves itself into whether this demeanor on the part of Carroll tended in any manner to obstruct the administration of justice. I have been referred to but one case having a direct bearing upon the condition involved. This I will allude to later. In treating of section 5399, Rev. St. [U. S. Comp. St. 1901, p. 3656], a cognate statute to section 725, the court in *United States v. Bittinger*, 24 Fed. Cas. 1149, No. 14,598, in its instructions to the jury, says of the first clause: "It contemplates a case in which an attempt is made to directly interfere with a witness, and to improperly and illegally influence him." And of the second clause: "It will be necessary for you to find that the defendant, Bittinger, did some act or acts which obstructed or impeded the due administration of justice." Thus giving the impression that the act complained of must have the direct effect, within itself, to obstruct or impede the administration of justice.

In a much later case, *United States v. Seeley*, 27 Fed. Cas. 1010, No. 16,248a, the court discusses directly the import of the words "obstruct" and "impede," as employed in the same section 5399. It says:

"To 'obstruct,' independent of the acceptance the word has obtained in the criminal law, would seem to stand *ex vi termini* a direct and positive interposition, which prevented, or tended to prevent, the action of the officer or court in respect to a matter then to be proceeded in. 'Impede' must necessarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the Legislature to give these terms an application only to direct acts of violence or menace is inferrible from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, etc., by threats or force, would necessarily imply the effort to put forth some act, which in its natural, if not necessary, consequence, must be attended with an obstruction, and with a forced and compelled interruption of further progress in the administration of justice."

Thus again indicating that the act put forth must itself have the direct and natural effect to obstruct or impede. If this be so, then the act of Carroll in endeavoring to get Hopkins to do something for him, or his brother, with the jury, which Hopkins never consented to, could, of itself, have no direct or sensible effect to obstruct or impede the due administration of justice. It was an endeavor which in no way reached or influenced the jury, and, therefore, tended in no way to impede justice or the administration thereof. If the endeavor had been directly with the jury or a member thereof, then it would have reached the mark; but an effort to get a third person to act, who declined, stops short of a misbehavior that is effective to obstruct, or impede justice, or to hinder its administration.

The case of *Ex parte McRae* (Tex. Cr. App.) 77 S. W. 211, alluded to above, is apt; the facts being very similar to the one at bar, whereof the court says:

"We do not think this testimony legally authorized the court to fine relator for contempt. We do not understand the authorities go to the extent of holding that the bare effort on the part of relator to secure the service of a party to find out how a juror stands in reference to a case then on trial would, *per se*, authorize punishment for contempt, unless the party so employed by relator should make some effort to tamper with the juror, or hold out some inducement to the jury to decide one way or the other, or should talk with the juror about the case with the view of ascertaining what position he occupied in reference to the testimony."

In this view of the law, which I feel constrained to follow, the endeavor of Carroll made with Hopkins to have him use his influence with the jury, for the purpose indicated, did not constitute a contempt punishable under section 725, Rev. St., which defines and limits the power of the court in the premises.

As to the alleged attempt to influence the witness Paulson, the testimony is too unsatisfactory upon which to find the accused guilty, beyond a reasonable doubt. Paulson was dull and sluggish in testifying, confining himself to merely asserting and reasserting, without stating intelligently any of the attending facts and circumstances, that Carroll said that he (Paulson) "didn't need to say the fences was closed." This, the defendant contradicted flatly, and with it there was some corroboration. I am unable to say, therefore, under the evidence, that defendant is guilty in the particular alleged by Paulson's affidavit.

Recurring again to the affair with Hopkins, I deem it proper to say further that I prefer to believe the testimony of Hopkins, as against that of the defendant, and I am firmly convinced that it was the purpose of Carroll to reach one or more of the members of the jury through Hopkins, if the latter could be had to serve his purpose. The act was willful, is vicious and reprehensible, and should be visited with appropriate punishment, but the court is unauthorized to mete it out in this proceeding.

The proceeding will therefore be dismissed, and the defendant discharged.

GADDIE v. MANN et al.

(Circuit Court, S. D. Georgia, W. D. August 31, 1906.)

1. COURTS—JURISDICTION OF FEDERAL COURT—BURDEN OF PROOF ON ISSUE.

Where a bill in a federal court properly alleges the requisite jurisdictional facts, the burden is on the defendant both to allege and prove to a legal certainty the facts relied on to defeat the jurisdiction, and, where he alleges a change of complainant's domicile, he must show both residence in the new locality and the intention to remain there.

2. SAME—CITIZENSHIP OF COMPLAINANT—EVIDENCE.

Where a complainant alleged in his bill in a federal court that he was a citizen of North Carolina, and it is shown without contradiction that he is a native of that state, that his home where his wife and family reside is and has always been there, that he visits them frequently and has always voted there in national elections, the presumption of his citizenship in that state arising from such allegation and facts is not overcome by evidence that for several years he has been for a large part of the time in Georgia, where the suit is brought, in connection with his business there in different places, that he took part in a political meeting there as member of a local committee, or that on one occasion he registered and voted there at a party primary; especially in view of the Georgia statute, which apparently requires only residence and the payment of taxes to entitle any citizen of the United States to vote.

3. SAME—MANNER OF RAISING ISSUE.

It is the better practice to determine the question of the jurisdiction of a federal court arising upon a denial of plaintiff's allegation of citizenship on an issue taken by plea, with opportunity to both parties to adduce evidence in the regular way, rather than on motion and ex parte affidavits.

In Equity. On motion to dismiss for want of jurisdiction.

Hall & Wimberly, for complainant.

A. L. Miller, for defendants.

SPEER, District Judge. This question arises on a motion made by one of the defendants, under section 5 of the judiciary act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511]), to dismiss the bill for want of diversity of citizenship, on the ground that the complainant is not a citizen of North Carolina, as alleged, but a citizen of Georgia.

Evidence in the form of affidavits has been introduced to show that he is a citizen of Irwin county in this state; that, in November, 1905, he registered as a voter for the Democratic White primary in that county, in which it is claimed that he subsequently voted; and that, some years prior to the bringing of this bill, he returned in that county a small amount of property for taxes. In reply, the complainant has produced certain affidavits to the effect that he has always been a citizen of North Carolina, where he has long maintained a home and his wife and children, regularly remitting to the latter money and supplies, and returning to his home several times in each year; that he is a temporary sojourner in Georgia on account of business interests which he claims to be of transient nature, not confined to one, but extending to many counties; that he has merely boarded where business exigencies required, has never had a home or office in this state, and possesses no property in Irwin county; and that he has

never renounced his citizenship in his native state, but has always returned there to vote in each national election.

Now, it is settled that, where a domicile is once shown to have been established, it is presumed to continue until it is clearly shown to have been abandoned. *Mitchell v. U. S.*, 21 Wall. 353, 22 L. Ed. 584; 24 Am. & E. Enc. of Law, 698. The rule is clearly stated that the domicile of a married man is presumed to be at the place where his wife or family resides. 14 Cyc. 861. And the presumption also exists that a man is a citizen of his native state until it can be shown that he has acquired citizenship elsewhere. *Coxe v. Gulick*, 10 N. J. Law, 328; 7 Cyc. 147. Where a bill properly alleges the requisite jurisdictional facts, the burden is on the defendant both to allege and prove the facts relied on to defeat the jurisdiction. *Wiemer v. Louisville Water Company (C. C.)* 130 Fed. 244, citing 1 Bates' Federal Practice, 252. It is important to observe that under Act March 3, 1875, c. 137, 18 Stat. 470, U. S. Comp. St. 1901, p. 508, the defendant must show by proof to a "legal certainty that the suit does not really and substantially involve a dispute or controversy within the jurisdiction of the court." *Chambers v. Prince (C. C.)* 75 Fed. 180. In the case of *Prentiss v. Brennan*, 2 Blatchf. 162, Fed. Cas. No. 11,385, the principle is announced that a fixed and permanent residence or domicile in a state is essential to the character of citizenship that will bring the case within the jurisdiction of the federal courts. Mere residence may be for a transient purpose, as for business, for a fixed period, or limited by an expected future event upon the happening of which there is a purpose to return or remove. But the two elements of residence and the intention that such residence shall be permanent must concur to make citizenship. *Marks v. Marks (C. C.)* 75 Fed. 325. Said the Supreme Court of the United States, in *Mitchell v. U. S.*, supra:

"Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject"—citing Wharton's Conflict of Laws, § 55.

The affidavits offered in support of the motion, and against it, are fairly in conflict as to the intention of the complainant to avail himself of the privileges and prerogatives of a resident of this state. He asseverates under oath and with great earnestness that he never meant to change his home from North Carolina to Georgia. It is undeniable that the only home he had was in North Carolina. His sworn testimony that his wife and children lived there, that he there supported them, that he returned to visit them at frequent intervals, that he voted there in national elections, is not in dispute. He is an expert in dealing with timber lands, and his occupation carried him to many counties in Georgia. He roomed with different men, as a man in his occupation might well have done; but it does not appear that he made

any effort to break up his home in North Carolina and establish it in Georgia. The principal contention made in support of the motion is that he voted in a certain Democratic White primary; that he was a member of the reception committee for one of the candidates for Governor in the alleged Democratic White primary which is now pending; that he was seen and heard on the "platform, hollowing" for his candidate, and declaring his unalterable devotion to the fortunes of that statesman; and that on the 19th day of March, of last year, he registered for a pending Democratic White primary, and took the following oath of a voter:

"I do solemnly swear that I am a citizen of the United States; that I have resided in the state of Georgia one year; in the county of Irwin six months; in the city of Fitzgerald six months; in the Third ward of said city thirty days. I have paid all taxes which have been required of me by the laws of Georgia since the adoption of the Constitution of the state."

These facts, it is insisted, are conclusive of the contention that the complainant is a citizen of Georgia. I pretermit at present the interesting inquiry whether a Democratic White primary constitutes an election, or voting thereat, the exercise of suffrage authorized by any valid law of the state, or of the United States, which a national court must regard as of any significance in a legal sense. But it is said that he voted in Georgia at an election clearly authorized by law. It seems, however, that voting at a lawful election in a particular state has been by many courts deemed as inconclusive of domicile or citizenship there.

It is true that in *Shelton v. Tiffin*, 6 How. 185, 12 L. Ed. 387, Mr. Justice McLean said that, on a change of domicile from one state to another, "an exercise of the right of suffrage is conclusive on the subject"; but the learned associate justice disclosed in his opinion that there was no proof that the party ever voted in any election in Louisiana, and this subject of suffrage, not being before the court for decision, the language quoted is merely a dictum. To the contrary, while recognizing the fact of suffrage as an important factor in determining the question, many authorities are to the effect that it is not conclusive. *Woodworth v. St. Paul* (C. C.) 18 Fed. 282; *Easterly v. Goodwin*, 35 Conn. 279, 95 Am. Dec. 237; *Enfield v. Ellington*, 67 Conn. 459, 34 Atl. 818; *Smith v. Croom*, 7 Fla. 81; 10 Am. & E. Enc. of Law, 24. Strongly to the same effect was the Louisiana case of *Mandeville v. Huston*, 15 La. Ann. 281. It was there held that the fact that a person had voted in that state, and had even become a candidate for the Legislature, was not sufficient to show a change of domicile from another state, where it was shown that he never made a permanent change in his residence.

In view of the fact that it has not been shown that the complainant ever relinquished his domicile in his native state; that he has always maintained a family and home there, which he has continuously visited, voting there in all national elections; and that his sojourn in Georgia appears to have been solely for business purposes—the court is of the opinion that, even conceding to the evidence contained in the affidavits of the defendant its fullest effect, the presumption that the complainant is a citizen of North Carolina is not overcome by the fact

that he merely once voted in a local primary to nominate candidates of a single political party, or a local election, or that he was on "an invitation committee," or that he "sat upon the stand" from which the candidate spoke, or that he was "whooping and hollowing" on that edifying occasion. It is, moreover, at least questionable whether the exercise of the right of suffrage in the state of Georgia by one who has a home elsewhere is very significant to show such a change of domicile and citizenship as will deprive a suitor, who would be otherwise entitled, of his right to pursue his remedies in the courts of the United States. Here residence and the payment of taxes seem to bestow the elector's privilege. The distinction between residence and citizenship is well known, and the relating clause in the Constitution of Georgia is silent as to citizenship. This is found in section 5737 of the Code, as follows:

"Every male citizen of the United States (except as hereinafter provided), twenty-one years of age, who shall have resided in this state one year next preceding the election, and shall have resided six months in the county in which he offers to vote, and shall have paid all taxes which may hereafter be required of him, and which he may have had the opportunity of paying, agreeably to law, except for the year of the election, shall be deemed an elector: Provided, that no soldier, sailor or marine in the military or naval service of the United States, shall acquire the rights of an elector by reason of being stationed on duty in this state; and no person shall vote who, if challenged, shall refuse to take the following oath, or affirmation: 'I do swear (or affirm) that I am twenty-one years of age, have resided in this state one year, and in this county six months, next preceding this election. I have paid all taxes which, since the adoption of the present Constitution of this state, have been required of me previous to this year, and which I have had the opportunity to pay, and I have not voted at this election.'"

Besides, on the whole, it is the better practice to determine an issue of this character upon the proofs, and not upon ex parte affidavits. It is true that some of the courts have received such affidavits, but others have required proof with opportunities for the examination and cross-examination of witnesses. An illustration of the superiority of the latter method will be seen in this case. Counsel for the complainant was deeply absorbed in another trial when this motion was made. In response to an urgent appeal by counsel making the motion, it was perhaps improvidently assigned two days after it was made. A very earnest complaint was made that complainant's counsel did not have the opportunity to put the evidence in his client's behalf before the court. A similar case was that of *Kilgore v. Norman* (C. C.) 119 Fed. 1008. There this court held:

"Evidence in the form of affidavits has been produced to show that two of the complainants were residents of this state, and, since they are necessary parties to the bill, it is contended that the relief sought must be denied for want of jurisdiction. Prima facie the court has jurisdiction, because the sworn averments of the bill set out the essential jurisdictional facts. * * * There is before us the testimony of the complainant and the testimony of her relatives that she had, in point of fact, in good faith removed to Alabama, and lives there now. The witnesses on whom the respondents rely to defeat jurisdiction have not been subjected to cross-examination. * * * This question ought to be determined on full proof, when the parties have had the right to examine and cross-examine the witnesses to establish the necessary and essential facts.

* * *

It is true that in *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690, it was held error not to dismiss upon motion a suit brought where the proper diversity of citizenship did not exist, but the court stated that this appeared from the evidence in the record, and, while certain affidavits were offered, it appears from the statement of the case that a lengthy deposition was taken with direct, cross, and redirect examination. Besides, Justice Harlan, in rendering the opinion, referred, on page 327, of 129 U. S., page 292 of 9 Sup. Ct. (32 L. Ed. 690), to the action of the court in *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725, where it is recited that in that case, after verdict, "the court summarily dismissed the action upon the ground solely for want of jurisdiction, without offering the complainant any opportunity whatever to reply or control the evidence on the question of jurisdiction." The learned justice continues:

"The failure, under the peculiar circumstances disclosed in that case, to give such opportunity, was, itself, sufficient to justify a reversal of the order dismissing the action, and what was said that was irrelevant to the determination of that question was unnecessary to the decision and cannot be regarded as authoritative."

Now, in this case, neither party has had the opportunity to offer evidence, and it seems that the question of jurisdiction ought to be determined in the orderly procedure by plea, with the amplest opportunity to both parties to adduce evidence. In the language of Mr. Justice Matthews, in *Barry v. Edmunds*, 116 U. S. 559, 6 Sup. Ct. 506, 29 L. Ed. 729:

"It might happen that the judge on the trial or hearing of a case would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court, but upon such personal conviction, however strong, he would not be at liberty to act, unless the facts upon which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusions based on them. Nothing less than this is meant by the statute when it provides that the failure of its provision on this account 'shall appear to the satisfaction of said Circuit Court.'"

An additional ground to defeat jurisdiction is the contention that one of the codefendants named in the bill is under its allegations an indispensable co-complainant; the alleged cause of action not being separable. The court, as at present advised, is, however, of the opinion that, this being a partnership bill under its allegations, the arrangement of parties is proper for the relief prayed, regardless of the incidental benefit which might accrue to this codefendant from the litigation. Besides, this question is gathered from the face of the bill, and may be raised by demurrer.

Conflicting as the record stands, with inadequate proof, the complainant certainly should not be thus summarily deprived of his right to invoke the powers of this court, and the motion to dismiss the bill is therefore denied.

GADDIE v. MANN et al.

(Circuit Court, S. D. Georgia, W. D. September 7, 1906.)

1. PARTNERSHIP—MUTUAL RIGHTS AND DUTIES OF PARTNERS—ACQUIRING TITLE ADVERSE TO FIRM.

Complainant and defendants entered into a written memorandum contract, which recited that they were "offering for sale a tract of land * * * (about 17,000 acres)," and providing that, in case of sale, they should share equally in the net profits. The evidence showed that the land was timber land, and that it was the intention to acquire it by purchase from separate owners of small tracts; the expected profit being in aggregating such tracts and selling together to some large lumbering concern. A number of options had previously been secured, and others were subsequently secured, aggregating in all some 25,000 acres. Some of these options expired, and one of the defendants renewed the same in his own name, as he was authorized to do for convenience. Nothing had been done toward terminating the agreement, and all parties were performing the agreed services in furtherance of the scheme, when such defendant contracted to sell all of the land for his own benefit, claiming that the agreement expired with the options which were held when it was made. *Held*, that the agreement created a partnership; that such defendant could not renew the expiring options for his own benefit, but such renewals inured to the benefit of all the partners, and all were entitled to share in the profits of the sale.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 144.]

2. SAME—SUIT FOR DISSOLUTION—FRAUDULENT CONDUCT OF PARTNER.

Where one partner has contracted to sell the partnership property, standing in his name, and refuses to admit his partners' interest in the property or proceeds, equity has jurisdiction of a suit by one of the other partners for a dissolution and an accounting, and in such case, where fraud is charged against such defendant, the court will not permit him to retain control and the right to dispose of the property by giving a bond, but will enjoin his further action in respect thereto and take possession by its receiver until the rights of the parties are determined.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 620, 760.]

3. COURTS—JURISDICTION OF FEDERAL COURT—SUIT FOR DISSOLUTION OF PARTNERSHIP.

Where one partner has committed acts which render the continuation of the partnership impossible, all of the other partners are not required to join as complainants in a suit for dissolution; but such suit may be maintained by one, joining the others as defendants, and the facts that the interest of others may be similar to his own, and that they are citizens of the same state as the offending partner, will not defeat the jurisdiction of a federal court, where the complainant is a citizen of another state.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 855.

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 293.]

In Equity. Suit for dissolution of partnership. On motion to give bond.

Olin J. Wimberly, for complainant.

A. L. Miller, for defendant Mann.

SPEER, District Judge. This is a bill brought for the dissolution and distribution of the assets of a partnership. The complainant,

for the purposes of this decision, must be regarded as a citizen of North Carolina. The respondents who appear at this stage of the case are citizens of Georgia and residents of this district. The statutory jurisdictional amount is involved.

The following is the contract of partnership before the court:

"Georgia, Telfair County:

"This agreement made and entered into this the 29th day of Nov. 1904, by and between Frank Mann, Thos. J. Wooten, W. M. Gaddie, and C. M. Wise, whereby the said parties are offering for sale a tract of land on the Ocmulgee river, (about 17,000 acres) and the said C. M. Wise is to have the sale of said property, and in case of a sale, then all parties hereto to share equally in the net profits of said sale.

"[Signed]

F. R. Mann.

"Thos. J. Wooten.

"W. M. Gaddie.

"C. M. Wise.

"Witness: A. J. Walker, J. P."

The plaintiff, W. M. Gaddie, is an expert in the valuation of standing timber. He has devoted 36 years of his life to this business, and for the last 10 years has been engaged in estimating and purchasing large bodies of timber lands lying in the state of Georgia. The evidence establishes that he is an expert with regard to the value of pine timber and hard woods also. J. J. Dorminy, owner of two of the largest sawmills in southern Georgia, testified that he had frequent transactions with Gaddie; that the latter had purchased and sold for him thousands of acres of timber, is a timber man of experience and ability, and understands everything connected with the timber business. The Messrs. Garbutt, proprietors of the Garbutt Lumber Company, and Mr. T. S. Price, prominently engaged in the same business, testify to the same effect.

It appears from the record that Frank R. Mann, Thomas J. Wooten, C. M. Wise, and W. M. Gaddie, the complainant, entered into the agreement above set forth. The proof shows that they agreed to secure certain options for the purchase of large bodies of valuable hard-wood timber. This was found principally in the broad swamp lands of the Ocmulgee river in the counties of Coffee and Telfair. It consisted of white oak, red oak, cypress, white hickory, pig-nut hickory, maple, elm, ash, poplar, swamp pine, water oak, red gum, black gum, tupelo, beech, birch, sycamore, persimmon, and cottonwood. While in the main contiguous, the lands upon which this timber stood belonged to a number of different parties, and it was recognized by the parties to the agreement that the aggregation of such isolated tracts of timber, now finding a ready sale, would prove a profitable investment. This was principally ascribable to its availability for milling. It was near Lumber City, on the river, and near the railroad. Some of the testimony was to the effect that freight rates at this point were one-half less than those exacted for similar shipments of timber not so favorably situated. The parties were satisfied that they would be recompensed for their expense, time, experience, and skill by the difference between the market value of such an aggregated tract, and separate small tracts, which were theretofore regarded as of little value. Indeed, it was conceded on the argument by counsel for the respondent that

large profits might be had from this scheme. These were estimated to be from \$50,000 to \$100,000. He denied, however, that the complainant was entitled to any share therein.

It further appears from the proof that each of the copartners was to endeavor to make a sale, although Wise had special charge of the duty of advertising and of making direct efforts to secure a purchaser. The complainant himself was to exert for the benefit of the partnership the skill and judgment he had acquired by his long experience as a timber man. There is no dispute at all as to these facts. It was the special duty of Mann to secure the options. The agreement seemed mutually beneficial, and it was signed. The parties went to work in pursuance of the general plan and secured control of between 17,000 and 25,000 acres of hard-wood lands of great value. This was done by means of options and escrow deeds. So clear is the participation of the four parties in the general plan that it was admitted by the defendant's counsel that until October 1, 1905, when he insists that the contract terminated, all four of the men went forward in the utmost good faith and attempted to carry out the scheme. Gaddie himself testified that he devoted practically his entire time to the labors belonging to him under this partnership; that he was instrumental in obtaining many of the options, and the testimony is uncontradicted that he was of great assistance in the information he furnished to Wise with regard to the lands. This was to be used for advertisements which were published generally throughout the country, and it cannot be fairly denied that his services were largely instrumental in bringing about the prospective sale, to which reference will presently be made. Nor was such assistance on his part restricted to Wise. He furnished information to prospective purchasers who came to look at the land. To Mann himself he gave much information relative to lumber business of this character. Mann was a turpentine operator, and apparently not skilled in the estimation or appraisal of value in hard-wood timber. Through Gaddie's assistance, he was thus enabled to secure advantageous options and to judiciously handle the lands thus controlled for the purposes of the partnership. The entire correspondence between the parties is put in evidence, and it nowhere appears that Mann or any of the other partners made the slightest complaint in writing or otherwise, as to the manner in which Gaddie performed his duties. It is plain enough that he at all times did what was required of him. It is, however, now contended as one of the grounds of defense that he lacked the requisite expert knowledge. The court regards this contention as wholly disproved. Were it true, however, it would not for that reason justify Mann, a partner, in taking action which would result in an immediate and arbitrary dissolution of the partnership and the acquisition to his own benefit of all the values which had been accumulated. Nor is the principal contention, which it appears Mann deemed to justify him in taking such action, more meritorious than the attack upon Gaddie. It is insisted that the contract to handle these timber lands had in view only the existing leases and escrow deeds, and that the contract itself as a consequence terminated on the date whereon the last option might expire, to wit, October

1, 1905. Mann contends that after that date it was competent for him to get for himself any advantage he could out of the situation as it then stood. Pretermittting consideration at this time of the fact, as it seems, that Mann was himself largely instrumental in delaying and defeating the completion of the purchase under the options, and regarding him merely as a partner who had previously taken no action and sought no advantage for himself, it is not tolerable in a court of equity that he shall be permitted to shut out the complainant or others concerned from the resulting profits of their agreement and labors, and seize the occasion to acquire such profits for himself. That he attempted to do this is indisputable. This is true, notwithstanding the fact that the partnership was of full force and effect, no step whatever had been taken to terminate it, and the partners yet held many leases and options which had not expired. As the options expired Mann sedulously renewed them all in his own name. This gave no information to his partners of the design he had, for, because of his acquaintance in the neighborhood, he had for the purposes of the partnership been authorized to take these conveyances in his own name. When, however, on April 27, 1906, he made a written contract, which is in evidence, for the sale, on his own account of all these lands, the complainant not unnaturally felt himself aggrieved and brought this bill to obtain the relief sought.

Nor is the inequitable character of Mann's conduct to be avoided by his present contention that a large number even of the renewed options have also expired. The court will not hear him to make this contention for his private advantage to the injury of the complainant. Besides, in his own contract with Trigg and White, he recites that he "is the owner in fee simple of about 15,000 acres of lands and timber situated in the counties of Telfair and Coffee, state of Georgia, on the waters of the Ocmulgee river, and also contracts controlling timber land adjoining said property, making the land owned and controlled by [him] to contain about 25,000 acres." These are the lands concerning which this suit is brought. To permit him now to proceed thus to sell the partnership assets, without accounting to the complainant and his other partners for their share of the profits of this transaction, would seem wholly unconscionable.

That he was a partner with the others cannot be fairly questioned. The law upon this subject is not contested. "Where two or more parties are engaged in a joint business enterprise, in which they contribute either capital, skill, or labor, upon an understanding, tacit or otherwise, that they will share in common the profits accruing therefrom, they are partners in fact and in law." *In re Beckwith & Co.* (D. C.) 130 Fed. 476, citing *George on Partnership*, 30. The written memorandum signed by the parties is conclusive as to the nature of their agreement and of their equal share in the profits. Taken in connection with the proof showing the duties to be performed, there is no satisfactory evidence that the partnership would be terminated ipso facto because purchases under certain options might not be completed on or before the date therein specified. In

the very nature of a transaction of this sort that would seem untenable. Indeed, many thousands of acres were acquired under the partnership subsequent to the signing of the agreement. Besides, the plainly expressed purpose of the arrangement is the handling and sale of "a tract" of land on the Ocmulgee river, and the partners might well fail to obtain control of integral parts of that tract, and yet the remainder, or any equities the parties might have, would be regarded as assets of the partnership. Mann in effect admits his intention to exclude his copartners from participation in the profits of their agreement, whatever such profits might be, and, in the affidavit filed in support of his defense, he admits that they are to be excluded from all participation in the profits of the sale to Trigg and White. Nothing in view of the relation could be more indefensible.

Partners are not to be permitted to take the law in their own hands in such manner and with such results to copartners. In *Mitchell v. Reid* (N. Y.) 19 Am. Rep. 252, the court observes:

"The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights, and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business affairs of the firm, clandestinely stipulate for a private advantage to himself. * * * Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary."

In that case the contract expressly stipulated that the partnership would terminate at the date of the expiration of the lease of the Hoffman House in New York, the management of which was the purpose of the partnership agreement. Before its expiration, the defendant, without the knowledge of his copartners, procured a renewal of this lease for a term commencing on the date that the partnership was to terminate and the original lease was to expire. The court held that this new lease inured to the benefit of the firm; the partner being a trustee thereof for the partnership. See, also, *Struthers v. Pearce*, 51 N. Y. 357, with regard to a contract of uncertain duration. There the same principle is laid down that a new lease accrued to the partnership assets. The famous case of *Keech v. Sandford*, 1 Lead. Cas. in Eq. (Hare & Wallace's Notes) 84, established the doctrine that a renewal of a lease "is but a graft on the old stock." This has been affirmed by a long line of cases. *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Phyfe v. Wardell*, 3 N. Y. Ch. R. Ann. 714; *Gibbes v. Jenkins*, 7 N. Y. Ch. R. Ann. 798.

Nor is the jurisdiction in equity questionable. The bill prays the dissolution of the partnership with other ancillary relief. Now the basis of such a bill "is the necessity for the due winding up of a partnership; and this equity alone, independently of any other considerations, will entitle a suitor to demand relief at the hand of a chancellor." *Bispham's Eq.* (6th Ed.) 635. "The general ground for a dissolution is that the partnership cannot be carried on for the benefit of the parties, according to the original intention." *Id.* 636.

In view of the refusal of the defendant Mann to permit his copartners to share equally in the benefits of the Trigg and White contract, of his claim that the renewals of the original options and deeds accrue solely to his individual advantage, and of his manifest intention disclosed by the record to exclude his copartners from the partnership undertaking, this is clearly a case which justifies the decree for a dissolution and accounting. And, "where a dissolution has been decreed in consequence of the improper conduct of parties, or for some similar cause, a receiver will be appointed as a matter of course; the reason being that the same causes which justify a decree for dissolution in such cases will also justify an appointment of a receiver." Bispham's Eq. 638.

The present case, under the facts, also is fairly within the principle expressed by Mr. Pomeroy (5 Pomeroy's Eq. 145), as follows:

"The exclusion of one partner from his full share of participation in the business of the partnership is considered one of the strongest grounds for the appointment of a receiver. When the application is made on this ground, it is not always a necessary condition of the action of the court that the property should be in imminent peril; but, if there is in addition to the exclusion a showing of fraudulent conduct on the defendant's part, and a dissolution is inevitable, the court will unhesitatingly appoint a receiver."

The respondent has resorted to another expedient by which he seeks to continue in control of the assets of the partnership, which, as is seen, he has taken charge of in his own interest. This is a motion to tender what he terms an "eventual condemnation money bond" to secure the complainant in any recovery he might make. This motion is obviously addressed to the discretion of the court, and, under the circumstances of the case, must as obviously be denied. The effect of the motion, if granted, would be to leave the management of the entire transaction in the hands of one who seems to be, in the present state of the case, a wrongdoer, and who would therefore, with the advantage of possession, render increasingly difficult the efforts of the court to ascertain what are the real values involved and the profits which should be shared. Here grave fraud is charged, here an investigation is imperatively demanded. The court cannot leave the control of the situation in the hands of Mr. Mann; it must enjoin his activities, and place the values—which are apparently great—in the control of impartial hands. As stated in *High on Injunctions* (volume 2, pp. 1502-1504):

The court will continue the injunction "where fraud is the gravamen of the bill, or where it is apparent to the court that a dissolution of the injunction would result in greater injury and hardship than its continuance to the hearing, or where it is apparent that by the dissolution complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause." And "where the case as presented by the bill is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property which is the subject of controversy beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved."

Besides, the Supreme Court of the United States, in *Shields v. Coleman*, 157 U. S. 178, 15 Sup. Ct. 570, 39 L. Ed. 660, has declared

that, when a court of the United States, after the appointment of a receiver, "accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property. * * * The property ceased to be in custodia legis. It was subject to any rightful disposition by the owner or to seizure under process of any court of competent jurisdiction." See, also, Alderson on Receivers, 26. Since Mr. Gaddie has sought this forum, his rights, such as they may be found to be, will be here determined. On this general subject, see *Bennett v. Smith*, 108 Ga. 466, 34 S. E. 156; *Mead v. Burk* (Ind. Sup.) 60 N. E. 338.

It is, however, said that the court has no jurisdiction, for the reason that one of the copartners, whose interests are similar to those of the plaintiff, and who concedes the rights of the plaintiff—which are to a degree coincident with his own—is a citizen of Georgia and ought to be treated as a plaintiff, with a view of defeating jurisdiction. This contention in this case is not regarded as sound. The plaintiff has the right to choose his forum. Conceding that the resident partner might, had he chosen, have been a party plaintiff, he was not a necessary party as such, and the court will not sua sponte institute a suit in his behalf and in his name in order to defeat jurisdiction. See *Insurance Co. of North America v. Delaware Mut. Ins. Co.* (C. C.) 50 Fed. 250.

To deny the complainant relief here, because one of the partners whose interests may coincide with his is a citizen of Georgia, would, indeed, nullify one of the main purposes for invoking the equity jurisdiction of United States courts in bills of this character. When one or more partners commit acts which render the continuation of the partnership impossible, but which in different degrees injure their copartners, it would be manifestly absurd to require all of the latter to join as co-complainants in order to obtain a decree of dissolution. The interests of Gaddie and of Wise cannot be regarded as identical, nor can it be maintained that the latter is the real complainant. In this case, as seen, the partnership was created by writing severally signed by four partners, each of whom had distinct duties to perform, and each of whom was to have a separate share of equal value in the profits of the venture. In such cases the cause of action cannot be regarded as necessarily joint, else it would leave a suitor without remedy whenever his copartners, through indifference, conspiracy, or fraud, fail or refuse to join with him in a proceeding against the offender or offenders. By a parity of reasoning it would be equally competent for resident partners to conspire and insist upon bringing a bill for dissolution in a state court, and thus deprive a nonresident of his constitutional right to sue in the courts of the nation. The bill is in behalf of Gaddie. It

prays a dissolution and accounting, with the ancillary remedies of injunction and receivership. The decree will bind each of the partners and will determine their separate rights. Under this view, we think it clear that the right of the complaining citizen of another state must be heard and determined here.

The injunction will be maintained, the receivership made permanent and suitable order will be framed, if practicable, authorizing the receiver to carry out the purposes for which the partnership was formed. The details may be provided by the interlocutory decree.

CHICAGO PORTRAIT CO. v. MAYOR, ETC., OF CITY OF MACON.

(Circuit Court, S. D. Georgia, W. D. April 8, 1899.)

1. COMMERCE—INTERSTATE—TAXATION BY STATE.

A corporation of one state there engaged in the manufacture of portraits and frames therefor has the right to send agents into another state to solicit orders for its work, and other agents to deliver the portraits made upon such orders and collect therefor, and, the entire transaction being one exclusively of interstate commerce, neither the state nor a municipality has power to impose license taxes upon either class of such agents.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 103-111.]

Taxation of interstate commerce by state, see note to Board of Assessors of Parish of Orleans v. Pullman's Palace Car Co., 8 C. C. A. 492.]

2. HAWKERS AND PEDDLERS—LICENSES—PERSONS SUBJECT TO TAX.

An agent of a corporation of another state engaged in making portraits by photographic enlargement, who delivers such portraits to customers who have previously ordered the same made, and collects therefor, is not a "peddler or hawker," within the meaning of an ordinance imposing a license tax on persons engaged in such occupations, merely because, as incidental to such delivery, he sells the customer a frame for the portrait, if desired.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Hawkers and Peddlers, §§ 3-6.]

In Equity. Suit for injunction.

Claud Estes and Malcolm D. Jones, for complainant.

Minter Wimberly, City Atty., for defendant.

SPEER, District Judge. The Chicago Portrait Company, a corporation of the state of Illinois, brings its bill against the mayor and council of the city of Macon, and asks an injunction against the enforcement of a tax upon the complainant's agents, upon the ground that such enforcement is repugnant to article 1, § 8, par. 3, of the Constitution of the United States. W. L. Chrystal was one of the complainant's agents. His case was taken as typical of the others, and the case submitted upon the following agreed upon facts:

"Chrystal was a nonresident of the state of Georgia. The Chicago Portrait Company was a corporation of Chicago, Ill., with its principal office and place of doing business in Chicago. Chrystal was a special agent of the Chicago Portrait Company and had been sent to Macon for the purpose of delivering

certain pictures to customers who had ordered pictures enlarged. That such pictures were enlarged in Chicago, and after they were finished they were consigned to the Chicago Portrait Company in bulk at Macon, Ga., for said customers, and were received by Chrystal as an agent of the Chicago Portrait Company for the purpose of delivering the same to the parties who had ordered them and receiving the pay therefor at the contract price. That such pictures were the property of the Chicago Portrait Company, until the same had been received and paid for by the respective customers who had ordered the work done. In case a customer refused to receive the picture, the same was shipped back to said company. That each and every customer had the privilege of receiving his picture framed or unframed, and had a choice between frames of different prices. That the orders for said pictures had been previously taken by other agents of the Chicago Portrait Company and forwarded, with the pictures to be enlarged, to Chicago, where the work of enlargement was to be done, and that Chrystal had been sent to Macon to make delivery of and to collect for said work, and was engaged at the same at the time he was arrested."

The bill contains the usual averment that the injury attempted by the city of Macon is noncomputable and irreparable in damages; that equity should take jurisdiction to avoid a multiplicity of suits—there being a large number of agents here engaged in the same capacity with Chrystal. The prayer is for an injunction to restrain and enjoin the city of Macon from arresting the agents of complainant who are now here, or who might at any time be sent to the city of Macon for the purpose of soliciting orders for pictures to be enlarged, or who may be here for the purpose of delivering and collecting for such pictures after they are enlarged and returned for delivery, and from attempting to collect from complainant a license or tax for its business by the mayor and council of the city of Macon, or from otherwise interfering with the agents of the complainant, or the conduct of its business.

The license ordinance of the city of Macon, in contemplation of which the tax is demanded, is as follows:

"Peddlers or hawkers, meaning those who sell any article of merchandise, books, etc., or from house to house solicit orders therefor, whether sold direct or delivered at a later period, shall pay a license per month of, and no license shall be prorated, \$5.00.

"And each and every person engaged in the above business shall be subject to license, and such license shall include the delivery of the article sold: provided, that this license shall not apply to traveling salesmen, commonly known as drummers, selling to the trade only."

While there are other averments in the bill and in the not properly verified answer of the defendant, the attention of the court has been, of course, restricted to the recital of agreed upon facts above stated. This being true, it is difficult to perceive anything in the business tax except an instance of interstate commerce. The Chicago Portrait Company sends its agents to Macon for the purpose of soliciting for the business in which it is engaged. That business is the manufacture of enlarged photographs. It is conducted exclusively in another state. It certainly cannot be contended that these soliciting agents are taxable by this state or by any corporation created by it. They are not peddlers, because they do not sell either by retail or by sample, and they do not carry their goods with them. They are merely traveling solicitors for the corporation engaged in the busi-

ness of making and enlarging portraits. These solicitors for the contracts of enlargement of portraits are not the agents who deliver the portraits when they have been enlarged. This also appears from the agreed statement of facts. It is equally true that the men who deliver the enlarged portraits are not peddlers or hawkers. They have not sold the articles. They are merely employed by the Chicago concern to deliver them and to collect the price. The business itself, which could be taxed by a state or municipal authority, is that carried on in Chicago, and it is presumable that it pays its share of the public burdens there. The only theory upon which the city insists upon the collection of this tax, and the imposition of penalties therefor when it is not paid, is that the agents of the Chicago corporation are peddlers or hawkers when they deliver the completed pictures sent to them for that purpose only. Now, in the case of *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, the Supreme Court of the United States quotes with approval the language of Chief Justice Shaw of Massachusetts, in the case of *Commonwealth v. Ober*, 12 Cush. 493, where he says:

"The leading primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers in contradistinction to a trader who has goods for sale and sells them in a fixed place of business."

It is difficult to discover any correspondence between this definition and the facts submitted by the parties in this case. It is insisted by the city attorney that the ruling of this court in the case of *Ben Duncan v. City of Macon*, no opinion filed, is authority for holding the agents of the complainants as peddlers. This does not seem to be justifiable in view of the character of that case. There the court in its oral opinion said, speaking of the parties concerned:

"It is true that they go from house to house and offer to sell goods by retail and by sample. If they stopped there, they would not be peddlers; but suppose they take the goods with them and deliver them. Whether they carried them in a highly decorated wagon, or whether they carried them in an oil cloth pack of less conspicuous character, they would be peddlers."

That clearly is not this case. Here the case is that of a nonresident manufacturer sending agents into the state to solicit business, and thereafter sending other agents into the state to deliver the goods the agents first sent have contracted to furnish. The case seems to be within the principle of *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. There a Chicago manufacturer of pictures and picture frames employed his agents to go personally into Pennsylvania and solicit orders. This he did. The goods sold were shipped to the purchaser from Pennsylvania, and the price of the goods was collected and forwarded, sometimes by the express companies, and sometimes by the agents of the manufacturer. There the Supreme Court held that the tax was upon interstate commerce, and could not be enforced. I quote the apposite language of Mr. Justice Brewer:

"The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state, can send an agent into another state to solicit

orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods."

The right to tax there was denied by the court, not only because it was an attempt to regulate interstate commerce, but also because the city of Titusville had no authority under its police power to impose the taxation. "It must be borne in mind," said the learned justice, "that the goods which the defendant was engaged in selling, to wit, pictures and picture frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community. * * * There is no discrimination, except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and, unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be to tax for the privilege of selling to the rest of the community." I think that the nonresident manufacturer of these pictures has the right to send its soliciting agents here and attempt to market its wares, and it also has the right to send its other agents here and deliver the wares when sold, and collect the price thereof, and the entire transaction being exclusively commerce between the states, and being in no sense objectionable as inimical to the good order and safety of the community, neither the state nor the city has any right to impose or collect taxation therefor.

It is said, however, that the sale of the picture frames by delivering agents will make them peddlers. It is not discoverable from the evidence submitted that the delivering agents sell the frames. The language is: "Each and every customer had the privilege of receiving his picture framed or unframed, and take his choice between frames of different prices." But, if this can properly be construed to indicate that the delivering agent is engaged in selling the frames, there is, nevertheless, high authority to negative this theory of the defendant. The Supreme Court of South Carolina, in the case of *State v. Coop*, 30 S. E. 609, 41 L. R. A. 501, Mr. Justice Gary delivering the opinion, held that the sale of the frame is a mere incident to the business in which appellant was regularly engaged, and the frame may properly be regarded as part of or incident to the picture. "This case," the learned justice remarks, "does not fall either within the letter or spirit of the statute against hawkers and peddlers, and, even if the statute could be construed to embrace cases like this, it would be unconstitutional on the ground of interference with interstate commerce." The plaintiff in error in whose favor the decision was made in that case was one of the agents of the complainant here.

For these reasons the injunction sought by the complainant will be granted.

HARDING v. CARGO OF 4,698 TONS OF NEW RIVERS STEAM COAL.

(District Court, D. Maine. October 15, 1906.)

No. 35.

1. SHIPPING—CHARTER PARTY—PRINTED AND WRITTEN PROVISIONS.

After the printed provision of a charter party, "Vessel to have turn in loading," was written, "Vessel to be loaded promptly." *Held*, that the latter provision did not nullify nor supersede the former, but that the two were consistent, and both could be given effect.

2. SAME—PROVISION FOR TURN IN LOADING.

A provision of a charter party for a schooner to carry a cargo of coal, "Vessel to have turn in loading," does not make a part of the contract a custom of the port to give steamers the preference in loading or filling their bunkers, which is not shown to have been known to the parties, but entitles the vessel to be loaded in turn with other vessels in the order of their arrival, and she is not obliged to take her turn with any particular class of vessels.

3. SAME—DEMURRAGE.

To avoid liability for demurrage to a vessel chartered to carry a cargo of coal and entitled under the charter party to be loaded in turn, where it is shown that other vessels arriving after her were loaded first, the burden rests on the charterer to clearly prove exceptional conditions or particular circumstances set up as a defense, and which it is claimed rendered it impracticable from a business standpoint to load sooner, as that owing to her height she could not be loaded at the piers where such other vessels were without great additional expense.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 572, 596.]

4. SAME—PROVISION FOR PROMPT LOADING—COAL CARGO.

Under a charter party for a vessel to carry a cargo of coal, which provided that she should "have turn in loading" and "be loaded promptly," she was entitled to be loaded promptly in view of the facilities of the port and the climatic conditions which existed at the time, and to have such facilities used to their normal capacity, not only in her own loading, but also in the loading of other vessels after her arrival while she was waiting her turn.

In Admiralty. Suit for demurrage.

Benjamin Thompson, for libellant.

J. Wells Farley and Charles Wolcott, for claimant.

HALE, District Judge. This is a libel to recover damages for detention of a vessel. The five-masted schooner Dorothy Palmer, with a carrying capacity of 4,800 tons, one of a large fleet of schooners known as the "Palmer Fleet," was chartered in Boston on the 27th day of January, 1904, for a voyage from Newport News to Portland, with a full cargo of coal. The charterer and claimant was the Warren & Monks Company, a corporation engaged in the wholesale coal business at Boston. The charterer had received notice from the New Rivers Consolidated Coal & Coke Company that it could supply it with 30,000 or 40,000 tons of coal per month until April 1, 1905. By the terms of the charter, the schooner was to be provided with a full and complete cargo of coal and pay for the use of the vessel 75 cents per ton. The charter party further provided:

"It is agreed that the lay days for loading and discharging shall be as follows: Commencing from the time the captain reports himself ready to receive or discharge cargo and excepting Sundays and national legal holidays unless used. Vessel to have turn in loading. Vessel to be loaded promptly."

The above provision was all in print, except the last sentence, namely, "Vessel to be loaded promptly," which was written below the printed part, in a blank space. The charter provided also:

"That for each and every day's detention by default of such charterer six cents per ton B. L. weight per day, day by day, shall be paid by said party of the second part [the charterer], or agent, to said party of the first part [the vessel], or agent. The cargo or cargoes to be received and delivered alongside within reach of the vessel's tackles, sufficient water guaranteed. Vessel to have an absolute lien on cargo for freight, dead freight and demurrage. Vessel may assert said lien with cargo still on board."

The schooner arrived at Newport News in the morning of the 12th day of February, 1904. The testimony shows that at Newport News there is no opportunity for coal to be stored. All coal shipped is bituminous, and is run upon cars from the mines to the docks of the Chesapeake & Ohio Railroad Company. It is dumped from the cars into the vessels. The company is represented at that port by Henry E. Parker, superintendent of terminals, who has charge of the docking of vessels at the piers, providing berths for them, ordering coal upon the dock, and directing the loading. He determines the place where, and the time when, vessels shall be docked. The railroad company has about 6,000 cars, a great part of which are used for the transportation of coal from the mines. It maintains three piers for the shipping of coal, known as "Pier 2," "Pier 3," and "Pier 10"; all of these piers having berths for vessels on both sides. Loading the vessels is done by gravity; the cars being brought from a low grade, pushed up an incline by a locomotive to the crest of the grade, where they are left by the locomotive, and then moved by hand, with the assistance of gravity, to the end of the pier and unloaded while in transit. At intervals along the tracks are pockets located under the track and connected near the edge of the pier with long metal chutes. Connection between the pocket and the chute is jointed, so that the chute may be raised or lowered to accommodate the height of the vessel to be loaded. By the use of these facilities, as the evidence shows, the maximum loading at that port is 325,000 tons per month, and, under normal conditions, about 10,000 tons per day are ordinarily loaded at the three piers. The testimony shows further that, during the time the schooner was waiting for cargo, the shipment of coal was normal, and there was no shortage of cars or track facilities.

All coal vessels arriving at Newport News anchor in the roadstead, from which point they are taken by steam tugs of the Chesapeake & Ohio Railroad Company and docked at the particular coal pier at which the superintendent of terminals determines to load them. The masters of such vessels do not have anything to say about the docking, but, after reporting, wait until a tug is sent. Upon her arrival at Newport News, the libellant's vessel anchored at the usual anchorage and reported to Mr. Parker, and also to Mr. Arnal, the charterer's agent. At the time of her arrival there were 20 or more coal vessels at anchor

in the harbor. These were, for the most part, schooners, and a few barges, waiting for cargo. The Palmer remained at her anchorage in the stream from the date of her arrival on February 12th until February 26th. The evidence shows that during all that time she was in readiness to be docked and to receive her cargo, and Mr. Parker testifies that, when a vessel comes into Newport News harbor and lets her anchor go, she is entitled to count her time from that moment, so that no question is raised but that the Dorothy Palmer, on and after February 12th, was an "arrived vessel," within the meaning of the charter party. At about noontime on February 26th the schooner was docked by direction of Mr. Parker at berth 9 of pier 10. Capt. Harding, her master, testifies that she received cargo right along every day up to March 2d, and on that day the coal supply ran short, and she was hauled into the stream; that on the following day, March 3d, she was docked at pier 3, where she remained until March 5th, when her loading was completed. The claimant admits liability for the delay incident to the shortage of coal on March 2d, and, to cover the detention from that time until March 5th, it has paid into the registry of the court the sum of \$850, but denies that it is liable for any further detention.

The first question in the case relates to the construction which the court shall give to the provisions of the charter, "Vessel to have turn in loading," and, "Vessel to be loaded promptly."

1. It is claimed by the libelant that the insertion into the printed charter party of the written words, "Vessel to be loaded promptly," supersedes the printed portion, "Vessel to have turn in loading," and that thus, under the terms of the charter party, the schooner should have been loaded promptly without any regard to the question of turn. The learned counsel for the libelant cites the class of cases where, in contracts which present great difficulty of construction, courts have disregarded printed portions which were inconsistent with inserted written clauses, and have permitted the written words to master the rest of the printed blank. He cites many important and leading cases, some of them in this circuit, where this position has been sustained, and urges that, under this class of decisions, the written portion of the charter party should be given the controlling weight; that the vessel should have been loaded as soon as she came to Newport News, without any regard to the loading of other vessels; and that the charterer was obliged to have cargo ready for shipment upon the arrival of the schooner at Newport News, or immediately thereafter. I cannot give this interpretation to the two expressions in the charter party. The principle of construction invoked by the learned counsel for the libelant is resorted to by courts upon questions where there is an irreconcilable conflict between two provisions in a contract; but this method of interpretation is not, and should not be, followed where a reasonable construction may be given, which gives force to every term and provision of the contract, and is, at the same time, consistent with law and with the intention of the parties. *The India*, 49 Fed. 76, 1 C. C. A. 174; *Miller v. Hannibal & St. Jo. R. R.*, 90 N. Y. 430, 43 Am. Rep. 179; *Bell v. Woodward*, 46 N. H. 315.

2. In order to find what the two expressions in the charter party mean, when taken together, it is necessary to find what is the meaning of the clause: "Vessel to have turn in loading."

The learned counsel for the claimant insists that this clause should be interpreted to mean that the vessel is to have turn in loading according to the custom of the port of Newport News. Under this construction, the claimant seeks to read into the contract a usage of the port that all sailing vessels shall be berthed in the order in which they arrive; but that preference shall be given to steamers whether they require coal for cargo or for bunker use.

In *Donnell v. Amoskeag Manufacturing Co.*, 118 Fed. 10, 14, 55 C. C. A. 178, 182, in speaking for the Circuit Court of Appeals in this circuit, Judge Putnam said:

"We will find, therefore, that, so far as the expression 'in turn' is concerned, we must follow a strict construction; but, as to any question of usage at the place of loading, we must apply just and reasonable rules. * * * We will now proceed to look at the effect of the expression 'in turn.' The learned judge who disposed of the case in the District Court found that this stipulation had been violated in two particulars: By giving precedence, first, to two steamers belonging to the Consolidation Coal Company, and, second, to certain local demand for steamers for bunker consumption, for street railways, and perhaps for other local purposes. On this branch of the case, we are met by an express stipulation in the charter party which is not to be lightly put aside. If it were intended that preferences of these kinds should be given, it was easy to so stipulate in the charter party, and it should have been done. It was apparently usual for the Consolidation Coal Company to give priorities of this character, but this does not relieve the position. * * * From the very nature of the usage, no limit can be put on it, so that to refuse this vessel the full benefit of the expression 'in turn' would expose her to an indefinite detention at the port of loading, without any rule by which the detention could be measured in advance, and without any relief. The authorities cited by one party or the other which are supposed to bear directly on this question are contradictory. None are of conclusive weight, and they are differently understood by different writers. *Scrutton, Charter Parties* (4th Ed.) 96, 97, *Carv. Carr. at Sea* (3d Ed.) 708, 709; *Abb. Merchant Ships & Seamen*, (14th Ed.) 410, 411. In *Evans v. Blair*, 114 Fed. 616, 620, 52 C. C. A. 396, we pointed out under what limitations some of the expressions in the cases thus cited may be safely applied. On the whole nothing would be gained by our undertaking to discuss them. What we have already said, however, is in the line of what was well observed by Martin, B., in *Lawson v. Burness*, 1 Hurl. & C., 396, 402. In that case it was claimed that the expression 'regular turn' in a charter party was to be construed as subject to the custom of the colliery where the vessel was to be loaded, by virtue of which custom vessels were loaded in the order in which they were entered on the books of the colliery, and not in the order in which they reported. Martin, B., observed: 'I cannot conceive anything more unreasonable than that, where two persons enter into a charter party by which a vessel is to load in regular turn, vessels which come in after it should load before it, because, by the practice of the colliery, vessels which are entered first in the book, though not ready to load, are loaded before those which are ready.' As well observed in *Scrutton, Charter Parties* (4th Ed.) 16, such usages 'may control the mode of performance of a contract, but cannot change its intrinsic character'; and to submit this vessel, which had stipulated for a specific right as to the order of being loaded, to usages which leave her no definite rights whatsoever, would be a change of that class."

In *Gardiner v. McFarlane*, 20 Ct. of Sessions Cases (4th Series) 414, the court held that the clause of the charter party, providing that the ship was to be loaded as customary, referred only to the manner of

loading customary at the port of loading, binding the ship to receive the cargo either by lighter, at the wharf, under a crane, or in any way by which such cargoes are usually or according to custom loaded at the port; and the court said:

"It did not include an obligation to wait a regular turn, and did not affect the time which the charterer might detain the vessel without being liable for demurrage for undue detention, although there was no custom time taken or allowed for loading cargoes."

See, also, *Swan v. 550 Tons of Reserve Coal* (D. C.) 35 Fed. 307; *Stephens v. Macleod*, 19 Ct. of Sessions Cases (4th Series) 38.

In *Evans v. Blair*, 114 Fed. 616, 620, 52 C. C. A. 396, 400, speaking for the Circuit Court of Appeals in this circuit, and commenting on the case which I have last cited, Judge Putnam said:

"The limitations of the rule applicable to this case are very well shadowed out, on the one hand, in *Stephens v. Macleod*, already referred to, which is well summed up in *Carv. Carr. by Sea* (3d Ed.) 708, 709, and by the observations of Chief Justice Jervis in *Leidemann v. Schultz*, found in the work entitled, with a certain degree of liberality, *Abbott's Merchant Ships and Seamen* (14th Ed.) 411. In *Stephens v. Macleod*, the *Cassia*, which was the vessel in question, having arrived at the port of Portugalete, and being thus outside of the words 'as ordered,' was entitled to be berthed in turn. There being several wharves for loading iron ore, which was to be her cargo, and the case showing no particular reason to the contrary, she was held to have been entitled to be berthed at the first wharf which was open for her. On the other hand, in the case in which Chief Justice Jervis made the remark referred to, it appeared that the delay arose from the vessel being directed, at Newcastle, to load coke at a particular spout. It was contended for her owner that she could have been loaded earlier at another spout. To this Chief Justice Jervis answered: 'Yes; but with different coke and at a higher price. If the captain may choose at what spout he will load, he may next choose what articles he will load with.' So far as we can discover, there are no authorities of weight inconsistent with these expressions on the one hand and on the other. They practically illustrate the remark of Lord Esher that the power given charterers to select a berth is for business reasons. They therefore further illustrate that, where several vessels are to load or discharge cargoes of the same generic class, they are apparently entitled, in their turn, to the first berths available, but that it may be shown that the particular circumstances are such as reasonably justify the consignee in directing otherwise."

When the testimony relating to usage is examined, it will be found that it is not altogether satisfactory. The evidence does not make it clear that any such custom as is asserted by the claimant was known and recognized by both parties to the contract. It falls short of showing that, when the parties contracted, they had in view a distinct custom at the port of loading. It is denied by the libellant that such a custom was known to him or to his agents. It is insisted that, if there had been such a custom, and if it had been known to the parties, such custom would have been mentioned to Capt. Harding, the master of the schooner, and that it would have been made the controlling reason why the vessel was delayed and was not given her turn; whereas, no such reason was given for delay, but the agents for the railroad company stated that coal had not yet arrived.

In *Barnard v. Kellogg*, 10 Wall. 383, 390, 19 L. Ed. 987, the Supreme Court says:

"The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. 'Usage,' says Lord Lyndhurst, 'may be admissible to explain what is doubtful. It is never admissible to contradict what is plain.' And it is well settled that usage cannot be allowed to subvert the settled rules of law."

In *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008, in speaking for the Supreme Court, Judge Clifford said:

"Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense, and different from the sense which they ordinarily import, and it is also admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent; but it is never admissible to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous and doubtful, but it is never admissible to vary or contradict what is plain. Where the language employed is technical or ambiguous, such evidence is admitted for the purpose of defining what is uncertain; but it is never properly admitted to alter a general principle or rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law."

In *Partridge v. Insurance Company*, 15 Wall. 573, 579, 21 L. Ed. 229, Mr. Justice Miller shows the logical use prevailing in courts on the subject of usage:

"The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place, has gone quite as far as sound policy can justify. It places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law. When this is confined to establishing an implied contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts."

In *Davis v. Wallace*, 3 Cliff. 123, Fed Cas. No. 3,657, in speaking for the court, Mr. Justice Clifford said:

"Reference is made by the respondents to the stipulation in the charter party that the cargo 'shall be received and delivered at the ports of loading and discharging as customary.' But it is evident that that clause refers to the manner of receiving and delivering the cargo, and that it has nothing to do with the question under consideration. Where there is no special contract, the usage of the port in respect to the reception and delivery of the cargo, in controversies between the shipowner and the consignee, is frequent-

ly a very material consideration; but demurrage is a matter of contract, and it is well-settled law that usage cannot prevail over or nullify the express provisions of a contract. Proof of usage is admitted either to interpret the meaning of the language of the contract or to ascertain its nature and effect in the absence of express stipulation, and where the meaning is equivocal or obscure; but the proof of usage is not admitted to contradict express stipulations, or to vary the language employed by the parties where their meaning is expressed in plain and unambiguous terms." *Marshall v. Perry*, 67 Me., 78, 82; *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Haskins v. Warren*, 115 Mass. 514; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224; *Randall v. Smith*, 63 Me., 105, 18 Am. Rep. 200; *The Gazelle and Cargo*, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496; *Tyson v. Belmont*, Fed. Cas. No. 14,316; *Isaksson v. Williams* (D. C.) 26 Fed. 642; *Turnbull v. Citizens' Bank* (C. C.) 16 Fed. 145; *The Dictator* (D. C.) 30 Fed. 637; *Nordaas v. Hubbard* (D. C.) 48 Fed. 921.

The claimant urges that *King v. Hinde*, 12 L. R. Ir. 113, supported as it is by *Scrutton on Charter Parties*, should have great weight with the court in deciding this question; but I cannot think that this case and others of its class can be held to override the rule which is laid down in the cases which I have cited. In view of the evidence in the case, and the law which ought to control it, I am of the opinion that it would be doing a violence to the clause, "Vessel to have turn in loading," if I made that clause to read, "Vessel to have turn in loading according to the usage of the port of Newport News." If it had been the intention of the parties to the contract to import the usage of Newport News into the charter party, they should have said so in the contract. The court is of the opinion, then, that the term "turn in loading" means that the *Dorothy Palmer* was entitled to be loaded in turn with other vessels, in the order of their arrival, and that she was not obliged to take her turn in loading with any particular class of vessels.

3. Did the *Dorothy Palmer* have her "turn in loading," as stipulated by the charter party?

The learned counsel for the claimant insists that the schooner did have her "turn." He admits that certain sailing vessels, which arrived after the *Dorothy Palmer*, were loaded before her at piers 2 and 3, but says that this fact is immaterial, since it was impossible, at least in a business sense, to load the *Dorothy Palmer* at those piers. He insists that pier 10 was the only pier at Newport News at which it was practicable to load the *Dorothy Palmer* when light, because the great height of her hatch coamings above the water line made it impossible to obtain an incline to the chute sufficiently steep to cause the coal to run from the hopper to the vessel; that the only method by which it is possible to load coal into this schooner at the other piers, until she has been partially loaded at pier 10, is to shovel the coal down the chutes; and that this method is not practicable, in a business sense, as it would involve indefinite delay in loading her, and would also delay the loading of all vessels behind her.

Particular circumstances and exceptional conditions, similar to these outlined by the charterer, have been accepted as defenses by late decisions of courts in England and America, and have, when proved, been held to relieve the charterer from liability under his contract to have the cargo ready when the vessel is ready.

In *W. K. Niver Coal Co. v. Cheronea S. S. Co.* (C. C. A.) 142 Fed. 402, 406, recently decided by the Circuit Court of Appeals in this circuit, in speaking for that court, Judge Putnam says:

"According to the primitive rule, a charterer who agrees to furnish a cargo for a vessel and to discharge it is bound to have the cargo ready when the vessel is ready, and to receive the cargo immediately on its arrival at its port of destination. This primitive rule applies to all contracts concerning the handling of merchandise, alike of sale, transportation, or bailment of any kind; but, within the last century, in view, partly, of the necessities of coal ports, and of ports for shipment and receipt of ores and grain, and the modern facilities peculiarly provided at terminals for handling the immense masses of such merchandise now required to be handled, this rule has somewhat yielded, as is fully explained in Scrutton's *Charter Parties and Bills of Lading* (5th Ed., 1904) 17-22. This has gone so far that this author says, in effect, at pages 259, 260, and 261, that a mere obligation to load or unload imports a stipulation that the work shall be done according to the settled and established practice of the port. Mr. Scrutton says, in effect, at page 260, that it has needed a long series of decisions to accomplish this proposition. The same series of decisions has also established the further proposition that, aside from any peculiar custom, the consignee has a right, to a certain extent, to select a particular wharf or berth for discharge of the vessel, although that berth or wharf may be occupied when the vessel is ready to unload, for that reason delaying her; and this not only under charter parties like those now before us containing the words 'as ordered,' but also where neither these words nor an equivalent expression are found. This is not only the settled law in England, but it is the apparent law in the United States. Accordingly, alike with regard to the port of lading and the port of discharge, large margins are given charterers, which have resulted in long detentions to vessels, extremely burdensome, but for which compensation has been refused. As these appeals do not require us to determine positively the modern application of the rules to which we refer, or to fix accurately their various limitations, we will only refer in a general way to the decisions of this court, and to a single English decision which was practically contemporaneous with the peculiar form of charter before us."

This comprehensive opinion of Judge Putnam proceeds to give an exposition of the present law upon the subject, and sustains the finding of the District Court in *New Ruperra S. S. Co. v. 2,000 Tons of Coal*, 124 Fed. 937, where Judge Lowell bases his decision upon the leading case of *Davis v. Wallace*, *supra*, in which case it was held that the charterers were liable for the delay caused by the vessel waiting her turn. The business reasons suggested by Lord Esher and referred to in *Evans v. Blair*, *supra*, have led courts in recent decisions to modify what Judge Putnam has called the "primitive rule"; but in *Ardan Steamship Co., Ltd., v. Andrew Weir & Co.*, L. R. App. Cases 1905, 501, it will be seen that the House of Lords indicates a tendency of English courts to return to something like the primitive rule. In the present attitude, however, of English and American law, it is difficult to determine in each case to what extent business reasons are competent matters of defense. In the case at bar it is clear that there was something more than a mere "obligation to load and unload." There was an obligation that the vessel should have her "turn in loading," and I have not allowed the usage of the port to be read into the contract, so far as that usage relates to permitting steamers, bunker or cargo, to take precedence of sailing vessels. It is clear that, in this case, exceptional conditions and particular circumstances cannot be a defense,

unless they are clearly proved. The burden, then, is upon the claimant to satisfy the court that it was impracticable to load the Dorothy Palmer at any other pier than pier 10. The consideration of this subject involves a careful study of the evidence. It is not necessary to review the testimony in detail. It is enough to say that I am of the opinion that the claimant has not met this burden. The preponderance of the evidence seems to me to show that the Dorothy Palmer could have been loaded at piers 2 or 3; that she did not have such height of hatch coamings above the water line as to make it impossible or impracticable for her to load at those piers. Mr. Parker was the leading witness for the claimant on this point. He insisted that, to his knowledge, the Dorothy Palmer could not have been loaded either at pier 2 or 3, and that she could have been loaded only at pier 10. The force of his testimony, however, is very much impaired by the fact that, at the hearing of the case, he declined to allow the vessel to be taken to piers 2 and 3 and to have a physical examination made, to satisfy the court upon this subject, although the vessel, unladen, was then at Newport News, and libellant was ready to have the test made.

Upon a careful examination of the evidence upon this point, the court is satisfied that the Dorothy Palmer could have been loaded at either pier 2 or 3; that she did not have her turn in loading with vessels in the order of their arrival; and therefore that this clause of the charter party was not met by the charterer.

4. Was the vessel loaded promptly?

In approaching this question the court must take into consideration the means of loading at Newport News. The testimony is that this port was in the full use of its facilities at the time of the loading of this vessel. With 60 miles of track and sidings and 6,000 cars, with its ample piers and great gravity system for loading vessels, the port presented the most ample opportunities for vessels seeking cargoes. This vessel was worth \$150,000. She had an earning capacity of about \$300 per day. She came to this port to avail herself of its great facilities, and she had a right to expect the benefit of them. The freighter, the charterer, "the adventurer who chalks out the voyage," had contracted to give this vessel "prompt loading" at that place. The testimony tends to show, as I have already said, that the maximum loading at these three piers was 325,000 tons per month; that 10,000 tons were ordinarily loaded per day under normal conditions, and Capt. Harding, the master of the schooner, says he has loaded 4,600 or 4,700 tons while his vessel was at the dock for about 27 hours, and that only 15 to 21 hours were actually consumed in the loading; that such loading was not quick loading, but that the average loading of a vessel of the capacity of the Dorothy Palmer was about 2½ days. Mr. Parker states that, under the conditions as they existed at Newport News in February and March, 1904, from three to five days would have been a reasonable time for the loading of this vessel. Under this charter party the libellant's vessel was to be "loaded promptly." As to whether she was so loaded is a question of fact. Upon a careful examination of all the testimony, the court is of the opinion that the charterer's obligation, "Vessel to be loaded promptly," has not been

complied with. Even allowing for the climatic conditions existing at the time of loading, I am of the opinion that this vessel should have been loaded in less time than was consumed in loading her.

The libellant makes the further claim that the term "loaded promptly" should not be limited to the time consumed in loading the Dorothy Palmer after she obtained her loading berth; but that the provision relates, and must be extended so as to apply, to the loading of other vessels which were loaded ahead of the Dorothy Palmer, whether they had previously or subsequently arrived; that she should not suffer by waiting her turn from the fact that these vessels were delayed in their loading, either from want of cargo or from the fact that the Chesapeake & Ohio Railroad Company (which both parties concede became the charterer's agent in the loading of the vessel) failed to utilize its loading facilities to their ordinary and normal capacity—in other words, that the charterer's normal capacity for loading should have been used, not only in loading this vessel, but also in loading the other vessels to which I have alluded, and upon the loading of which she was dependent in obtaining her own prompt loading. There is much force in this contention. The attention of the court has been called by both parties to *Elliott v. Lord*, 52 L. J., P. C. 23, 48 L. T. 542, 5 Asp. M. C. 63, in which—

"A charter party provided that the ship should proceed to a port, and there load from the factors of the charterers a cargo of coal, 'taking her turn with other steamers,' and receive 'prompt despatch in loading.' The charterers employed the persons at the port of loading who were employed to load other ships, and the ship was loaded in her turn, but, by reason of an insufficient supply of coal, the ship was delayed, and it was held that the charterers were responsible for the delay."

In *Abbott's Law of Merchant Shipping* (13th Ed.) 297, the author says:

"A contract that a steamer should take her turn with other steamers, and receive prompt dispatch, was held not to be satisfied by merely loading the ship in turn, as she did not receive prompt dispatch, owing to a deficiency in the supply of cargo."

The court is of the opinion that the charterer's covenant to load promptly should not be limited to the period after the Dorothy Palmer obtained her berth. Upon this point, Capt. Harding, the master of the schooner, states—and I do not find that he is contradicted—that Mr. Parker, the superintendent of terminals, told him that there were at that time several vessels waiting in Newport News because there was no cargo for them, and the evidence tends to show that the usual loading facilities of the port were not being used to the extent that they were in use under normal conditions; but to what extent there was a failure in this particular, or how far such failure may have been due to climatic conditions, does not satisfactorily appear. As this particular aspect of the case, however, is one of damages, it will necessarily be heard by an assessor.

Libellant further argues that the evidence shows that the failure of the libellant's schooner to have her turn, as well as the failure to load her promptly, were due to the fact that her cargo was not ready, although

the charterer had requested the New Rivers Coal Company to supply coal; that this failure to have the cargo at the time and place for loading was the real cause for the delay in giving this vessel her turn, and in not loading her promptly; that such reasons were given by the charterer's agent, as also by the superintendent of terminals, on several occasions during the time the schooner was waiting in Newport News; and that the reasons which were made the subject-matter of this defense were pretexts and after-thoughts. There is considerable testimony in the case sustaining the libelant's contention upon this point. It is not, however, incumbent upon the court to decide what reasons prevailed in this behalf. It is enough to find, and I do find, that this vessel was improperly detained.

5. I hold, then, in this case that under the clause, "Vessel to be loaded promptly," the Dorothy Palmer was entitled to have her turn in loading with the other vessels in the order of her arrival, as I have indicated in this opinion, and without reading into the charter party the alleged custom. I further hold that she should have been loaded promptly, in view of the facilities of the port, taking into account the climatic conditions which existed at the time, and that she was not so loaded.

A decree may be entered for the libelant. An assessor may be appointed to report the extent of the libelant's damages.

McCARTHY et al. v. BUNKER HILL & SULLIVAN MINING & COAL CO.
et al.

(Circuit Court, D. Idaho. August 11, 1906.)

1. INJUNCTION—MEASURE OF PROOF REQUIRED.

Courts may grant temporary restraining orders for the preservation of possible rights upon testimony which is not convincing; but they will not grant a permanent injunction, except upon the clear establishment of those facts which justify it.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 278, 322, 387.]

2. SAME—COMPARATIVE INJURIES.

A permanent injunction will not be granted, which would necessitate the closing of mines and mills in which 10,000 to 12,000 men are employed and large capital is invested, because a comparatively small amount of damage is done by tailings therefrom discharged into a stream to lands below in times of overflow, where the mines and mills were in operation before the lands were acquired, and the owners have done all that could reasonably be done to prevent injury to others by the construction of dams and reservoirs in which the greater part of the tailings are impounded. In such case the owners of the lands will be remitted to their remedy at law by actions for damages.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 22, 23.]

In Equity. Suit for injunction.

W. T. Stoll, W. C. Jones, and E. McBee, for complainants.
Albert Allen and Chas. W. Beale, for defendants.

BEATTY, District Judge. The sole question for present consideration is whether a permanent injunction shall be issued against the defendants. The issue is the same that was considered in a former hearing asking for a temporary restraining order. From the decision then rendered the following is quoted, from which the facts and issues involved appear:

"The complainants allege that about the year 1890 they entered into possession of the lands in question, which are low flat lands lying along the Coeur d'Alene River, and that the defendants through certain mining operations have rendered impure the water of said river, which, when it overflows their lands, poisons and destroys vegetation, as well as animal life, and ask an order restraining defendants from further depositing any mining debris into said river. Among the allegations of the complaint are that when they took possession of their lands the channel of said river was navigable for large boats, which was of great advantage in controlling the freight rates; also that the river was valuable for floating logs and timber to market; that from defendants' mining operations a large amount of material, including lead and other poisonous matter, is cast into said river, which by its overflow deposits upon said lands these poisoned materials, causing destruction of vegetation and the poisoning of the grass and hay with which it comes in contact; that such grass and hay, when eaten by domestic animals, cause their death, and the same result follows from their drinking of said waters; that these deposits have filled the channel of said river 'to such an extent that it is no longer well defined, and its banks rise but little above the stream at low water, so that any slight rise * * * causes it to overflow its banks'; that the channel in places has been filled more than 60 feet, so that places once navigable for large boats cannot now be navigated by even small boats; and that much waste and debris have been deposited upon said lands, but that noticeable evidence of these deposits and alleged injuries complained of has been chiefly since the year 1900.

"Upon the hearing for a temporary restraining order very many affidavits were presented, after which counsel united in a request that I make a personal examination of the premises, which I did on the 24th day of May, 1905, by visiting with counsel for both parties the dams referred to in the record at Osborn and Pine Creek, and by taking a boat at Dudley, which is a few miles below 'Old Mission,' and traveling down said river to its mouth. On this trip counsel were notified that I would submit myself to their directions and go wherever and examine whatever they asked. Admitting the allegations of the complaint as true, the conclusion would follow that these defendants, by their mining operations, are making the valleys below them a besom of waste; that the Coeur d'Alene river, beautiful in name and by nature, is being obliterated, and that soon its polluted waters must flow unvexed by prow or rudder. Had not the affidavits convinced me that these allegations were highly colored, the personal examination made would remove all doubt that some of them are absolutely untrue. After the most careful observation, no justification appeared for the charge that the channel of the river had been so filled with mining deposits or debris that it is no longer well defined, or that it has been filled 'more than 60 feet,' or that its navigation has been obstructed, or that large deposits of such debris have been made upon the lands. It should be stated that what passes from the mining mills as waste consists of rock crushed into what is known as 'tailings' of size from powder to that of small gravel; the powdered part floats in the water, giving it a milky appearance, while the coarser material sinks as soon as discharged from the milling operations and can be carried down the stream only by a strong, swift current. The water as it leaves the mill is thick with the powdered sediment and is quite milky in color, but the sediment gradually sinks and the water becomes less colored as we descend the river. There are two dams, one at Osborn and the other at Pine Creek, the latter being below all the mills, which creates reservoirs of many hundred acres in extent, beyond which none of the coarser material can possibly pass, and in which all the coarser sediment must settle, for the current through

these reservoirs is slight. The color of this fine sediment when deposited is a light gray. No great quantity of it was found below the dams, and the evidence of it decreased as we advanced down the river. Below the dams, none of the coarse tailings were found. The first place we stopped was at Bacon's ranch, where there was no evidence whatever of any mining deposits. The next was at Graff's ranch, where were about 30 acres of bad, wet land, apparently worthless. On this was a deposit. At one place was found a gray deposit about an inch thick, a sample of which I have, which I think is from the mining debris, but the greater part of the deposit was a sandy clay, rather reddish in appearance, much resembling the material found on the bank of the river some feet below the surface. Some of the counsel dug—they seemed good diggers, as well as talkers—into the bank, and into the body of the deposit on the field, to show that the two were the same and that the field deposit had been carried from the bank by a wash into the field. It is admitted there is reason for their theory. The next and last stop was at Kalanquin's ranch. Here was a tract of 75 to 100 acres of overflowed land near a lake. The deposits had some appearance of the mining debris, but less than at the last place. The indications are that some of the fine sediment carried in the water is deposited upon the lands when the overflow occurs; but, as these overflows occur only when the quantity of water is greatly increased, the proportion of sediment in it is much reduced, and I am satisfied that the amount of mining deposits is small, that there is absolutely none of the coarse material or tailings deposited, and that all the mining deposits made is small, compared with the representations thereof made by complainants.

"There was no evidence whatever to justify the assertion that the river had been greatly filled or that navigation had been impeded. The only impediment was the floating logs on their way to the mills, and the river was deep enough to float a battleship, nor is this at the high-water stage. The banks everywhere were from 4 to 6 feet above the water. A few soundings taken showed a depth of 30 feet, and those taken some time ago by Sanborn, a steamboat captain, showed as much as 40 feet in places, and he said the river is now as deep as it was in 1884, and as it was during the many subsequent years he navigated it. The wild assertions of complainants are without justification. They cannot shelter themselves behind the flimsy veil that they believed them, because so told. A man must have some reason for his belief before asserting it as a truth. It seems by some to be considered admissible practice in litigation to assert anything, regardless of the truth, that will constitute a non-demurrable case. It is a duty that counsel owe to the courts to see that their clients present to them only the truth. Courts will endeavor to see that no man shall succeed through misrepresentation. It must be concluded either that these complainants intended to deceive the court, or were themselves deceived by their own culpable negligence. In either event a court of equity would not be justified in granting the relief they ask. Turning, now, to the affidavits filed in the case, we find them directly contradictory. Upon one side the chemists say the water is impregnated with poisonous ingredients. The medical experts say the live stock dies from drinking the water and eating the vegetation grown upon these overflowed lands; that a Spokane dog died in an hour after drinking the water. Upon the other side are an equal number of apparently equally competent chemists, medical experts, and others who say the waters are not poisoned, that animal death is not caused from poisoned waters or vegetation, that live stock in the neighborhood of the mills, where the water necessarily must be more impregnated, habitually drink the water, and Wallace and Wardner dogs drink it with impunity, and both stock and dogs, instead of dying by its use, thrive upon it. It is utterly impossible from the evidence in this case for any court to justify itself in issuing a restraining order.

"But, admitting that complainants have suffered injury, and may suffer more, from the causes alleged, there is a potent reason why the court should exercise its discretion against the issuing of a restraining order. Without detailing the reasons, such an order would mean the closing of every mill and mine, of every shop, store, or place of business, in the Coeur d'Alenes.

There are there about 12,000 people, the majority of whom are laboring people, dependent upon the mines for their livelihood. Not only would their present occupation cease, but all these people must remove to other places, for the mines constitute the sole means of occupation, and when they finally close, Wallace and Wardner, Gem and Burke, and their surrounding mountains will again become the abode only of silence and the wild fauna. Any court must hesitate to so act as to bring such results."

Since the former hearing over 1,400 pages of testimony have been taken, which with the oral arguments and the carefully prepared and able briefs of counsel were, at the last term of court, submitted for consideration. After examination of the same, a different conclusion from that before reached would not be justified. Even if this testimony could be held as changing the former testimony by affidavits, I know from my personal examination, made at the request of both parties as stated, what the facts are as to the real damage or injury, so far as disclosed by inspection of the premises. It is admitted that, for the preservation of possible rights, courts may grant temporary restraining orders upon testimony which is not convincing; but they will not grant a permanent injunction, except upon the clear establishment of those facts which justify it. It is not necessary to here review the testimony, but it is held insufficient to establish the alleged injury to complainants or to authorize the injunction asked.

There are reasons why this injunction should not be granted, even if complainants had established their allegations of injury. The defendants had commenced their mining operations, including the building of mills and the use of the said river complained of, long before the complainants had settled upon the lands, and even after settlement they long occupied them before making complaint of defendants' actions. I do not, however, agree with defendants' contention that such prior occupation by them gives them the right to use the river as they please. Their mining operations must be so conducted as to protect as far as possible the rights and properties of others. They have not, however, ruthlessly destroyed complainants' property, but have attempted to protect it by building the dams and reservoirs to impound the tailings. The appellate court of this circuit in *Mountain Copper Co. v. United States* (C. C. A.) 142 Fed. 630, says:

"It is quite true that it is a maxim of the law that every one must so use his own property as not to interfere with that of another. But, where one cannot use his own property at all without indirectly injuriously affecting the property of another, then the sound discretion of the court of equity that is appealed to, to abate the nuisance, is invoked, and should be wisely exercised."

Another important matter for consideration is the relative injury to the parties to the litigation. The granting of injunctions is generally somewhat within the discretion of the court. All the circumstances must be considered. It is true that there are many complainants, with a large aggregate interest in farming lands, to which the damage from defendants' operations may be very great, and certainly will be, if complainants' allegations are true. On the contrary, if this injunction is granted, it must result in the closing, not only of the mills, but also of the mines. Generally the ores are of such low grade that they cannot profitably be shipped until concentrated;

hence the mills must be operated. If they are, the water used in them must finally reach the said river, bearing such sediment as it is impossible to impound in the reservoirs. The court must consider the consequences of closing these mills and mines. It must bear in mind the very great hardship and loss to the defendants. They have many millions of dollars invested in their properties and are now conducting an immense business, which is not only of much profit to them, but also of great business interest to others. But of equal consideration is the fact that it would deprive thousands of laborers of employment who are now earning good wages; also there are many others engaged in various avocations who would be seriously affected. I presume it is safe to say that there are 10,000 to 12,000 people who are now earning a livelihood through the operation of these mines and mills, all of whom would be seriously injured by an injunction. The court will long hesitate before taking such a drastic mode of guarding complainants' interest as would result in incalculable injury, not only to defendants, but also to large communities.

None regret more than the court if these complainants are suffering injury; but, if they are, they are not without remedy. That is indicated in *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820. Instead of granting an injunction, and thus putting a defendant at the mercy of a complainant to demand what he pleases, the court held that complainant's remedy was to recover such damages as he could show he had suffered. It was intimated that an injunction would have been granted, had it been asked before the defendant had made its improvements; but a delay of two years occurred and until the work had far advanced. A like situation exists here. I am clearly of the opinion that the complainants should not have an injunction, but should rely upon the recovery of such damages as they have suffered, and the injunction is therefore refused, which conclusion seems supported by *Mountain Copper Co. v. United States* (C. C. A.), 142 Fed. 625, and some other authorities that might be discussed, but from which I refrain.

The complainants may have such reasonable time as they desire and ask to take any further action they deem best.

THE LOWLANDS.

(District Court, S. D. Georgia, E. D. July 28, 1906.)

1. ADMIRALTY—AMENDMENT OF LIBEL—JURISDICTION IN PERSONAM.

A libellant who has attached a foreign vessel on a libel in rem, based on a claim which does not constitute a maritime lien, cannot convert such libel by amendment into one in personam and proceed against the owner thereon, where no monition was served, and the owner has not entered a general appearance.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 524.]

2. SAME—EFFECT OF APPEARANCE IN SUIT IN REM.

The appearance of the foreign owner of a vessel to claim and release the same when seized in a suit in rem does not constitute a general appearance, such as to give the court jurisdiction to render a personal judgment against him.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 382.]

In Admiralty. On motion for leave to amend libel.

Convers & Kirlin and William R. Leaken, for claimants.

Twiggs & Oliver and Simon N. Gazan, for libellants.

SPEER, District Judge. This is a libel brought by Nancy Williams, widow of Leander Williams, late of Savannah, Ga., against the steamship Lowlands, of which D. Lloyd is master, and her tackle, sails, apparel, furniture, boats, equipment, and other appurtenances and cargo, and all persons intervening for their interest in the same, in a case of tort and damage for the death of the libellant's husband; the damages claimed being both civil and maritime. It is alleged that on the 19th day of July, 1905, the steamship Lowlands was lying at the Atlantic Coast Line Wharf, in the Savannah river, city of Savannah, for the purpose of being loaded with rosin and turpentine, and that libellant's husband was one of a number of laborers employed by Alexander White, stevedore, to assist in loading said vessel. It is further alleged that in the course of his employment on said day libellant's husband was working in the hold of said steamship, removing barrels of rosin from the place where they were deposited after descending through the hatch on the lower floor of the vessel, and storing said barrels in their proper place in the ship. On the morning of the day aforesaid the pendant fall, or hooks attached to the barrels for the purpose of lowering into the hold, was released from a barrel which had been deposited at the point where libellant's husband was working and was ascending to the upper deck for the purpose of receiving other barrels. The upper hatch, beneath which libellant's husband was working, is on the main deck, and the hatches are equipped with what are known as "strong backs," or iron beams, which are laid horizontally across the opening of the hatch, for the purpose of affording a rest on which to lay the hatch coverings. There are three main "strong backs"—one situated in the middle of the hatch, and known as "midships strong back," and one on either side of this, toward the end of the hatch, and known, respectively, as "aft strong back" and "forward strong

back." At the time libelant's husband was killed the "aft strong back" and the "midships strong back" had been removed, leaving the "forward strong back" stretched across the hatch, opening at the forward part thereof, on which said "forward strong back" was laid the hatches, which are constructed of heavy timber, about $3\frac{1}{2}$ inches in thickness, and each hatch being about 5 feet long, and about 2 feet wide, and being quite heavy. The pendant fall in ascending caught in the "forward strong back," and as the pendant fall was being hoisted it pulled the "forward strong back" up with it, but before being raised very much the gang which was working about the hatch on the main deck called to the "donkey runner," or man who was in charge of the donkey engine used in lowering and hoisting cargo, to stop his engine. By reason of the fact that said donkey runner failed to obey the signal and continued to hoist said pendant fall, the "forward strong back" and hatches were pulled from their place of rest and fell back into the hold to the lower floor beneath, where libelant's husband was working, said strong back and hatches striking libelant's husband in the head, crushing the same, and killing him instantly. The libel alleges that libelant's husband was engaged in his usual and accustomed duty, and in no way contributed to the causes of his death, and charges that his death is due solely to the incompetency of the said donkey runner and his failure to stop the engine when signaled, which incompetency was known to the master, or should have been known in the exercise of proper care and caution, but which was unknown to libelant's husband. Libelant alleges that she has been damaged in the sum of \$10,000.

The prayer is for process of attachment against the steamship Lowlands, etc., and that said D. Lloyd, master, and all other persons having or pretending to have any right, title, or interest therein, and in particular Joseph F. Wilson & Co., owners, of West Hartlepool, England, may be cited to appear, and answer all and singular the matters propounded, and that this court will pronounce for the damage alleged and for such other relief to the libelant as shall to law and justice appertain, and also to condemn said steamship, etc., to be sold to pay the same. No monition was issued on this prayer, and no advertisement was had. The marshal made no personal service, but attached the vessel and its equipment. The owners who were cited to appear in the process filed their claim to the ship, and gave bond for her release.

The claimants and owners except to the libel, because the allegations do not disclose any admiralty and maritime lien and claim upon the said vessel whereupon the judgment prayed for should be founded, and therefore this court has no power to entertain said libel in rem, because no monition has been caused to be published by the libelant, and other grounds of exception. Proctors for libelant, in their brief, "admit the soundness of the first point," and concede that they have no remedy in rem. They contend, however, that the prayer of the libel makes the libel a joint proceeding in rem and in personam, and that they can dismiss as to the in rem feature and maintain the action in personam. They offer an amendment to the libel, which in

effect converts the proceeding into an action in personam. They further contend that monition is unnecessary when the respondent gives bond and files a claim to the property; that by giving bond the defendants admit the jurisdiction of the court and waive service.

The question for decision arises on the allowance of the amendment offered. As already stated, proctors for libelant admit that she has no right to proceed in rem for the death of her husband. They state in their written brief, "our contention is that our prayer in the libel made the libel a joint proceeding in rem and in personam, and that we can dismiss as to the in rem feature and maintain the action in personam." They continue, "The amendment which we offer effectively converts the proceeding into an action in personam." The libel filed is clearly a libel in rem. It is not a joint proceeding in rem and in personam. It can hardly be contended that the libelant could dismiss as to the rem, and proceed only in personam on the original libel. The amendment proposed as the proctor himself states "converts" the proceeding into an in personam proceeding. The citation that B. Lloyd, master, and all other persons having or pretending to have any right, etc., and in particular Joseph F. Wilson & Co., owners, etc., may be cited to appear and answer, etc., is language appropriate to procedure in admiralty for the claimant to come in and release the property. The master has appeared only to protect his interest in the ship. As held in *The Monte A.* (D. C.) 12 Fed. 334, 335:

"It would be unjust to hold that a foreign owner shall not appear in a foreign court to reclaim his property as against an unauthorized seizure without necessarily subjecting himself to liability for a personal judgment against which he has never been cited to defend."

In this cause there is no appearance by the claimant except upon the objections to the proceedings in rem.

The amendment converting the libel in rem into a libel in personam should therefore be disallowed.

In re SCREWS.

(District Court, S. D. Georgia, W. D. July 23, 1906.)

1. BANKRUPTCY—TRUSTEES—COMPENSATION—STATUTES.

Under Bankr. Act Amend, Feb. 5, 1903, c. 847, § 19, 32 Stat. 801 [U. S. Comp. St. Supp. 1905, p. 683], declaring that the provisions of such amendatory act shall not apply to bankruptcy cases pending when the amendatory act took effect, but that such cases shall be adjudicated and disposed of conformably to the provisions of the act of 1898, whether a bankrupt's trustee, who qualified in April, 1901, should obtain additional compensation to that specified in section 48, subd. "a" (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]), must be determined by the original act independent of the amendment.

2. SAME.

Bankr. Act July 1, 1898, c. 541, § 48, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], provides that trustees shall receive, as full compensation for their services, a fee of five dollars deposited with the clerk, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed 3 per cent. on the first \$5,000 or less, etc. General order 35 (3) declares that the compensation allowed to trustees shall be in full compensation for the services performed by them, but shall not include expenses necessarily incurred in the performance of their duties, and allowed on the settlement of their accounts. (89 Fed. xiii, 32 C. C. A. xxxiv). *Held*, that though a trustee rendered meritorious services, and suffered considerable inconvenience in investigating a bankrupt's disposition of his property, etc., no allowance in addition to the fees prescribed could be made therefor.

In Bankruptcy.

James Tift Mann, in pro. per.

SPEER, District Judge. This is an application on the part of a trustee in bankruptcy for special compensation additional to that which is permitted by the letter of the statute creating the uniform system of bankruptcy. The application was referred to the referee, the Honorable Clayton Jones, as special master. He reported that there now remains \$168.87 in the hands of the trustee, but no additional dividend will probably be allowed from this sum, and recommends the allowance of the compensation sought. There are no exceptions to this report of the special master, but an examination of the statute with relating precedents will, we think, disclose that such an allowance, however deserved, cannot be justified.

Section 72 of the amendatory act of 1903 (Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 691]) expressly makes such an allowance illegal, in the following language:

"That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act."

While section 48a of the original act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]), relating to the compensation of trustees, has been also changed by the amendatory Act, section 19 of the latter expressly provides:

"That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, 1898." 32 Stat. 801 [U. S. Comp. St. Supp. 1905, p. 683].

Since this case appears to have been pending since April, 1901, in which month the trustee qualified, the provisions of the old act as construed by the courts must therefore govern here.

Section 48 of the old law is as follows:

"Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk, * * * and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less," etc.

General order of the Supreme Court 35 (3), promulgated in 1898, provides:

"The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts." 89 Fed. xlii, 32 C. C. A. xxxiv.

It is true that under the old law, in one case (*In re Mitchell*, 1 Am. Bankr. Rep. 687), the court allowed additional compensation for professional services rendered by the trustee. This case is, however, the opinion of a referee, has been criticised in later cases, and under general principles of law is not regarded as authoritative. It was also held (*In re Plummer*, 3 Am. Bankr. Rep. 320), that, "where, at the request of creditors, a trustee continued running a live manufacturing plant and giving his personal attention to the business with a profit to the creditors, he should be granted a reasonable extra compensation." But the weight of authority, however, seems to the contrary.

In re Carolina Cooperage Company, 3 Am. Bankr. Rep. 154, 96 Fed. 950, the court held:

"A court of bankruptcy has no power or authority to allow to the trustee any compensation other than the commissions at the fixed rate per cent. established by the statute. It cannot give a lump sum. Neither can it allow the trustee compensation as agent for the performance of services which ordinarily devolve upon the trustee, even though performed by him prior to his appointment."

To the same effect is *In re Epstein*, 6 Am. Bankr. Rep. 191, 109 Fed. 878, which, disapproving the case *In re Plummer*, supra, holds that:

"The fact that a trustee has rendered services highly beneficial to the estate does not warrant any allowance to him outside of the specific compensation provided by the bankruptcy act and the general orders of the Supreme Court."

It is, moreover, true that the precedents upon this subject are strengthened by the legislative construction afforded by the recent amendment upon this subject. Section 2(5) of the amendatory act of Congress (Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797 [U. S. Comp. St.

Supp. 1905, p. 682]) provides that receivers who carry on the business of a bankrupt estate as a going concern shall be entitled to "additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services." It follows that if receivers who perform general services in managing an estate of this character, providing for all its exigencies, are allowed no compensation additional to that granted trustees, when the trustee performs duties, even though equivalent to the services of a receiver, it was not intended by Congress that his own compensation should be enlarged.

And it was also held in a recent case (*In re McKenna* [D. C.] 137 Fed. 611), that the trustee of a bankrupt, "though an attorney, is not bound to perform legal services, and, if he does so, he cannot have compensation from the estate." The same doctrine is distinctly reiterated in *Re Felson* (D. C.) 139 Fed. 281. To the same effect is *Hill on Trustees*, par. 575; *Bispham's Equity*, p. 92; 2 *Pomeroy's Equity Jurisprudence*, par. 1084; *Collier v. Munn*, 41 N. Y. 143. In *Perry on Trusts*, § 432, the rule is clearly expressed in the following language:

"A trustee can receive no indirect profits from the estate by reason of his connection with it. * * * If the trustees are factors, or brokers, or commission agents, or auctioneers, or bankers, or attorneys, or solicitors, they can make no charges against the trust estate for services rendered by them in their professional capacity to the estate of which they are trustees."

The weight of the views of this eminent law-writer, we think, will be generally conceded.

While it appears from his evidence before the special master that the trustee suffered considerable inconvenience in making long trips by conveyance through the country in the performance of his duties, and exerted commendable efforts in investigating the bankrupt's disposition of his property and the loss of the stock by fire, these services were such as a diligent and conscientious trustee should have performed under a proper construction of his duties prescribed in the bankruptcy act, and the incidental inconvenience should have been considered by him, not subsequently, but prior to his acceptance of the trust.

Notwithstanding the persuasive considerations in favor of such an allowance, in view of the statute and the precedents cited, the petition of this trustee for additional compensation must be disallowed.